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# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



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## editor's preface

Our children's schools of are nearly, if not completely, as segregated as they were in the 1960s. It's no surprise, then, that for children of color grade school can be an introduction to the carceral state. Just take a peek into the local youth offender detention center in any major U.S. city and you'll see that the school-to-prison pipeline is a readily observable phenomenon. We can change this.

In "Arrested at the Schoolhouse Gate," Noelia Rivera-Calderón explains that to end the incarceration of minority children it is essential to end school "disturbance" laws, which have allowed teachers to bring police into the classroom and hale "disruptive" children off to jail. The consequences for our youth, including the generational inequities stemming from such oppression, are striking.

But uniformed school discipline is just the beginning. As Meikhel Philogene details in "Why the Black Man is Really Gray," there are other contributing forms of oppression that have fed the crisis of mass incarceration in this country. He focuses on the racism inherent in central aspects of the criminal justice system: access to justice, predatory capitalism, and systemic bias. Philogene also spells out how an underrepresentation of minorities in positions of power within the sports and entertainment industries has perpetuated a system of inequality and racism.

In recent years, these myriad forms of oppression have spawned new, popular resistance and solidarity movements nationwide. Within these groups, movements aligning along racial and ethnic lines are aiming for social, racial, and environmental justice. In "Identity Extremism," Natsu Taylor Saito explains that our government has been paying close attention to these movements. Indeed, the State has conflated popular struggle for freedom with malicious radicalism and danger. Unsurprisingly, it has responded with surveillance, criminalization, and violence. Saito goes on to argue that the State has wielded its coercive power to pressure activists into forsaking their racial and ethnic identities in exchange for a tokenish sort of equality. Saito, in prose that ascends to eloquence, demonstrates, that the path toward genuine liberation requires an insistence on self-determination and, however arduous, we should never give up the fight.

Our issue closes with David Gesspass's review of two essential, recently released books on the controversy, reignited in the age of Trump, regarding freedom of expression on college campuses: *Free Speech on Campus* by Erwin Chemerinsky and Howard Gillman and *Hate: Why We Should Resist It with Free Speech, Not Censorship*, by Nadine Strossen.

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## **ARRESTED AT THE SCHOOLHOUSE GATE: CRIMINAL SCHOOL DISTURBANCE LAWS AND CHILDREN'S RIGHTS IN SCHOOLS**

### **I. Introduction**

A generation ago, adults remember detentions and suspensions as the most common, and among the most severe, punishments for school-based misbehavior.<sup>1</sup> Today almost half of children in the United States attend schools with sworn law enforcement officers who may, and do, arrest children for the same offenses that in the past would have merited these detentions.<sup>2</sup>

Close to two million children in the United States attend a school with a law enforcement officer but no guidance counselor.<sup>3</sup> Over ten thousand children across the country are arrested each year for some form of “disturbing school,”<sup>4</sup> codified by at least twenty-two states as school-specific disturbance laws,<sup>5</sup> and encompassed by many other states’ disorderly conduct and disturbing the peace statutes.<sup>6</sup> These laws may subject children as young as seven years old to fines or incarceration—or incarceration for failing to pay the fine.<sup>7</sup>

This Comment recommends that legislatures repeal school disturbance laws and that courts find these laws unconstitutional. To support this conclusion, this Comment proceeds in the following manner. Section II discusses the development of law concerning children’s rights in schools, from laws encompassing school-based forms of protest to the more recent development of zero tolerance school discipline and the different charges that may result from student misbehavior in school. As school disturbance laws have put thousands of students in the hands of the juvenile justice system, involvement that carries lifelong consequences,<sup>8</sup> some advocates have sought to push back on the severity of the laws, challenging them through the legislatures and the courts. Parts II.C. and II.D. discuss these challenges and their successes and failures.

Section III discusses the many harms that come from reliance on school-based law enforcement officers to police routine student misbehavior. Not only do school disturbance laws increase juvenile justice involvement, they are widely recognized as having a discriminatory impact against students of color, lesbian, gay, bisexual, transgender, and queer (LGBTQ) students, and students with disabilities.<sup>9</sup> Aside from the harms, school disturbance laws are, by pure common sense and on their face, simply unconstitutional. Part III.B. discusses how school disturbance laws should be found both void for vagueness and unconstitutionally overbroad. Finally, Part III.C. shows that school disturbance laws are unnecessary state intrusion—they take responsibility away from the parties that should be responsible for handling routine student misbehavior: school administrators, teachers, and parents. Further, if an arrest in school is warranted, it may be brought

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under an existing charge that already has a depth of case law limiting its reach, such as disorderly conduct.<sup>10</sup>

## II. Overview

This Section provides an overview of children's rights in school settings. It further explores the effect of "zero tolerance" on school enforcement of student discipline, leading to the frequent use of sworn law enforcement officers to police student behavior. It describes different statutory bases for student arrests, including disorderly conduct, disturbing the peace, and so-called "school disturbance laws" prohibiting minor student misbehavior that are the main focus of this Comment. Finally, it explores recent legislative and judicial responses to school disturbance laws.

### A. A History of Children's Rights in Schools

Since the introduction of compulsory schooling laws, the rights of children, parents, and the State in schools have been in tension.<sup>11</sup> The pattern of tension began when early Supreme Court decisions concerning children in schools and establishing a "children's rights" body of case law did not focus on children's rights at all, but rather the rights of parents to direct their children's education.<sup>12</sup> The rights of parents were weighed against the right of the State to regulate and control children in matters of education in cases like *Wisconsin v. Yoder*,<sup>13</sup> which weighed the State's interest in compulsory education against the right of Amish parents to keep their children out of school after eighth grade.<sup>14</sup> While in cases like *Yoder*, the rights of parents came out stronger, State interests were advanced in cases like *Ingraham v. Wright*,<sup>15</sup> which held that schools could impose corporal punishment on children without notice to parents and without obtaining parental consent.<sup>16</sup> This Part reviews the modern cases that lay the foundation for the present "children's rights" body of law.

#### 1. The *Tinker* line of cases and "material and substantial disruption"

Struggles over regulating student behavior in school began to emerge in the context of student expression, whether students expressed themselves through protesting or other forms of speech.<sup>17</sup> *Tinker v. Des Moines Independent Community School District*,<sup>18</sup> a foundational school discipline case, involved a supposed disruption caused in school when several students wore black armbands to school in protest of the War in Vietnam.<sup>19</sup> The students wearing the armbands were suspended from school until they came back without the armbands.<sup>20</sup> The Court found little evidence of actual disruption resulting from the armbands, and came out on the side of students, holding that their right to First Amendment freedom of expression was not outweighed by the school's wish to avoid controversy.<sup>21</sup> The *Tinker* Court famously stated that students do not "shed their constitutional rights to freedom of speech or of expression at the schoolhouse gate,"<sup>22</sup> that "[s]chool officials do not possess absolute authority over their students," and that "[s]tudents in school as well as out of school are 'persons' under our Constitution... possessed of fundamental rights which the State must respect."<sup>23</sup>

*Tinker* also, importantly, set a standard for restricting student rights in school.<sup>24</sup> Even while seemingly championing the rights of students, the Court acknowl-

edged the “comprehensive authority of the State and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools.”<sup>25</sup> While *Tinker* dealt with freedom of speech under the First Amendment, its standard has applied in school discipline cases broadly.<sup>26</sup> The standard set was that prohibition of student conduct requires “facts which might reasonably [lead] school officials to forecast substantial disruption of, and material interference with, school activities.”<sup>27</sup> The Court later paraphrased this standard as prohibiting conduct “materially and substantially interfering with the requirements of appropriate discipline in the operation of the school.”<sup>28</sup>

Dissenting opinions in *Tinker* pointed to the school’s need for control, and students’ immaturity.<sup>29</sup> Justice Black was not “fully persuaded that school pupils are wise enough, even with this Court’s expert help from Washington, to run the 23,390 public school systems in our 50 states,”<sup>30</sup> and warned that the *Tinker* decision would make students “ready, able, and willing to defy their teachers on practically all orders.”<sup>31</sup> He emphasized the purpose of schools was to make us a “more law-abiding people,” cautioned that “[w]e cannot close our eyes to the fact that some of the country’s greatest problems are crimes committed by the youth, too many of school age, and stated that “[s]chool discipline...is an integral and important part of training our students to be good citizens.”<sup>32</sup> Justice Harlan, also dissenting, stated that “school officials should be accorded the widest authority in maintaining discipline and good order in their institutions.”<sup>33</sup> These dissenting opinions set the stage for post-*Tinker* school discipline decisions.

Despite a seemingly high bar for prohibiting student conduct set by *Tinker*, post-*Tinker* decisions proceeded to give schools more authority and discretion in imposing discipline.<sup>34</sup> *Bethel School District v. Fraser*,<sup>35</sup> which emphasized a school’s “need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process,”<sup>36</sup> permitted schools to prohibit speech that is vulgar, lewd, indecent, or plainly offensive.<sup>37</sup> Perhaps because of the rise of “zero tolerance” school discipline imposing more severe consequences for routine misbehavior,<sup>38</sup> cases then began to deal with the rights of students in schools who come into contact with law enforcement, and the role of law enforcement in imposing school discipline.<sup>39</sup>

## 2. School searches and seizures in *New Jersey v. T.L.O.*

*New Jersey v. T.L.O.*,<sup>40</sup> a case involving a child who was searched in school on suspicion of possessing drugs and then arrested,<sup>41</sup> brought judicial attention to the intersection of educational institutions and the juvenile justice system. The essential questions concerned the proper standard for the legality of searches conducted by school officials, and whether school searches were subject to Fourth Amendment protections.<sup>42</sup> Citing *Tinker* for the proposition that students “do not ‘shed their constitutional rights...at the schoolhouse gate,’”<sup>43</sup> and clearly establishing that school authorities are State representatives, not merely parental surrogates,<sup>44</sup> the Court held that the Fourth Amendment applies to school searches.<sup>45</sup> The standard set was the “reasonableness, under all the circumstances, of the search,” requiring reasonable grounds for suspecting that the search “will turn up evidence that the student has violated or is violating either the law or the

rules of the school.”<sup>46</sup> The scope of the search must be reasonable when reasonably related to the objective of the search and not “excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>47</sup>

The post-*T.L.O.* case of *Vernonia School District 47J v. Acton*,<sup>48</sup> which involved drug testing for student athletes, again focused on the balance of intrusion on Fourth Amendment rights with legitimate government interests in keeping drugs out of schools. Citing Justice Powell’s concurrence in *T.L.O.*, the Court limited student rights in school by finding that students have a “lesser expectation of privacy than members of the population generally.”<sup>49</sup> *Vernonia* demonstrates the common tension in children’s rights law between granting children the same substantive and procedural due process rights as adults (as in *Tinker*), and, on the other hand, finding that children are different from adults and thus have “special needs” entitled to different protections, often corresponding with lesser rights.<sup>50</sup> The “legitimate governmental interests” in maintaining school order in various ways (in *Vernonia*, for example, by keeping drugs out of schools)<sup>51</sup> have gained traction and major influence in setting school discipline law and policy.<sup>52</sup>

### 3. The rise of “zero tolerance” school discipline

The policy of “zero tolerance,” which prescribed harsh punishments for a large range of school misbehavior, began with the Gun-Free Schools Act of 1994, which required states receiving funding under the law to expel students who bring weapons to school.<sup>53</sup> “Zero tolerance” laws and practices were meant to act as a deterrent to any and all unwanted student conduct, ranging from serious bullying to everyday classroom disruptions such as interrupting teachers.<sup>54</sup> At the same time in the 1990s, the juvenile justice system was responding to the fear of so-called “super-predators”—children thought to number in the tens of thousands whose natural response to being severely “morally impoverished” was to “murder, rape, assault, burglarize, deal deadly drugs, and get high.”<sup>55</sup> The policy of zero tolerance in the juvenile justice system was mirrored in school policies that prescribed harsh exclusionary punishment for minor offenses.<sup>56</sup>

While these practices mostly focused on suspensions and expulsions, increasingly School Resource Officers (SROs) were called in to enforce and manage student behavior.<sup>57</sup> School law enforcement officers have existed in schools since the 1950s, but the practice of policing student behavior with law enforcement officers dramatically increased in the 1990s and has continued to increase since then.<sup>58</sup> SROs have been described by a Congressional Research Service report as “a hybrid educational, correctional, and law enforcement officer,” charged with enforcing school safety and discipline.<sup>59</sup> These SROs (also sometimes called school safety officers, school police, and school liaison officers) are local law enforcement agency officers or school district police officers with “sworn authority to schools,” who carry arms and have arrest powers.<sup>60</sup> This definition does not generally include school security officers hired directly by school districts, who are typically not armed and do not have arrest powers.<sup>61</sup> In the 2013-14 school year, forty-three percent of all United States public schools had SROs,<sup>62</sup> who may legally arrest children in schools for any behavioral disruptions with “probable cause” if school disturbance statutes are violated.<sup>63</sup>

## **B. Statutes Criminalizing Student Behavior in School**

At least thirty-one states have either statewide code provisions or municipal ordinances criminalizing conduct that takes place in or around schools.<sup>64</sup> These statutes take varied forms: some are general disorderly conduct statutes that also apply to children in schools,<sup>65</sup> some prohibit disturbing the peace and are also applied to schoolchildren,<sup>66</sup> and others are school-specific.<sup>67</sup> All may be bases for subjecting students to arrest or to a non-arrest based law enforcement referral that may result in juvenile justice system involvement (and the consequences that come with that involvement).<sup>68</sup> Parts B.1-B.3 will review these statutes and their effects.

### **1. Disorderly Conduct**

Violating a “disorderly conduct” statute is one of the most common bases for school arrests.<sup>69</sup> For example, in Delaware’s 2011-12 school year, disorderly conduct not related to offensive touching or fighting/assault was the second most common charge resulting from a student arrest.<sup>70</sup> As the fourth most common juvenile charge in Massachusetts, disorderly conduct in schools has been described as “disrespect toward [SROs]...rowdiness and loud public behavior... [or] disturbing a school in session.”<sup>71</sup> The Florida Department of Juvenile Justice found that disorderly conduct was one of the most common school-based referrals to juvenile court.<sup>72</sup> One Mississippi high school had a 400% increase in arrests over three years, the majority were for disorderly conduct.<sup>73</sup> Michael Nash, former president of the National Council of Juvenile and Family Court Judges and former presiding judge of juvenile court in Los Angeles, stated that while the intended purpose of SROs is to provide safety, they “often end up handling discipline and handing out charges of disorderly conduct or assault.”<sup>74</sup>

Disorderly conduct is a discretionary arrest, subject to opinion on what behavior counts as “disorderly” and deserving of arrest.<sup>75</sup> The charge is, by nature, vague and subjective, resulting in potential for abuse.<sup>76</sup> Studies have found that while white youth in schools are more likely to be charged with objective, clearly-defined offenses (such as vandalism or weapons offenses), black youth are much more likely to be charged with subjective offenses like disorderly conduct.<sup>77</sup> In Delaware’s 2011-12 school year, seventy-seven percent of students charged with disorderly conduct were black.<sup>78</sup> In a study of Pittsburgh, Pennsylvania, school arrests over four years, disorderly conduct was “the most common offense for black 10-year-olds in cases with a single charge.”<sup>79</sup> The nature of the conduct that warranted the charges in Pittsburgh has been described, in some examples, as “disrupt[ing] a class by cussing,” “use of profanity,” and, in one case, simply, “[a]ctor is disruptive at school.”<sup>80</sup>

### **2. Disturbing the Peace and Disturbing Assemblies**

Disturbing the peace is not as broad as disorderly conduct, though disorderly conduct can include a breach of the peace.<sup>81</sup> States and municipalities sometimes have broad disturbing the peace statutes that have been applied to school-based conduct,<sup>82</sup> or disturbing the peace statutes that specifically encompass school conduct.<sup>83</sup> Disturbing assemblies is a related charge that also encompasses school-based conduct, either as applied or with school-specific statutory lan-



guage.<sup>84</sup> While disturbing the peace can mean fighting, it can also be committed with “abusive, profane, indecent, or otherwise provocative language.”<sup>85</sup> Conduct encompassed by disturbing the peace in school ranges from hallway fights to cursing at teachers and other disruptive or loud behavior.<sup>86</sup> Cursing in school is only supposed to give rise to a disturbing the peace violation if the target is likely to be provoked to respond with violence to the words.<sup>87</sup> However, although disturbing the peace is not seen as being as broad as disorderly conduct it is still seen as a catchall charge, making its use subject to discretion in the same way as disorderly conduct.<sup>88</sup>

As with disorderly conduct, disturbing the peace (which does not have a clear definition) is frequently used across the nation as a basis for school-based arrests.<sup>89</sup> In Jefferson Parish, Louisiana from 2012-14, disturbing the peace was the third most frequently used school-based charge.<sup>90</sup> In Stockton, North Carolina from 2013-17, almost half of school-based arrests were for disturbing the peace.<sup>91</sup> In San Bernardino, California from 2005-15, over a third of more than 30,000 school-based arrests were brought under this charge.<sup>92</sup>

### 3. School Disturbance

At least twenty-two states and dozens of local municipalities outlaw some form of disturbing school.<sup>93</sup> These statutes and ordinances, which can be termed “school disturbance laws,” vary in the language they use: some specifically use the term “disturbing school,”<sup>94</sup> some prefer the word “disruption” and use the words “disrupting the operation of a school.”<sup>95</sup> Some rely on the word “interfere” and make it unlawful to knowingly “disrupt or interfere with...[an] educational institution.”<sup>96</sup> Others, more specifically, outlaw “willfully or maliciously mak[ing]...any noise, disturbance, or improper diversion” which disturbs the peace of a school,<sup>97</sup> “act[ing] in an obnoxious manner” in a school,<sup>98</sup> “annoy[ing]” the conduct of classes, “willfully interrupt[ing]” a school, or being “rude, boisterous or disorderly” on school grounds.<sup>99</sup> Only a couple of school disturbance laws make any distinction between such unlawful conduct committed by non-pupils (such as trespassers) versus pupils.<sup>100</sup>

In the majority of states that do not make a distinction between pupils and non-pupils, enforcement of the statutes against students varies.<sup>101</sup> In some states, like Washington and Delaware, school disturbance laws are rarely enforced.<sup>102</sup> However, in states like South Carolina, these statutes have widely been used to bring charges against students for school-based conduct.<sup>103</sup> There, disturbing school has been the second most common juvenile charge after misdemeanor assault, with an average of seven kids charged with disturbing school every day schools were in session in 2015.<sup>104</sup> While collection of data varies across the nation, more than 1,000 students a year are charged with disturbing schools in Maryland, Florida, and Kentucky; this number is around 2,000 in North Carolina; in Arizona, which does not officially track the number of charges per year, estimates place school disturbance charges at up to 5,000.<sup>105</sup> One nationwide estimate suggests that juveniles are charged with disturbing school more than 10,000 times a year.<sup>106</sup>

### 4. Judicial interpretation of school disturbance laws

Because not all states with school disturbance laws have a thorough and developing body of case law interpreting their statutes, examples of such interpretation



can be found in the courts of only a few states. The courts of Georgia, Alabama, and Maryland, for example, have begun to interpret their statutes to determine what conduct rises to the level of an illegal school disturbance.<sup>107</sup> The Georgia Court of Appeals found that there was sufficient evidence to support a conviction for disturbing school when a student started a fistfight outside the school building before school started, drawing a crowd of spectators.<sup>108</sup> The court gave special attention to the fact that the incident attracted spectators, seeming to find that the distraction to students caused the disturbance.<sup>109</sup> In Alabama, when a student threatened to burn a field and the principal spoke to him about his behavior, the school argued that the school disruption law had been violated because having to speak to him was a disruption preventing the principal from attending to his other duties.<sup>110</sup> The court found this argument “illogical and incompatible with common sense,” because it would make any school incident a principal must address criminal.<sup>111</sup>

The courts of Maryland have addressed the state’s school disturbance law in several opinions, beginning with 1998 case *In re Nahif A.*<sup>112</sup> The student in that case was involved in a “heated altercation” with school officials, refusing to follow directions, cursing, and shouting in a hallway where classes were in session nearby.<sup>113</sup> The charge for disturbing schools was for this behavior only, as separate charges were filed for the underlying offenses that led to the altercation.<sup>114</sup> Nahif A. argued that Maryland’s school disturbance law,<sup>115</sup> as originally crafted, intended to criminalize riots during the Vietnam War era, specifically sit-ins, protest marches and other forms of civil disobedience that would interrupt school activities.<sup>116</sup> Additionally, since Nahif A. attended a school specifically intended to support students with behavioral issues, he argued that the law was not intended to apply to him.<sup>117</sup> The court held that the language of the statute was “plain and unambiguous,” and that nothing in the language would exclude application to students with behavioral issues.<sup>118</sup> His delinquency adjudication was therefore upheld.<sup>119</sup>

After Nahif A.’s shouting, cursing, and refusal to follow directions were found to fall within the scope of Maryland’s school disturbance law,<sup>120</sup> Maryland’s highest court attempted to limit the scope of conduct that counts as “disturbing school” in the 2003 case of *In re Jason W.*<sup>121</sup> In this case, middle school student Jason W. had written “There is a bomb” in pencil on a wall in a school stairwell, erasing the word “bomb” when a teacher approached.<sup>122</sup> Jason W. was taken to the principal’s office, where the police were called.<sup>123</sup> The police officer questioned Jason W., who said he did not know what he was doing, following which the officer charged him under the school disturbance law.<sup>124</sup> The court noted that the school did not take the writing seriously as a bomb threat, not having cleared the school or alerted any relevant agency, and that it caused no actual disruption of school activities.<sup>125</sup> After reviewing the legislative history of the law, including concerns expressed when the original bill was pending in the legislature that the law “could be applied to a kindergarten pupil throwing a temper tantrum,”<sup>126</sup> the court found that the state’s juvenile court prosecutors were advancing exactly that overbroad and absurd interpretation.<sup>127</sup> It set guidelines for what type of conduct may not rise to the level of disturbance under the law:

The words "disturb or otherwise willfully prevent," as used in § 26-101(a), cannot be read too broadly or too literally. A child who speaks disrespectfully or out of turn, who refuses to sit down or pay attention when told to do so, who gets into an argument with another student, who throws a rolled-up napkin across the room, who comes to class late, or even one who violates the local dress code in some way, may well disturb the class and, if sent to the principal, may divert the teacher or the principal from other duties for a time, but surely that conduct cannot be regarded as criminal because it is temporarily disruptive. We reject the State's argument that there need not be any "actual disturbance." The only sensible reading of the statute is that there must not only be an "actual disturbance," but that the disturbance must be more than a minimal, routine one. It must be one that significantly interferes with the orderly activities, administration, or classes at the school.<sup>128</sup>

The Maryland courts then applied the Jason W. standard (that conduct be more than a routine disruption) to subsequent cases, beginning with *In re Qoyasha D.*<sup>129</sup> Qoyasha D. was a middle schooler with an emotional disability inhibiting his anger control and self-management and whose education was governed by an Individualized Education Program (IEP) because of the disability.<sup>130</sup> He left class without permission and ran down the hall, punching lockers and knocking over a sign before he returned to class, at which point he was no longer aggressive.<sup>131</sup> When an instructional assistant told him to leave class, he refused, so a school police officer was called who also told him to leave, at which point he complied.<sup>132</sup> At this point the officer said he was under arrest, and Qoyasha D. attempted to walk away.<sup>133</sup> When the officer grabbed Qoyasha D.'s arm, Qoyasha D. clenched his fists, following which the officer said he must comply or be pepper-sprayed. Qoyasha D. did not comply, and was pepper-sprayed, handcuffed, and arrested.<sup>134</sup> The court found that Qoyasha D.'s conduct was closer to Nahif A.'s than Jason W.'s, and upheld the conviction,<sup>135</sup> also noting that the fact that Qoyasha D. had an IEP was not relevant to the delinquency.<sup>136</sup>

In other subsequent cases, the Maryland courts have made varied determinations on what counts as disturbing school, even in similar situations. With no clear distinction between them, one classroom fight was held to be a school disturbance,<sup>137</sup> while another was not;<sup>138</sup> yelling, screaming, and cursing after refusing to take off a hoodie was also not a disturbance.<sup>139</sup> The loose standard that the Court of Appeals reached in *Jason W.*, that the conduct must be more than a routine disturbance,<sup>140</sup> is the closest thing to a "test" of whether conduct meets the statute, and that test has been applied to similar situations with varied results.<sup>141</sup>

### **C. Legislative Responses to School Disturbance Statutes**

As stories of children being charged with disrupting school have been increasingly reported,<sup>142</sup> some legislators have felt pressure to respond.<sup>143</sup> In Texas, State Senator John Whitmire led the push to change Texas's school disruption law, which defined school disruption as a Class C misdemeanor subjecting thousands of offenders to up to \$500 in fines.<sup>144</sup> Disruption of Class, in Texas, was one of the most common charges officers would use to "ticket" students, referring them immediately to juvenile court.<sup>145</sup> State Senator Whitmire noted that the practice

was “ridiculous on its face,” as it was used to ticket children, even under the age of ten, for behaviors such as “marking on a wall with a pencil” or “using a cuss word.”<sup>146</sup> In one case that became highly publicized, a girl was ticketed for disruption when she sprayed herself with perfume after classmates said she smelled.<sup>147</sup> State Senator Whitmire has noted that if the law had been enforced when he was a child, he himself may have been charged with disrupting school.<sup>148</sup>

Texas Senate Bill 393,<sup>149</sup> which became effective September of 2013, prohibited school police officers from issuing citations for misbehavior at school.<sup>150</sup> The bill also removed Disruption of Class from the education code.<sup>151</sup> Officers can instead issue “complaints,” but a prosecutor must decide whether to charge the student with a crime.<sup>152</sup> Additionally, the complaint must be accompanied by an affidavit from an eyewitness.<sup>153</sup> In the year following the change in the law, Class C misdemeanor ticketing dropped by seventy-one percent.<sup>154</sup>

South Carolina’s school disturbance law,<sup>155</sup> which has been one of the most frequently used in the country,<sup>156</sup> has also been the subject of some of the most widespread calls for legislative reform.<sup>157</sup> The law as originally written in 1919 had been intended to be applied to trespassers in all-girls schools, but in recent years has been applied almost exclusively to students.<sup>158</sup> In 2015, a video of an SRO forcibly removing a black girl from her desk and throwing her across the room went viral,<sup>159</sup> drawing attention to the state’s school disturbance law.<sup>160</sup> That girl, who has remained anonymous, and another student, Niya Kenny, who protested during the encounter, were charged with disturbing school.<sup>161</sup> South Carolina State Senator Mia McLeod called the incident “shocking and unconscionable,” and sponsored a bill that would eliminate school arrests for disturbing school.<sup>162</sup> This bill, S. 131, passed on May 14, 2018, and was signed into law on May 17, 2018.<sup>163</sup> While S. 131 does not ban the use of school arrests for “disturbance,” it urges schools to exhaust all other discipline before involving law enforcement, and also increases the punishment for non-student violators only to up to a year in prison and a fine of up to two thousand dollars.<sup>164</sup> Similar bills have died in committee in the past.<sup>165</sup> The State Board of Education also tentatively approved a plan that would limit SRO involvement to serious incidents, which also must be approved by the legislature.<sup>166</sup>

## **D. Court challenges to school disturbance statutes**

In addition to legislative responses, there have been court challenges to the constitutionality of school disturbance laws, but they have been limited and generally unsuccessful.<sup>167</sup> School disturbance laws have been challenged on the basis of unconstitutional vagueness and unconstitutional overbreadth.<sup>168</sup>

The vagueness doctrine is predicated on the Fourteenth Amendment of the United States Constitution, under which no person may be deprived of life, liberty, or property without due process of law.<sup>169</sup> Due process requires fair notice, so that people can conform their conduct to the law.<sup>170</sup> Therefore, a criminal statute must be sufficiently definite so that an ordinary person can understand what conduct is prohibited.<sup>171</sup> A criminal statute will be found void-for-vagueness under the due process clause if it does not provide minimally adequate notice of what conduct is prohibited to individuals who might be prosecuted, or if it “grants

too much discretion to law enforcement without standards to avoid arbitrary or discriminatory enforcement.<sup>172</sup> Either by itself is sufficient to find a statute void-for-vagueness.<sup>173</sup> Further, a statute may be found void-for-vagueness either on its face or as applied.<sup>174</sup>

A civil statute will be found void-for-vagueness when “its language is such that men of common intelligence must necessarily guess at its meaning.”<sup>175</sup> However, where a judicial construction of a state statute has removed the vagueness, the statute can be upheld.<sup>176</sup> There is less room for ambiguity in criminal statutes because of the heightened consequences to their violation.<sup>177</sup>

The overbreadth doctrine specifically concerns the First Amendment and applies only within that context.<sup>178</sup> A statute is unconstitutionally overbroad if it does not aim specifically “at the evils within the allowable control of the government,” but also covers constitutionally protected activities.<sup>179</sup> Even clear and precise legislation may be overbroad if it covers such conduct.<sup>180</sup> The test of overbreadth is whether the statute’s language is so broad as to discourage conduct that is expressly protected by the Constitution.<sup>181</sup> The focus must be on the “normal and reasonable” reading of the language.<sup>182</sup>

To challenge a statute on the basis of overbreadth, the challenging party must establish that (1) the protected activity is part of the law’s target, and that (2) there is “no satisfactory method of severing the law’s constitutional from its unconstitutional applications.”<sup>183</sup> A substantial number of the law’s applications must be unconstitutional for a statute to be overbroad on its face, in relation to the statute’s legitimate purposes.<sup>184</sup> If conduct is involved as well as speech, the overbreadth must be both real and substantial when judged against the law’s legitimate purposes.<sup>185</sup> An overbreadth challenge can be defeated if the state court has given a narrowing construction to the statute.<sup>186</sup>

### **1. *Kenny v. Wilson* as a challenge to unconstitutional vagueness**

Following the headline-grabbing incident of an SRO throwing a student from her desk in a South Carolina school, the American Civil Liberties Union (ACLU) brought suit on behalf of the classmate who verbally protested the SRO’s behavior and was also arrested, Niya Kenny, and all similarly situated parties.<sup>187</sup> Other named plaintiffs include a college student arrested for criticizing a police officer for the racial profiling of a fellow student, a student with disabilities arrested for refusing to leave the school library and cursing at a student making fun of her, and a student arrested for disturbing schools after a minor physical altercation and who was later threatened with detention for failure to pay the fine.<sup>188</sup> The defendants are the South Carolina Attorney General, Alan Wilson, and the local police departments that provide SROs to schools.<sup>189</sup> The ACLU noted that in South Carolina, black students are nearly four times as likely as white students to be charged with disturbing school.<sup>190</sup>

In the complaint filed by the ACLU, the plaintiffs argue that South Carolina’s school disturbance law covers “a broad swath of adolescent behavior,” violating fundamental fairness and “the most basic tenets of due process” by creating an impossible standard for children to understand and follow.<sup>191</sup> Additionally, the

plaintiffs argue that the law prevents students from speaking out against abuses.<sup>192</sup> The plaintiffs note that the law, enacted nearly 100 years ago, was never intended to apply to students rightfully in their own school, and has only served to draw thousands of youth into the juvenile justice system.<sup>193</sup>

The complaint targets not only the school disturbance law, but South Carolina's disorderly conduct statute, saying that both are unconstitutionally vague and fail to provide notice to students of what adolescent conduct would fall under the law.<sup>194</sup> Because the conduct covered by both statutes is indistinguishable from conduct schools address without resort to arrest (such as cursing, refusal to follow directions, or physical altercations without significant injury), the statutes are impermissibly vague.<sup>195</sup> Not only are the statutes vague, the plaintiffs argue, they are also unnecessary since schools have access to a range of effective approaches to prevent disruption and address misbehavior.<sup>196</sup> The plaintiffs seek declaratory relief that the statute violates their constitutional right to due process when applied to schoolchildren, and seek an injunction enjoining the law from being applied to students.<sup>197</sup>

The specific words alleged to be vague in the school disturbance statute are "interfere," "disturb," "loiter," and "act in an obnoxious manner."<sup>198</sup> The complaint also cites South Carolina Attorney General's Opinions addressing the reach of the statute, which allow the Disturbing Schools charge to apply to the use of offensive language toward teachers, principals, and police officers, and to failure to leave school when asked.<sup>199</sup> The plaintiffs argue that behavior should be managed by school administrators rather than police officers, and that the racial disparities in the law's application not only cannot be explained by racial differences in behavior, but that the greatest disparities come up when laws use subjective words like "disrupt."<sup>200</sup> The plaintiffs' memorandum accompanying the motion for preliminary injunction argues that the school disturbance law is void for vagueness on its face and fails to provide adequate notice to students of the nature of prohibited conduct.<sup>201</sup>

The United States Department of Justice (DOJ) also filed a Statement of Interest in *Kenny v. Wilson*, urging that if the plaintiffs' allegations are taken as true, they have stated a proper claim under the due process clause of the Fourteenth Amendment.<sup>202</sup> Citing *J.D.B. v. North Carolina*,<sup>203</sup> holding that a child's age informs an analysis of police custody,<sup>204</sup> the DOJ notes that student behavior is influenced by their diminished maturity, and that children can demonstrate negative behaviors and still become productive members of society.<sup>205</sup> Additionally, in the experience of the DOJ enforcing civil rights, significant racial disparities can indicate the unconstitutional vagueness of a statute.<sup>206</sup>

The defendants prevailed in the U.S. District Court for the District of South Carolina (Charleston) on a motion to dismiss for failure to state a claim, on the grounds that plaintiffs lacked standing.<sup>207</sup> On appeal to the Fourth Circuit, the district court was reversed.<sup>208</sup> The Fourth Circuit left room for a challenge to the Disturbing Schools law based on vagueness, noting that *Tinker* and prior state cases addressed only overbreadth.<sup>209</sup> Further, the court found that the plaintiffs faced credible threats of prosecution from discriminatory enforcement based

on race and disability, and on the plausibly vague nature of the law itself.<sup>210</sup> The case is currently pending.<sup>211</sup>

## **2. *In re Amir X.S.* as a challenge to unconstitutional overbreadth**

*In re Amir X.S.*<sup>212</sup> was a pre-Kenny South Carolina case challenging the overbreadth of South Carolina's school disturbance law. The case began in family court, which held the statute constitutional and adjudicated Amir X.S. delinquent.<sup>213</sup> When Amir X.S. moved to quash the juvenile petition on the grounds that the statute was unconstitutionally vague and overbroad, the State argued that he lacked standing to challenge the statute since his conduct "fell plainly within its terms."<sup>214</sup> Because the traditional rule of standing is "relaxed" for claims involving overbreadth, the appellant needed only to show that the statute could cause someone—anyone—to "refrain from constitutionally protected expression."<sup>215</sup> The alleged overbreadth must not only be real, but also substantial.<sup>216</sup> While the South Carolina Supreme Court recognized that expressive conduct may be covered by the First Amendment,<sup>217</sup> it held that the conduct prohibited by the school disturbance law does not cover that type of protected expressive conduct.<sup>218</sup> Specifically citing *Tinker*, the court noted that symbolic expressive conduct can clearly not be subjected to school disciplinary consequences.<sup>219</sup>

Because the court found that *Tinker* did not apply to the type of conduct prohibited by the school disturbance law, it looked instead to *Grayned*, the Supreme Court case which dealt with student picketing prohibited by an anti-noise statute.<sup>220</sup> The important piece of *Grayned*, for the court, was the substantial disruption of school activities rather than the conduct itself.<sup>221</sup> Not only is the conduct prohibited by the school disturbance law substantially disruptive, it is not protected by the First Amendment, the *Amir X.S.* court held, and therefore cannot be challenged on the grounds of overbreadth.<sup>222</sup> Amir X.S.'s conduct had been to refuse to leave a classroom, to curse at the teacher and students, and to attempt to hit his teacher as he was escorted from the room.<sup>223</sup> Additionally, the court found that the construction of the statute itself is limited by its applicability only to schools, and that since there is a limiting construction, the statute was not overbroad.<sup>224</sup> Ultimately, while the statute may encompass protected speech, and "[a]ny fertile legal imagination can dream up conceivable ways in which enforcement of a statute violates First Amendment rights," the court held that it does not do so "substantially."<sup>225</sup>

## **3. *A.M. v. Holmes* and the validity of arrests under school disturbance laws**

*A.M. v. Holmes* involved a thirteen-year-old, F.M., who allegedly disrupted his physical education class and was arrested under New Mexico's school disturbance law.<sup>226</sup> F.M., a seventh grader, fake-burped in class, making other students laugh, and his teacher requested that he stop.<sup>227</sup> F.M. ignored her requests and continued, and was then asked to sit in the hallway.<sup>228</sup> He did so, but continued the fake-burping and laughing.<sup>229</sup> F.M.'s teacher called an SRO, who asked F.M. to come to the school's administrative office; F.M. cooperated.<sup>230</sup> The SRO then told F.M. he would be arrested for interfering with the educational process, and drove him to the juvenile detention center.<sup>231</sup>



A.M., F.M.'s parent, sued, arguing that F.M. had been deprived of his civil rights through an unlawful arrest and the use of excessive force, among other Fourth Amendment claims.<sup>232</sup> A.M. felt that the officer "should have known that burping was not a crime" and that because her son was compliant, the officer did not need to use force in arresting him.<sup>233</sup> The district court granted qualified immunity to the officer and the school administrators, and dismissed the claims against the officer, which A.M. appealed to the Tenth Circuit Court of Appeals.<sup>234</sup>

The circuit court focused on whether the school disturbance law encompassed F.M.'s conduct.<sup>235</sup> Because the statute manifested the legislature's intent to prohibit a "wide swath of conduct" that interferes with the educational process, the court held that it did encompass F.M.'s conduct.<sup>236</sup> F.M.'s conduct, the court reasoned, did not "merely...disturb the good order" of the classroom, it brought the activities of the class "to a grinding halt."<sup>237</sup> The use of handcuffs was also appropriate given reliance on clearly established law.<sup>238</sup>

Justice Neil Gorsuch, then a judge on the Tenth Circuit Court of Appeals, offered a sarcastic dissent, stating that maybe nowadays it is "too old school" for the teacher to have ordered extra laps or given detention to F.M., and that "[m]aybe today you call a police officer," who decides that rather than escorting the compliant thirteen-year-old to the principal's office, "an arrest would be a better idea."<sup>239</sup> Judge Gorsuch cited an earlier New Mexico case *State v. Silva*,<sup>240</sup> which A.M. also relied on, holding that a more substantial interference is required under a similar school disturbance law (applying in that case to college sit-ins, but with identical language to the school disturbance law in the present case).<sup>241</sup> Judge Gorsuch also cited *In re Jason W.* for the proposition that conduct that requires intervention by a school official does not rise to the level of a school disturbance under the law.<sup>242</sup>

Upon losing her case, A.M. petitioned for certiorari to the United States Supreme Court,<sup>243</sup> which was denied in May of 2017.<sup>244</sup>

### **III. Discussion**

This Section argues that school disturbance laws are not only unnecessary for maintaining school discipline, but are unconstitutionally vague and overbroad. Because any juvenile justice system involvement is harmful, school disturbance laws are not worth the lifelong burden placed on the students charged under them. The use of school disturbance laws is marked by persistent and substantial racial bias, bias against LGBTQ students, damaging effects on students with disabilities, and general harms associated with juvenile justice system involvement. Because school disturbance laws violate the due process rights of students, are harmful, and are unnecessary, they should be repealed or held unconstitutional by the courts.

#### **A. School Disturbance Laws are Harmful and Discriminatory**

##### **1. School disturbance laws increase harmful juvenile justice system involvement**

When it becomes "too old school" for a teacher to give detention and the teacher or school administrator decides that "an arrest would be a better idea,"<sup>245</sup> a child that would once have had their behavior addressed by the school becomes a sub-



ject of the juvenile justice system. The “school-to-prison pipeline” is sometimes discussed as the somewhat abstract idea that zero tolerance school discipline, like suspensions and expulsions, inevitably leads to juvenile justice involvement.<sup>246</sup> However, the school-to-prison pipeline can be very literal, with more children than ever going straight from classrooms to prisons.<sup>247</sup> Juvenile justice involvement comes with a lifetime of harmful consequences.<sup>248</sup>

Even one court visit on a juvenile justice charge can result in negative educational outcomes, increasing the risk that a child will drop out of school.<sup>249</sup> Further, court appearance is most detrimental to those with the least previous involvement in delinquency.<sup>250</sup> Some theorize that the arrest will have a deterrent effect. In fact, the opposite is true: juvenile justice involvement leads to more juvenile justice involvement.<sup>251</sup> For both youth who experience incarceration and for juvenile justice involved youth who do not (instead getting probation, for example), system involvement follows them long-term.<sup>252</sup>

For youth that, as a result of a school disturbance delinquency adjudication, are incarcerated, adequate education is difficult to access.<sup>253</sup> Problems in attaining an education while incarcerated include lack of appropriate work and educational resources,<sup>254</sup> lack of qualified teachers,<sup>255</sup> harmful disciplinary practices including the use of seclusion,<sup>256</sup> and difficulty transitioning back to regular schools following incarceration, often because youth are not given adequate credit for education completed while in juvenile justice placements.<sup>257</sup> If children are not only unable to access an adequate education while incarcerated, but then fall further behind when they leave incarceration, it becomes easy to see how juvenile justice involvement so dramatically affects the dropout rate.<sup>258</sup>

Even those youth who are not incarcerated as a result of violating a school disturbance law face negative outcomes as a result of court involvement.<sup>259</sup> Although ninety-five percent of youth involved in the juvenile justice system, including (generally) those who are involved due to violating school disturbance laws, are in the system for non-violent offenses, the juvenile records that result from that involvement will follow them into adulthood.<sup>260</sup> Having a juvenile record interferes with a young person’s ability to secure housing, get a job, join the military, go to college, or be the recipient of public benefits.<sup>261</sup> While it is commonly believed that juvenile records are automatically sealed at age eighteen, in reality procedures for sealing and expungement of these records vary widely across states.<sup>262</sup> These records result in “lifelong barriers to success.”<sup>263</sup>

## **2. School disturbance laws have a disparate impact on students of color, LGBTQ students, and students with disabilities**

Black students face disproportionately high rates of school arrest.<sup>264</sup> Black students, at sixteen percent of total school enrollment, account for thirty-one percent of school-related arrests.<sup>265</sup> Over seventy percent of students in school-related arrests or law enforcement referrals are black or Latino.<sup>266</sup> In accordance with that heightened rate of arrest, school disturbance laws are more often used to charge students of color—in South Carolina, black students like Niya Kenny are nearly four times as likely to be charged under the state’s school disturbance law.<sup>267</sup> Black students are also more likely to be in schools with SROs and school

police officers in the first place: seventy-four percent of black high school students attend a school with at least one on-site law enforcement officer, compared with sixty-five percent of white high school students.<sup>268</sup> In middle school, the disparity is even greater, with fifty-nine percent of black students attending a school with law enforcement officers compared to forty-seven percent of white students—and early system involvement also increases the likelihood of later involvement.<sup>269</sup> Given that subjective offenses create greater opportunities for the influence of implicit bias, compared with clearly-defined objective offenses, this bias and use of discretion leads to more students of color being charged with the subjectively-defined “disturbing school.”<sup>270</sup>

LGBTQ youth also experience the effects of greater reliance on law enforcement to enforce school discipline.<sup>271</sup> While LGB youth, for example, make up just five to seven percent of all youth, they represent up to twenty percent of youth in the juvenile justice system.<sup>272</sup> LGB youth are between 1.25 and 3 times as likely to face criminal consequences, like school-based arrests, when their heterosexual counterparts do not for similar conduct.<sup>273</sup> In general, LGB and gender-nonconforming youth are up to three times more likely to experience harsh disciplinary treatment, ranging from school-based sanctions to school arrests and juvenile justice involvement,<sup>274</sup> because of discretionary application of subjective rules—not because they engage in more delinquent behavior.<sup>275</sup>

Finally, it appears likely that juvenile justice system involvement, in effect, criminalizes disability. Students with disabilities represent a quarter of all students arrested or referred to law enforcement from schools, while they account for 12% of the entire student population.<sup>276</sup> Nothing in the law prevents an SRO from arresting a student for conduct directly caused by their disability.<sup>277</sup> In fact, the Individuals with Disabilities Education Act (IDEA) was amended by Congress expressly to state that nothing within the IDEA prevents reporting agencies (like schools) or law enforcement from applying laws equally to crimes committed by students with disabilities.<sup>278</sup> This has resulted in the fact that a shocking 20% of students with emotional and behavioral disorders have been arrested in school—often for conduct directly caused by their disabilities.<sup>279</sup> Because some emotional and behavioral disabilities are likely to cause disturbances in schools, especially in schools that are not appropriately responding to the students’ behavioral needs with their IEPs, school arrests and referrals to law enforcement are, in many cases, criminalizing disability.

## ***B. School Disturbance Laws are Unconstitutionally Vague and Overbroad***

### **1. School disturbance laws are unconstitutionally vague**

School disturbance laws should be held unconstitutionally vague because they do not provide minimally adequate notice of what conduct is prohibited to students who might be prosecuted.<sup>280</sup> Additionally, under the vagueness doctrine school disturbance laws “grant[] too much discretion to law enforcement without standards to avoid arbitrary or discriminatory enforcement.”<sup>281</sup> Because the average, reasonable student is unable to distinguish between conduct that would be subject merely to school-based punishment and conduct that would be

subject to arrest, school disturbance laws fail to pass the first test of vagueness.<sup>282</sup> Because, on their face and as applied, they do not provide standards to avoid arbitrary or discriminatory enforcement, school disturbance laws also fail the second vagueness test.<sup>283</sup>

### **First vagueness test: minimally adequate notice to a person of average intelligence**

Under the first test for vagueness, school disturbance laws would have to provide minimally adequate notice of what conduct is prohibited.<sup>284</sup> One typical statute is South Carolina's, which is frequently employed to bring charges for school-based conduct.<sup>285</sup> It makes it unlawful to "willfully or unnecessarily... interfere with or disturb" students or teachers or to "act in an obnoxious manner" in a school.<sup>286</sup> The question is what is meant by "interfere," "disturb," or "obnoxious manner," and whether an ordinary person (in this case, a child) would reasonably know what conduct this encompasses.

### **A "person of average intelligence" should be a reasonable child**

The notice required by due process must be of the type that ordinary people can understand.<sup>287</sup> Further, the statute must give fair warning of the prohibited conduct when measured by "common understanding and practice."<sup>288</sup> School disturbance laws should thus be construed through the understanding of an ordinary *child*—not simply an ordinary *person*—and should be measured by common understanding and practice specifically in schools. Increasingly in criminal justice, a "reasonable child" standard is used and advocated for.<sup>289</sup> In a typical school, a reasonable student would likely not know that they could be arrested for offenses such as criticizing a school police officer, cursing at a student, making fun of them for their behavioral disabilities, complaining about having to get a late slip loud enough that others in the hallway could hear, or speaking with another student after being sent out of class.<sup>290</sup> If an average, reasonable child would not know whether "interfering with" or "disturbing" school would encompass interrupting a teacher, cursing at another student, or complaining about or criticizing adults, the statute is unconstitutionally vague.

Would Niya Kenny have known that she would be arrested, as she shouted for help while watching an officer throw a classmate from her desk?<sup>291</sup> Would an autistic ten-year-old with a need for extensive behavior management services, who kicked and scratched an aide after the child said he did not want to be touched, know that his conduct would subject him to handcuffs and a juvenile record?<sup>292</sup> Would an eighth grader participating in a "Skittle fight" on the bus (with several students throwing skittles at each other) know that, as he took a social studies test in class the next day, he would be arrested?<sup>293</sup> Would a reasonably intelligent student who committed any of those behaviors at a school without SROs before transferring to a school with SROs where she then does the same thing know that the behavior would now subject her to arrest? The use of discretion inherent in school disturbance laws makes minimally adequate notice to a child of average intelligence nearly impossible.

## **Second vagueness test: Too much discretion to law enforcement without standards to avoid arbitrary or discriminatory enforcement**

Many school codes of conduct punish disruptive offenses with consequences ranging from detention to suspension and expulsion.<sup>294</sup> In today's schools, SROs are law enforcement, and increasingly classroom management is delegated not to teachers but to these law enforcement officers.<sup>295</sup> It is within an SRO's discretion to charge a child with school disturbance.<sup>296</sup> Given the highly discretionary nature of school disturbance laws,<sup>297</sup> and widely varied use of school disturbance laws across states,<sup>298</sup> there is no consistent basis for the application of these laws. Additionally, the implicit bias inherent in discretion leads to arbitrary and discriminatory enforcement.<sup>299</sup>

## **2. School disturbance laws are unconstitutionally overbroad**

School disturbance laws are so broad they do not aim specifically "at the evils within the allowable control of the government," but can easily cover constitutionally protected activities.<sup>300</sup> Challenges arguing that school disturbance statutes' languages are so broad as to discourage conduct that is expressly protected by the Constitution,<sup>301</sup> must focus on the "normal and reasonable" reading of their language.<sup>302</sup> These statutes would fail if they have a substantial number of applications covering constitutionally protected conduct; additionally, there must be "no satisfactory method of severing the law's constitutional from its unconstitutional applications."<sup>303</sup> The overbreadth must weigh against the law's legitimate purposes,<sup>304</sup> and constitutionality can be sustained if the state court has given a narrowing construction.<sup>305</sup>

*In re Amir X.S.* showed that the traditional rule of standing is "relaxed" for claims involving overbreadth, meaning the challenger need only show that the statute could cause any third party, not necessarily a plaintiff, to "refrain from constitutionally protected expression."<sup>306</sup> While *Amir X.S.*'s own conduct (not only refusing to leave the room, but cursing at and attempting to hit a teacher, continuing disruption as he was escorted from the room) may have fallen within the meaning of a school disturbance,<sup>307</sup> it would be difficult to say that Niya Kenny's speech (calling attention to the unfairness of the arrest she was witnessing)<sup>308</sup> would not have been constitutionally protected expression within the meaning of *Tinker*.<sup>309</sup> Under *Tinker*, any "material and substantial disruption" would already have been caused by the arrest itself and not by Niya Kenny's words of protest.<sup>310</sup> Yet she was arrested and charged with disturbing school due to her words, which not having caused a material and substantial disruption were constitutionally protected speech under *Tinker*.<sup>311</sup>

The danger that the vague charge of "disturbing schools" can be used to arrest students for practically any unwanted in-school behavior—including constitutionally protected speech—renders the statute unconstitutionally overbroad. The South Carolina Supreme Court has failed to provide an appropriate narrowing construction to the statute other than saying that the statute applied only to schools.<sup>312</sup> To state that there exists an appropriate narrowing construction because the statute (giving no specificity as to conduct) is narrowed to a particular location (schools) is not to provide an appropriate narrowing construction at all. On its face, a statute that says only that "act[ing] obnoxious" or "disturb[ing] in

any way or in any place the teachers or students of any school” will necessarily encompass constitutionally protected conduct and speech—including constitutionally protected unpopular speech, like Niya Kenny’s—to a substantial degree.<sup>313</sup>

## **C. School Disturbance Laws are Unnecessary**

### **1. Disorderly conduct and disturbing the peace are similar charges with less risk of abuse**

There is no need to rely on specific school disturbance laws, because disorderly conduct, disturbing the peace, and disturbing assemblies already exist as charges. While similar vagueness arguments can be (and are) made against disorderly conduct statutes,<sup>314</sup> an existing body of case law has better defined when, for example, disorderly conduct statutes sink to the level of unconstitutional vagueness.<sup>315</sup> A disorderly conduct or disturbing the peace statute, to be valid, must give a person of ordinary intelligence fair warning that their conduct will be prohibited.<sup>316</sup> While school disturbance laws are, depending on the state, either criminal or civil offenses, disorderly conduct is a criminal offense and thus is held to a higher standard of certainty, meaning a vague disorderly conduct statute can be held invalid on its face even if it may have some valid application.<sup>317</sup>

The Supreme Court has ruled on the validity of disorderly conduct statutes as applied to the following types of (often) school-based conduct: verbal acts, noisemaking, and “an annoying manner of acting,” and state courts are bound by the standard of vagueness set by the Supreme Court.<sup>318</sup> A charge of disorderly conduct, therefore, will not survive a challenge in a situation where a student, for example, curses at a teacher, because the Supreme Court has held that only “fighting words” and other unprotected speech may be covered.<sup>319</sup> Similarly, “annoying” conduct is lawfully prohibited only when the words or conduct would have a direct tendency to cause violence or incite to fight.<sup>320</sup> Since, unfortunately, cursing in school is a common enough occurrence that the average teacher (and student) will not be induced to fight by it,<sup>321</sup> a disorderly conduct charge would not be appropriate. Because the scope of disorderly conduct and disturbing the peace has been limited by case law, it has less potential for abuse than school disturbance laws.

### **2. School disturbance laws are unnecessarily taking the place of classroom management**

While this Comment takes the position that school disturbance laws are harmful, unconstitutional, and unnecessary, the importance of a safe classroom free from disturbances to the learning environment cannot be overstated. However, this fundamental responsibility belongs to schools, not to law enforcement, and when the lines become blurred and the responsibility becomes abdicated, schools become less places for education and more places for social control.

There are many proven ways to maintain school discipline without resorting to law enforcement. The United States Departments of Education and Justice, through the Supportive School Discipline Initiative and the School Discipline Consensus Project, sponsored a report by the Council of State Governments Justice Center called the School Discipline Consensus Report.<sup>322</sup> This report provides

comprehensive, research-based, and practical recommendations for establishing a positive school climate, encouraging schools and school districts to analyze their own discipline data to pinpoint issues and begin targeted school-based strategies for addressing them.<sup>323</sup> This report can serve as a starting point for any school struggling to maintain appropriate discipline. Many effective, school-based disciplinary programs already exist, that are used by many schools and can be used by many more: Positive Behavioral Interventions and Supports (PBIS) (a multi-tiered system for setting behavioral expectations while providing appropriate supports);<sup>324</sup> Assertive Discipline (a system of effective and positive classroom management strategies for teachers);<sup>325</sup> Responsive Classroom (an approach to teaching focused on building an engaging, positive classroom community);<sup>326</sup> and restorative approaches to discipline (focusing on responding to challenging behavior through engaging all parties involved in authentic dialogue leading to an effort to make things right);<sup>327</sup> among many other effective approaches.

The roles of existing school security officers or SROs should also be redefined. Under no circumstances should police officers take on the role of teachers in managing routine classroom misbehavior.<sup>328</sup> Arrests should be used only for the most serious conduct—“[a] scuffle between students in line for the bus does not need to be treated as an assault, and a student who heckles a speaker at a school event does not need to be charged with disorderly conduct.”<sup>329</sup> SROs can also be trained to use discretion and to consider alternatives to arrest; good SROs already do this.<sup>330</sup> If school administrators, teachers, students, and SROs are all clear on what their appropriate roles are, arrests under school disturbance laws can be eliminated, and school-based arrests in general can be kept to an appropriate minimum.

#### **IV. CONCLUSION**

This Comment recommends that school disturbance laws be repealed by the legislatures and found unconstitutional by the courts. Because the rights of children in schools do not and should not “stop at the schoolhouse gate,”<sup>331</sup> we must recognize that the Fourteenth Amendment protects children from the right to be deprived of their liberty without due process under vague, overbroad, harmful, discriminatory, and unnecessary school disturbance laws.<sup>332</sup> Otherwise we consent to live in a nation where the rights of some of our most vulnerable residents, children, are not only limited but terminated at the schoolhouse gate.

## Notes

- 1 *E.g.*, Gary Fields and John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, THE WALL STREET JOURNAL (Oct. 20, 2014), <https://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602>.
- 2 INSTITUTE OF EDUCATION SCIENCES, PUBLIC SCHOOL SAFETY AND DISCIPLINE: 2013-14 18 (2015).
- 3 Evie Blad, *Schools With Police But No Guidance Counselors: A Closer Look*, ED WEEK (Dec. 9, 2016), [http://blogs.edweek.org/edweek/rulesforengagement/2016/12/black\\_hispanic\\_students\\_more\\_likely\\_to\\_attend\\_schools\\_with\\_police\\_but\\_no\\_counselors.html](http://blogs.edweek.org/edweek/rulesforengagement/2016/12/black_hispanic_students_more_likely_to_attend_schools_with_police_but_no_counselors.html).
- 4 *See* Amanda Ripley, *How America Outlawed Adolescence*, THE ATLANTIC (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/>.
- 5 *See, e.g.*, FLA. STAT. § 871.01 (2017).
- 6 *See, e.g.*, CAL. PENAL CODE § 415 (2017).
- 7 *See Ibid.*; *see, e.g.*, Robin Shulman, *A South Carolina Student Was Arrested for 'Disturbing a School' When She Challenged Police Abuse, So We Sued*, ACLU (Aug. 11, 2016), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/south-carolina-student-was-arrested-disturbing>
- 8 *See* JUVENILE LAW CENTER, FAILED POLICIES, FORFEITED FUTURES 2 (2014).
- 9 *See infra* Parts III.A.1. and III.A.2.
- 10 *See infra* Part III.C.1.
- 11 Hillary Rodham, *Children Under the Law*, 43 HARV. ED. REV. 487 (1973) (“The delicate operation of inserting new elements into the control-of-children equation began during the compulsory schooling controversy. From the first confrontations between parents and the state, education has been the subject of continuous and often bitter struggles, primarily over the proper social role of education and the proper treatment of children within the schools.”)
- 12 *Ibid. See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (describing the right of a teacher to teach a foreign language and “the right of the parents to engage him so to instruct their children”); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (holding that a compulsory school law which forbid parents from sending their children to private school “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Prince v. Massachusetts*, 321 U.S. 158, 166, 168 (1944) (citing *Meyer* and *Pierce* as standing for the principal of “children’s right to receive [education],” while at the same time stating that “[t]he state’s authority over children is broader than over like actions of adults,” reasoning that would be echoed in later school discipline cases).
- 13 406 U.S. 205 (1972).
- 14 *Ibid.*
- 15 430 U.S. 651 (1977).
- 16 *Ibid.* at 681.
- 17 *See, e.g.*, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
- 18 393 U.S. 503 (1969).
- 19 *Ibid.*
- 20 *Ibid.* at 504.
- 21 *Ibid.* at 503.
- 22 *Ibid.* at 506.
- 23 *Ibid.* at 511.
- 24 *See Ibid.* at 507.
- 25 *Ibid.*
- 26 *E.g. New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
- 27 *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 503 (1969).
- 28 393 U.S. at 513.



- 29 *Ibid.* at 525–26.
- 30 *Ibid.* at 525.
- 31 *Ibid.* at 525–26.
- 32 *Ibid.*
- 33 *Ibid.* at 526.
- 34 *E.g.*, *Bethel School District v. Fraser*, 478 U.S. 675 (1986).
- 35 478 U.S. 675 (1986).
- 36 *Ibid.* at 686.
- 37 *Ibid.* at 683.
- 38 See American Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?* 852, AMERICAN PSYCHOLOGIST (Dec. 2008).
- 39 *E.g.* *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
- 40 469 U.S. 325 (1985).
- 41 *Ibid.*
- 42 *Ibid.*
- 43 *Ibid.* at 348 (omission in original) (Powell, J., concurring).
- 44 *Ibid.* at 337.
- 45 *Ibid.* at 337.
- 46 *Ibid.* at 341–42.
- 47 *Ibid.*
- 48 515 U.S. 646 (1995).
- 49 *Ibid.* at 657.
- 50 See Hillary Rodham, *supra* note 11.
- 51 *Vernonia*, 515 U.S. at 653.
- 52 See *infra* notes 52–55 and accompanying text for a discussion of “zero tolerance” school discipline.
- 53 Gun-Free Schools Act, 20 U.S.C. § 7961 (2015).
- 54 See American Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?* 852, AMERICAN PSYCHOLOGIST (Dec. 2008).
- 55 John J. DiIulio, Jr., *The Coming of the Super—Predators*, THE WEEKLY STANDARD (Nov. 27, 1995), <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160>.
- 56 See American Psychological Ass’n Zero Tolerance Task Force, *supra* note 54, at 852.
- 57 Schools that do not rely heavily on SROs to manage behavior use a variety of school-based behavior management systems. For examples, *see, e.g.*, POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, <https://www.pbis.org/> (last visited December 14, 2017); LEE CANTER, ASSERTIVE DISCIPLINE (4<sup>th</sup> ed. 2009); RESPONSIVE CLASSROOM, <https://www.responsiveclassroom.org/> (last visited December 14, 2017); AMOS CLIFFORD, CENTER FOR RESTORATIVE PROCESS; TEACHING RESTORATIVE PRACTICES WITH CLASSROOM CIRCLES 1 (2013).
- 58 EMILY MORGAN ET AL., THE COUNCIL OF STATE GOVERNMENTS JUSTICE CTR., THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM 187 (2014) [hereinafter SCHOOL DISCIPLINE CONSENSUS REPORT].
- 59 NATHAN JAMES ET AL., CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2 (2013).
- 60 SCHOOL DISCIPLINE CONSENSUS REPORT, *supra* note 58, at 188.
- 61 *Ibid.*
- 62 INSTITUTE OF EDUCATION SCIENCES, PUBLIC SCHOOL SAFETY AND DISCIPLINE: 2013–14 18 (2015).
- 63 *See, e.g.*, *A.M. v. Holmes*, 830 F.3d 1123, 1139 (10<sup>th</sup> Cir. 2016).
- 64 Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Kansas, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New

Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin.

- 65 See, e.g., WIS. STAT. § 947.01 note 68 (LexisNexis 2017) (prohibiting “violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance,” and classified as a Class B misdemeanor) (applied when a child’s conduct was “disruptive of good order and tended to cause or provoke a disturbance” by bringing caffeine pills to school).
- 66 See, e.g., CAL. PENAL CODE § 415 note 6 (Deering 2017) (prohibiting “maliciously and willfully disturb[ing] another person,” subject to up to ninety days’ imprisonment and/or a fine of \$400) (considered in the case of a minor who acted aggressively and used offensive language in school).
- 67 See, e.g., S.C. CODE ANN. § 16-17-420 (2017) (making it unlawful for “any person wilfully or unnecessarily...to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State...or to act in an obnoxious manner thereon,” classified as a misdemeanor subject to up to ninety days’ imprisonment or a fine of \$5000).
- 68 See Catherine Y. Kim, *Policing School Discipline*, 77 BROOKLYN L. REV. 861, 880 (2012). See generally Deborah N. Archer, *Introduction: Challenging the School-To-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2010) (on the so-called “school-to-prison pipeline”). See generally JUVENILES FOR JUSTICE, JUSTICE FOR JUVENILES: YOUTH RECOMMENDATIONS TO IMPROVE EDUCATIONAL OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 1 (2015) (for an example of how juvenile justice involvement can hurt educational outcomes); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23(4) JUST. QUARTERLY 462, 463 (2006).
- 69 JUSTICE POLICY INSTITUTE, *EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS* 15 (2011).
- 70 Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 NW J. L. & SOC. POL’Y 58, 70 (2013). See also JUVENILE LAW CENTER, *FAILED POLICIES, FORFEITED FUTURES* 2 (2014).
- 71 Lisa H. Thureau and Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 1004 (2010).
- 72 Catherine Y. Kim, *supra* note 68, at 886.
- 73 Lydia Wright, *Story from the field: Mississippi high school sending children to jail for ‘disorderly conduct,’* SOUTHERN POVERTY LAW CENTER (Apr. 19, 2016) (describing how one student was handcuffed and threatened with arrest for this charge when “walking in the hallway, at a teacher’s request, during school hours”).
- 74 Erik Eckholm, *With Police in Schools, More Children in Court*, NY TIMES (Apr. 12, 2013), <http://www.nytimes.com/2013/04/12/education/with-police-in-schools-more-children-in-court.html>.
- 75 See JUSTICE POLICY INSTITUTE, *supra* note 69, at 15.
- 76 *Ibid.*
- 77 See Amanda Ripley, *supra* note 4. See also U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE ISSUE BRIEF NO. 1, p. 6 (Mar. 2014) [hereinafter SCHOOL DISCIPLINE ISSUE BRIEF NO. 1]; Evie Blad and Alex Harwin, *Black Students More Likely to be Arrested at School*, ED WEEK (Jan. 24, 2017), <https://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html>.
- 78 Kerrin C. Wolf, *supra* note 70, at 72.
- 79 Jeffrey Benzing, *From school to jail: How hundreds of kids get arrested in Pittsburgh schools every year*, PUBLICSOURCE (July 31, 2017), <http://publicsource.org/from-school-to-jail-how-hundreds-of-kids-get-arrested-in-pittsburgh-schools-every-year/>.
- 80 *Ibid.*
- 81 *Ibid.*
- 82 See, e.g., CAL. PENAL CODE § 415 (2017) (making unlawful, subject to imprisonment for not more than ninety days and/or a fine of not more than \$400, “unlawfully fight[ing] in a public place,” “maliciously and willfully disturb[ing] another person by loud and unreasonable noise,” or “us[ing] offensive words in a public place which are inherently likely to provoke an immediate violent reaction.”) This statute was used to charge a child who “hit a wall, kicked a trash can, and cursed in front of the school’s athletic director.”

- 83 See, e.g., GRAND RAPIDS, MICH. CODE OF ORDINANCES § 9.142 (2017) (making it unlawful to “wilfully or maliciously make or assist in making any noise, disturbance or improper diversion by which the peace, quietude or good order of any public, private or parochial school is disturbed.”) Michigan has dozens of identical or similar ordinances.
- 84 See, e.g., FLA. STAT. § 871.01 (making guilty of a second-degree misdemeanor anyone who “wilfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose”); KANSAS CITY, MO. CODE OF ORDINANCES § 50-166 (2017) (making it unlawful “for any person acting alone or in concert with others to wilfully, maliciously or contemptuously interfere unreasonably with any school or other meeting or assembly of people met together for any lawful purpose whatever, by making a noise, or by rude or indecent behavior or profane discourse within the place of any such school or assembly, or so near the same as to interrupt or disturb the order thereof”); W. VA. CODE § 61-6-14 (2017) (making guilty of a misdemeanor anyone who “wilfully interrupt, molest or disturb any free school, Sunday school, or other school, a school exhibition...lawfully carried on”).
- 85 12 AM. JUR. 2d *Breach of Peace and Disorderly Conduct* § 1 (2017)
- 86 12 AM. JUR. 2d *Breach of Peace and Disorderly Conduct* § 2 (2017); see also Susan Ferriss, *An Epidemic of Questionable Arrests by School Police*, THE CENTER FOR PUBLIC INTEGRITY (Dec. 10, 2015), <https://www.publicintegrity.org/2015/12/10/18944/epidemic-questionable-arrests-school-police>
- 87 12 AM. JUR. 2d *Breach of Peace and Disorderly Conduct* § 2 (2017) (“[S]tudents conduct in vulgarly insulting teacher from about ten feet away by calling her a “fucking bitch” and then repeating this insult and also shouting “stupid bitch” while leaving the classroom did not constitute “fighting words” in violation of statute; considering the circumstances in which student uttered his words, his insults would not have likely provoked an ordinary teacher to exchange fisticuffs with the student or to otherwise react violently.”)
- 88 See Amanda Ripley, *supra* note 4.
- 89 See James King, *School District Arrests Kids for Throwing Skittles*, VOCATIV (May 12, 2015), <http://www.vocativ.com/underworld/crime/where-students-can-get-arrested-for-throwing-skittles/index.html>; STOCKTON EDUCATION EQUITY COALITION, OVER-POLICING IN STOCKTON SCHOOLS: A REPORT CARD 1 (2017), [https://www.aclunc.org/sites/default/files/Report\\_Card\\_SEEC.pdf](https://www.aclunc.org/sites/default/files/Report_Card_SEEC.pdf); Susan Ferriss, *An Epidemic of Questionable Arrests by School Police*, THE CENTER FOR PUBLIC INTEGRITY (Dec. 10, 2015), <https://www.publicintegrity.org/2015/12/10/18944/epidemic-questionable-arrests-school-police>; Gary Fields and John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, THE WALL STREET JOURNAL (Oct. 20, 2014), <https://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602>.
- 90 James King, *School District Arrests Kids for Throwing Skittles*, VOCATIV (May 12, 2015), <http://www.vocativ.com/underworld/crime/where-students-can-get-arrested-for-throwing-skittles/index.html>
- 91 STOCKTON EDUCATION EQUITY COALITION, OVER-POLICING IN STOCKTON SCHOOLS: A REPORT CARD 1 (2017), [https://www.aclunc.org/sites/default/files/Report\\_Card\\_SEEC.pdf](https://www.aclunc.org/sites/default/files/Report_Card_SEEC.pdf)
- 92 Susan Ferriss, *An Epidemic of Questionable Arrests by School Police*, THE CENTER FOR PUBLIC INTEGRITY (Dec. 10, 2015), <https://www.publicintegrity.org/2015/12/10/18944/epidemic-questionable-arrests-school-police>
- 93 *Ibid.*
- 94 See, e.g., FOLEY, ALABAMA CODE OF ORDINANCES § 11–18 (2017) (rendering delinquent minors who engage in “disturbing school assemblies”); FLA. STAT. § 871.01 (2017) (“Whoever wilfully interrupts or disturbs any school...commits a misdemeanor of the second degree.”); GRAND RAPIDS, MICHIGAN CODE OF ORDINANCES § 9.142 (2017) (“No person shall wilfully or maliciously make or assist in making any noise, disturbance or improper diversion by which the peace, quietude or good order of any public, private or parochial school is disturbed.”); KANSAS CITY, MISSOURI CODE OF ORDINANCES § 50-170 (2017) (on “disturbing school activities”: “No person shall... intentionally disrupt, disturb or interfere with the teaching of any class of students, or any other school-sponsored activity conducted in a school building, or school grounds or in any other public place.”); TARBORO, NORTH CAROLINA CODE OF ORDINANCES § 11-23 (2017) (on “disturbing school children or school functions”: “It shall further be unlawful for any person to cause any disturbance or to disrupt any school function.”); S.C. CODE ANN. § 16-17-420 (2017) (on “Disturbing schools”: “It shall be unlawful for any person wilfully or unnecessarily to interfere with or to disturb in any way or in any place the students or teachers of any school or college

in this State” subject to “not less than” thirty days imprisonment or by fine of between \$50 and \$500, or both.); WASH. REV. CODE § 28A.635.030 (2017) (on “Disturbing school”: “Any person who shall willfully create a disturbance on school premises during school hours or at school activities or school meetings shall be guilty of a misdemeanor.”).

- 95 See e.g., FLA. STAT. § 877.13 (2017) (making it unlawful “[k]nowingly to disrupt or interfere with the lawful administration or functions of any educational institution”); GA. CODE ANN. § 20-2-1181 (2017) (on “disrupting operation of public school”); WYANDOTTE COUNTY - UNIFIED GOVERNMENT, KANSAS CODE OF ORDINANCES § 22-123 (2017) (on “disrupting schools”); ST. LOUIS, MISSOURI CODE OF ORDINANCES § 15.112.020 (2017) (making it unlawful to disrupt or attempt to disrupt the normal operation of any public or private primary or secondary school”); SPARKS, NEVADA CODE OF ORDINANCES § 9.57.035 (2017) (on “[d]isrupting school activities”); N.C. GEN. STAT. § 14-288.4(6) (2017) (on disrupting any public or private educational institution); BOARDMAN, OREGON CODE OF ORDINANCES § Sec. 9.32.020 (2017) (stating that “[n]o person shall disrupt or threaten to disrupt the order, discipline or process in an educational setting”); UTAH CODE ANN. 76-9-106 (2017) (prohibiting “[D]isrupting the operation of a school” as a misdemeanor); BURLINGTON, VERMONT CODE OF ORDINANCES § 21-39 (2017) (on “[d]isruption of school operations”).
- 96 See, e.g., GADSDEN, ALABAMA CODE OF ORDINANCES § 90-235 (2017) (making it unlawful to “interfere with the conduct and discipline of any public school”); KANSAS CITY, MISSOURI CODE OF ORDINANCES § 50-166 (2017) (making it unlawful to “willfully, maliciously or contemptuously interfere unreasonably with any school”); NEV. REV. STAT. ANN. § 392.910 (2017) (making it a misdemeanor to “interfere with or disturb any persons peaceably assembled within a building of a public school for school district purposes”); N.M. STAT. ANN. § 30-20-13 (2017) (stating that “[n]o person shall willfully interfere with the educational process of any public or private school”); N.D. CENT. CODE § 15.1-06-16 (2017) (making it unlawful to “[w]illfully interfere with or interrupt the proper order or management of a public school by an act of violence, boisterous conduct, or threatening language”); KERSHAW, SOUTH CAROLINA CODE OF ORDINANCES § 26-66 (2017) (making it unlawful to “[i]nterfere with or disturb in any way or in any place the students or teachers of any school”); S.D. CODIFIED LAWS § 13-32-6 (2017) (making guilty of a misdemeanor any person who “intentionally interferes with or interrupts the proper order or management of a public or nonpublic school”).
- 97 See, e.g., TOPEKA, KANSAS CODE OF ORDINANCES § Sec. 54-131 (2017) (making it unlawful for any person to “willfully or maliciously make...in any building in which a public school shall be in actual session, any noise, disturbance or improper diversion”); NORTHVILLE, MICHIGAN CODE OF ORDINANCES § 54-156 (2017) (outlawing “[w]illfully or maliciously...making any noises, disturbance or improper diversions by which the peace, quietude or good order of any public, private or parochial school is disturbed”); KANSAS CITY, MISSOURI CODE OF ORDINANCES § 50-166 (2017) (making it unlawful to “willfully, maliciously or contemptuously interfere unreasonably with any school...making a noise, or by rude or indecent behavior”).
- 98 See, e.g., S.C. CODE ANN. § 16-17-420 (2017) (making it unlawful to “act in an obnoxious manner” in a school).
- 99 See, e.g., GADSDEN, ALABAMA CODE OF ORDINANCES § 90-235 (2017) (making it unlawful to “be rude, boisterous or disorderly” in a school); ME. REV. STAT. ANN. tit. 20-A, § 6804 (2017) (making someone who “willfully interrupts or disturbs the teacher or student by loud speaking, rude or indecent behavior” guilty of a civil offense); KANSAS CITY, MISSOURI CODE OF ORDINANCES § 50-166 (2017) (targeting “rude or indecent behavior” in a school).
- 100 See, e.g., N.H. REV. STAT. ANN. 193:11 § (2017) (specifying that “[a]ny person not a pupil who shall willfully interrupt or disturb any school shall be guilty of a misdemeanor”). See *contra* S.D. CODIFIED LAWS § 13-32-6 (2017) (stating that any “person, whether pupil or not, who intentionally disturbs a public or nonpublic school when in session...so as to prevent the teacher or any pupil from performing his duty, is guilty of a Class 2 misdemeanor”).
- 101 Amanda Ripley, *supra* note 4.
- 102 *Ibid.*
- 103 *Ibid.*
- 104 *Ibid.*
- 105 *Ibid.*

- 106 *Ibid.*
- 107 *See, e.g.,* Pitts v. State, 581 S.E.2d 306, 308 (Ga. Ct. App. 2003); Amanda Ripley, *supra* note 4.
- 108 Pitts v. State, 581 S.E.2d 306, 308 (Ga. Ct. App. 2003) (finding a violation of GA. CODE ANN. § 20-2-1181).
- 109 581 S.E.2d at 308; *see also* Amanda Ripley, *supra* note 4.
- 110 P.J.B. v. State, 999 So.2d 581, 583 (Ala. Crim. App. 2008).
- 111 999 So.2d at 588.
- 112 717 A.2d 393 (Md. Ct. Spec. App. 1998).
- 113 717 A.2d at 400.
- 114 *Ibid.* at 396. These charges included theft of a sandwich from the cafeteria and a drug transaction.
- 115 MD. CODE ANN., EDUC. § 26-101 (LexisNexis 2017) (“A person may not willfully disturb or otherwise willfully prevent the orderly conduct of the activities, administration, or classes of any institution of elementary, secondary, or higher education.”)
- 116 *In re Nahif A.*, 717 A.2d at 399.
- 117 *Ibid.*
- 118 *Ibid.* at 400.
- 119 *Ibid.*
- 120 *Ibid.*
- 121 837 A.2d 168 (Md. 2003).
- 122 *In re. Jason W.*, 837 A.2d at 170.
- 123 *Ibid.*
- 124 *Ibid.*
- 125 *Ibid.*
- 126 *Ibid.* at 173–174.
- 127 *Ibid.*
- 128 *Ibid.* at 175.
- 129 2015 Md. App. LEXIS 273 (Md. Ct. Spec. App. 2015).
- 130 *In re Qoyasha D.*, 2015 Md. App. LEXIS at 1–2. *See also* Miranda Johnson, *Why are we criminalizing behavior of students with disabilities?*, WASHINGTON POST (Apr. 25, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/25/why-are-we-criminalizing-behavior-of-children-with-disabilities/?utm\\_term=.0c7020405ace](https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/25/why-are-we-criminalizing-behavior-of-children-with-disabilities/?utm_term=.0c7020405ace).
- 131 *Ibid.* at 3–4.
- 132 *Ibid.* at 4.
- 133 *Ibid.* at 5.
- 134 *Ibid.* at 5.
- 135 *Ibid.* at 9–10.
- 136 *Ibid.* at 11–12.
- 137 *In re* Damir M., 2015 Md. App. LEXIS 645, \*12 (Md. Ct. Spec. App. 2015).
- 138 *In re* A.S., 2016 Md. App. LEXIS 995, \*7 (Md. Ct. Spec. App. 2016).
- 139 *In re* Micah M., 2016 Md. App. LEXIS 309, \*14 (Md. Ct. Spec. App. 2016).
- 140 *In re. Jason W.*, 837 A.2d 168, 175 (Md. 2003).
- 141 *See supra* notes 137–39.
- 142 *See, e.g.,* Richard Fausset and Ashley Southall, *Video Shows Officer Flipping Student in South Carolina, Prompting Injury*, NY TIMES (Oct. 26, 2015), <https://www.nytimes.com/2015/10/27/us/officers-classroom-fight-with-student-is-caught-on-video.html>.
- 143 *See* Amanda Ripley, *supra* note 4.
- 144 State Senator John Whitmire, *Ticketing Students at School Teaches the Wrong Lesson* (2011), <http://www.senate.texas.gov/members/d15/press/en/p20110307a.pdf>.

- 145 *Ibid.*
- 146 *Ibid.*
- 147 Donna St. George, *In Texas Schools, Response to Misbehavior is Questioned*, WASH. POST (Aug. 21, 2017), [https://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIA5EG9UJ\\_story.html?utm\\_term=.f0d1e9e156a7](https://www.washingtonpost.com/local/education/in-texas-schools-a-criminal-response-to-misbehavior/2011/08/04/gIA5EG9UJ_story.html?utm_term=.f0d1e9e156a7).
- 148 Amanda Ripley, *supra* note 4.
- 149 S.B. 393, 2013 Leg., 83(R) Sess. (Tex. 2013).
- 150 *See Ibid.*, *see also* Jody Serrano, *School Officers Can No Longer Issue On-Campus Misdemeanor Citations*, TEXAS TRIBUNE (Aug. 29, 2013), <https://www.texastribune.org/2013/08/29/class-disruption-cases-head-principals-office-not-/>.
- 151 S.B. 393, 2013 Leg., 83(R) Sess. (Tex. 2013); *see also* Terri Langford, *After Reforms, Student "Tickets" Decline*, TEXAS TRIBUNE (Jun. 3, 2014), <https://www.texastribune.org/2014/06/03/texas-students-see-fewer-tickets-issued/>.
- 152 Jody Serrano, *School Officers Can No Longer Issue On-Campus Misdemeanor Citations*, TEXAS TRIBUNE (Aug. 29, 2013), <https://www.texastribune.org/2013/08/29/class-disruption-cases-head-principals-office-not-/>.
- 153 S.B. 393, 2013 Leg., 83(R) Sess. (Tex. 2013); *see also* Terri Langford, *After Reforms, Student "Tickets" Decline*, TEXAS TRIBUNE (Jun. 3, 2014), <https://www.texastribune.org/2014/06/03/texas-students-see-fewer-tickets-issued/>.
- 154 Ryan Poppe, *Two Laws Lead To Significant Drop In Student Ticketing At Texas Schools*, TEXAS PUBLIC RADIO (Jun. 5, 2014), <http://tpr.org/post/two-laws-lead-significant-drop-student-ticketing-texas-schools>; Terri Langford, *After Reforms, Student "Tickets" Decline*, TEXAS TRIBUNE (Jun. 3, 2014), <https://www.texastribune.org/2014/06/03/texas-students-see-fewer-tickets-issued/>.
- 155 S.C. CODE ANN. § 16-17-420 (2017).
- 156 *See* Amanda Ripley, *supra* note 4.
- 157 *See infra* notes 161-67.
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- 332 *See U.S. CONST. amend. XIV*, § 1.



*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

-International Covenant on Civil and Political Rights  
-International Covenant on Economic, Social and Cultural Rights<sup>1</sup>

Governmental policies have shifted rapidly over the past few years, making it difficult to keep up with current events, much less assess their long-term implications. One development that warrants concern is the increasingly frequent association of “identity,” most often defined in racial or religious terms, with “extremism” and its connotations of armed attacks on civilian targets. This leads to a false equivalence between White supremacy and the nationalistic frameworks invoked by many individuals and organizations of color engaged in struggles for social, racial and environmental justice.<sup>2</sup> Law enforcement agencies, much of the media, and many self-styled liberals and progressives claim, implicitly or explicitly, that (non-statist) nationalism fosters racialized hatred and, therefore, threatens public safety. The underlying message is that people of color in the United States must forswear our identities—other than as “Americans”—if we wish to have racial equality. In other words, the right to be free from discrimination on the basis of race, ethnicity, national origin or religion can be achieved only at the expense of the right to self-determination. This essay suggests that the opposite is true, particularly within the context of on-going settler colonialism; that only by exercising our right to self-determination will we be able to liberate ourselves from structural racism.

### **Constructing “Identity Extremism” as a Threat**

On August 3, 2017, the Federal Bureau of Investigation (FBI)’s Counterterrorism Division issued an “intelligence assessment” entitled “Black Identity Extremists Likely Motivated to Target Law Enforcement Officers.”<sup>3</sup> Citing six incidents of actual or intended assaults on police officers between 2014 and 2016, the report found it “very likely that BIEs’ perceptions of unjust treatment of African-Americans and the perceived unchallenged illegitimate actions of law enforcement will inspire premeditated attacks against law enforcement.”<sup>4</sup> The FBI’s report was first publicly revealed in an October 2017 Foreign Policy article which notes that the term “black identity extremist” (BIE) was recently invented, perhaps as “part of a politically motivated effort to find an equivalent threat to white supremacists.”<sup>5</sup> Questioned by Congresswoman Karen Bass, Attorney

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General Jeff Sessions—who claimed not to have read the report—was unable to identify any African American group that had targeted police officers, could not explain why there was no similar report on White extremists, and refused to say whether he considered Black Lives Matter an extremist organization.<sup>6</sup>

In 2011, the Obama administration initiated the “Countering Violent Extremism” or CVE policing programs, described by Khaled Beydoun as the cornerstone of structural Islamophobia in the United States today.<sup>7</sup> According to the White House, its “underlying premise . . . is that (1) communities provide the solution to violent extremism; and (2) CVE efforts are best pursued at the local level. . . .”<sup>8</sup> What this actually means, Beydoun notes, is that under these programs there are only two choices. One can become a “good Muslim” by disavowing and apologizing for every violent act committed by any Muslim, anywhere, and by being willing to inform on other Muslims. One who refuses to become an informant, or who simply demonstrates a renewed interest in his or her faith, is “vulnerable to identification as a bad Muslim, followed by the surveillance and state violence [that attend] that classification.”<sup>9</sup> There need be no evidence of actual violence—or extremism, whatever that means—to be treated as a security threat.<sup>10</sup>

Law enforcement agencies have also targeted Indigenous individuals, organizations, and movements, particularly those protesting the environmental damage caused by extractive industries. In Canada, the police have explicitly labeled such activists “Aboriginal extremists” in order to encompass Indigenous struggles for self-determination within the government’s “war on terror.”<sup>11</sup> In the U.S., many Indigenous activists asserting treaty rights, most notably the Standing Rock water protectors, have been labeled by the Department of Homeland Security (DHS) as “environmental rights extremists” or, in the alternative, dupes of extremists who “attempt to exploit indigenous causes for their own ideological purposes,”<sup>12</sup> conveniently sidestepping questions of American Indian sovereignty and treaty compliance. The government’s desire to avoid recognizing Indigenous rights is also reflected in its continued efforts to reduce indigeneity to a “racial” classification,<sup>13</sup> the precursor, one suspects, to labeling as “identity extremists” those who maintain traditional practices or exercise their rights as Indigenous peoples.

In many respects this is nothing new. American Indians defending their homelands and enslaved Africans rising in rebellion have long been the stuff of settler nightmares, justifying the state’s use of overwhelming military force against those who would assert their rights and independent identities. Neither the colonial occupation of Indigenous lands nor the racialized subjugation of peoples involuntarily incorporated into the polity has ceased. As a result, the fears of uprising (a.k.a. decolonization) persist.

During the global decolonization era of the 1960s and early 1970s, the FBI’s counterintelligence programs (COINTELPROs) prioritized the American Indian Movement and Puerto Rican Independentistas, as well as “Black Nationalist-Hate Groups.”<sup>14</sup> Under the latter descriptor, there was a particularly vicious focus on the Black Panther Party, but virtually all predominantly African American activist organizations were targeted, from the Southern Christian Leadership Conference

(SCLC) to the Nation of Islam, regardless of their tactics, goals, or ideologies.<sup>15</sup> In other words, organizing along “racial” lines to contest explicitly racialized subordination posed a threat to the national security.

A similar elasticity characterizes the FBI’s current definition of BIEs “as individuals who seek, wholly or in part, through unlawful acts of force or violence, in response to perceived racism and injustice in American society and some do so in furtherance of establishing a separate black homeland or autonomous black social institutions, communities, or governing organizations within the United States.”<sup>16</sup> This sentence, quoted directly from the Bureau’s Intelligence Assessment, is so incoherent I’m not even sure where to insert the “[sic].” Nonetheless, we can glean from it that (1) persons willing to consider violating the law to contest racism and injustice may be legitimately targeted; and (2) the Bureau attaches particular significance to those who advocate separatism or support “autonomous” Black communities or institutions.

A significant difference between COINTELPRO operations and the government’s current targeting of “extremists” is that the latter is proceeding quite publicly, with very little criticism from the public, the mainstream media, or political leaders, Karen Bass being the notable exception. By contrast, the exposure of the secret surveillance and disruption programs of numerous governmental agencies in the mid-1970s created quite a scandal. After a significant if notably incomplete investigation,<sup>17</sup> the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities published a multi-volume report condemning these programs as both illegal and undemocratic. The Committee—hardly a left-leaning group—stated bluntly:

Many of the techniques used would be intolerable in a democratic society even if all of the targets had been involved in violent activity, but COINTELPRO went far beyond that. The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.<sup>18</sup>

In the post-9/11 era, with so much of the public apparently numbed by a perpetual “war on terror,” it’s difficult to imagine law enforcement agencies that “do whatever is necessary to combat perceived threats” to the status quo being censured in this manner. Instead, the dominant sentiment, even among many progressives, seems to be acquiescence in, if not approval of, the government’s targeting of racialized “identity extremists.”

### **Using “Identity Extremism” to Discredit Resistance**

In distilling the FBI’s definition of Black identity extremists, I purposely omitted its reference to “acts of force or violence” because I believe this to be a cosmetic rather than functional part of the definition. In the government’s construction, BIEs constitute a threat because *other* “identity extremists”—most notably White supremacists<sup>19</sup>—have engaged in violent attacks, not because of the actual conduct of those labeled BIEs. Thus, for example, in what some have described as the FBI’s first arrest of a “Black identity extremist,” Christopher Daniels, also known as Rakem Balogun, was charged with illegally possessing firearms, not with a



crime involving force or violence.<sup>20</sup> At the time of his arrest in December 2017 he had been under FBI surveillance for nearly two years, targeted for protesting police brutality, and for advocating gun ownership and training. In May 2018 a federal judge dismissed the charges but only after Daniels had spent five months in custody, during which time he lost his job and his home.<sup>21</sup> Reinforcing this anecdotal evidence, the Department of Homeland Security explicitly acknowledges that “environmental rights extremists” are protesting “people, businesses, or governmental entities perceived to be destroying, degrading, or exploiting the natural environment” and that many of their actions are entirely peaceful and nonviolent. Nonetheless, DHS justifies its characterization with the argument that “some [of their] tactics—such as shutting off pipeline valves []—carry an inherent risk of death or serious injury, regardless of intent.”<sup>22</sup>

It seems clear that the terms “identity” and “extremist” are being conjoined to scare off support for those resisting racialized injustice, thereby freeing up the state and/or its corporate partners to crush such resistance at will.<sup>23</sup> This brings to mind FBI Director J. Edgar Hoover’s 1968 instructions to his agents to discredit “militant black nationalist groups and leaders” first to “the responsible Negro community,” then “to the white community, both the responsible community and to ‘liberals’ who have vestiges of sympathy for militant black nationalist [sic],” and finally to “the followers of the movement.”<sup>24</sup> This, of course, laid the foundation for what Hoover euphemistically called “neutralization”—tactics intended to “disrupt and destroy” individuals, organizations, and movements by manufacturing conflict and suspicion within groups, framing people for crimes they did not commit and, when all else failed, simply murdering the leadership.<sup>25</sup>

Today, it is difficult to discredit massive and popular struggles for racial justice, or the enforcement of treaty rights, or the protection of drinkable water and breathable air. Repressive measures can be implemented much more easily when the substance of the struggles and their historical contexts are stripped away, when advocates are simplistically described as motivated by hate and willing to engage in “extreme” measures. A contemporary example may be found in the “liberal” Southern Poverty Law Center (SPLC)’s inclusion of 233 “Black nationalist” groups in their June 2018 roster of 954 “hate groups” in the United States. Throughout, the SPLC uses the terms “nationalist” and “separatist” interchangeably, and appears to equate separatism with racial supremacy.<sup>26</sup> Mark Potok, a Senior Fellow at the SPLC acknowledges that about 14% of the groups covered are “black separatists, or black supremacists, [] depending on how you want to characterize them,” despite the fact that “there’s not much violence at all out of that sector.”<sup>27</sup>

If they’re not engaging in violence, why are they being tracked and vilified? According to the SPLC’s website, Black nationalism “may be the predictable reaction to white supremacy” but “[i]f we seek to expose white hate groups, we cannot be in the business of explaining away black ones.”<sup>28</sup> Some types of racialized hate speech constitute advocacy of genocide and have been condemned as such under international law.<sup>29</sup> However, the SPLC’s simplistic hate group framing does not help us identify actual threats to society. Rather, it reinforces the narrative that

links racialized identity to hatred and then to armed attacks; a narrative that, in turn, the state relies on to justify the profiling, surveilling, arresting, assaulting, and murdering of people of color.

White supremacists have posed a threat to the physical security of people of color throughout U.S. history.<sup>30</sup> Some of their most notable—or at least most noted—recent actions include a 21-year-old Confederate history buff’s attack on a study group at an African American church in 2015 that killed nine people.<sup>31</sup> In just eight days in May 2017, a Black university student was stabbed and killed in Maryland by a member of the “Alt-Reich: Nation”; two men in Portland who tried to stop a white supremacist from harassing two Muslim women were murdered and a third seriously injured; a California man was arrested for yelling racial slurs and then attacking a Black man with a machete; and in Washington state one American Indian man was killed and another injured when a white man shouting racial slurs and “war whoops” ran them over with his pickup truck.<sup>32</sup> And, of course, there was the August 2017 torch-lit rally of neo-Nazis and Klansmen chanting “blood and soil” in the college town of Charlottesville, Virginia, that resulted in a lethal attack on counter-protesters.<sup>33</sup> Such individuals and groups are frequently described as “nationalists” and the picture is complicated by the conflation of race, religion and, identity in the so-called “Christian Identity movement” associated with the Brüder Schweigen (Silent Brotherhood), the Aryan Nations, many White militia groups, and Timothy McVeigh, who was responsible for the 1995 Oklahoma City bombing in which 168 people were killed.<sup>34</sup>

“Hate” is a grossly inadequate term for describing White supremacist world-views and objectives. Nonetheless, once they have been associated with terrorist attacks and with organizations classified as “hate groups,” there is a certain superficial logic to characterizing other “nationalists” as security threats. (A logic also reflected in President Trump’s description of the Charlottesville confrontation as an “egregious display of hatred, bigotry, and violence on many sides, on many many sides.”<sup>35</sup>) This conflation of White supremacy with the nationalism advocated by subordinated peoples of color allows what Hoover described as “the white community, both the responsible community and [the] ‘liberals’” to define the terms upon which racism may “legitimately” be opposed in this society. Racialized “hatred” may be condemned; equal protection, colorblindness, and assimilation may be promoted. But the structural issues need not be confronted. By employing the construct of identity extremism, those willing “to do whatever is necessary to combat perceived threats to the existing social and political order”<sup>36</sup> are tapping into the deep-seated fears that prevent so many Americans from being willing to confront racialized injustice at its roots. That said, we are not going to achieve any semblance of racial justice in this country without a much deeper and more thoughtful analysis.

### **Conflating Nationalism with Racism**

In equating White supremacy to the nationalism of people of color in the United States a superficial moral equivalence is being invoked to gloss over inequities that need to be taken seriously.<sup>37</sup> The FBI’s August 2017 report on Black identity extremists emphasizes that “perceptions of police brutality” have “spurred an

increase in premeditated, retaliatory lethal violence against law enforcement and will very likely serve as justification for such violence” in the future.<sup>38</sup> In support, it cites six incidents in 2014 and 2016, two of which resulted in the deaths of eight officers, but provides no accounts of contemporary attacks by “BIEs” on any other targets.<sup>39</sup> According to the *Washington Post*, in 2016 alone, 963 people were shot and killed by the police, 234 of them Black.<sup>40</sup> The FBI’s report acknowledges “perceived” police brutality as a causal factor, but says nothing about these killings. With respect to private violence, the Anti-Defamation League catalogues 387 deaths attributable to “domestic extremists” between 2008 and 2017. Of these, right-wing extremists account for 71% of the murders; 26% are associated with Islamic extremism, and only 3% are attributed to left-wing extremism, defined to include both anarchists and Black nationalists.<sup>41</sup> There is no evidence that Black nationalism poses a meaningful threat to public safety; there is plenty of evidence that racism does.

Moving beyond the numbers, asserting a right to dominate others, or to benefit from their exploitation, is simply not comparable to insisting upon a right to live in dignity, and in community, free from racialized subordination. Purpose matters. As Keisha Blain notes, “what has distinguished black nationalist thought . . . is a militant response to white supremacy, a recognition of the distinctiveness of black culture and history, and an emphasis on how people who represent a ‘nation within a nation’ ought to create for themselves autonomous spaces in which to advance their own social, political, and economic goals.”<sup>42</sup> None of this involves the subjugation of others; the focus, instead, is on self-determination. Nonetheless, as the FBI’s description of BIEs illustrates, the state considers such efforts to build “autonomous black social institutions, communities, or governing organizations” problematic, even in direct response to racialized injustice.<sup>43</sup>

Self-proclaimed “anti-racists” also often oppose self-determination. Many advocate “progressive” social order in which the state is committed to protecting individual human rights, including the right to be free from discrimination. To achieve this, they are willing to insist that people of color subordinate other dimensions of our identities to our state citizenship. This is not a news flash. Almost thirty years ago Gary Peller explained that as early as 1963 Malcolm X had

identif[ied] the basic racial compromise that the incorporation of “the civil rights struggle” into mainstream American culture would eventually embody: Along with the suppression of white racism that was the widely celebrated aim of civil rights reform, the dominant conception of racial justice was framed to require that black nationalists be equated with white supremacists, and that race consciousness on the part of either whites or blacks be marginalized as beyond the good sense of enlightened American culture.<sup>44</sup>

And that’s pretty much where we are. Many “progressives” recognize the distinction between self-defense and racially motivated criminal attacks; many do not explicitly equate White supremacy with Black nationalism. Nonetheless, their critiques of the government’s suppression of “identity extremists” do not generally challenge the legitimacy of the construct directly. Instead, they rely on the right to equal protection, arguing that these law enforcement programs

are being used pretextually or disproportionately against those deemed Other. With remarkable consistency, the left/liberal narrative proclaims, implicitly or explicitly, “we are all Americans.”<sup>45</sup>

In this framing, the only acceptable form of nationalism is statist.<sup>46</sup> “American” national unity is a presumptive good; internal divisions are inherently problematic. Somewhat ironically, both the white supremacist *and* anti-racist agendas invoke and promote an overarching, universalizing, exclusive statist identity, despite their divergent visions for that identity. Left and right are quick to condemn “tribalism,” using this racially coded term to associate sub-state nationalism with a devolution to “primitive” times characterized by civil disorder, racialized warfare, and the potential disintegration of the state.<sup>47</sup> It is not surprising that the overt advocates of White privilege would take this position. The more interesting question is the why so many who believe the state should provide “all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” to quote the International Covenant on Civil and Political Rights,<sup>48</sup> also believe that this can only be achieved by rejecting non-state group loyalties in favor of a common (statist) national identity.

To condition equal protection on statist allegiance is to eviscerate the right to self-determination. And why should we care about self-determination? Perhaps because it allows us to envision what it would mean to be free from discrimination and also to be free, period. Free to determine our political status; free to create our own economic, social and cultural institutions.<sup>49</sup> Free to develop understandings of ourselves that are not singular and exclusive, limited by colonially-imposed boundaries of race and state, but multi-dimensional, layered, and reflective of our actual histories. Non-discrimination is a presumptive bottom line but it should not be confused with freedom.

### **Assimilating Others**

Throughout U.S. history, racialization has been used to facilitate the appropriation of Indigenous lands and resources and the exploitation of the labor and talents of both voluntary and involuntary migrants.<sup>50</sup> After the Civil War, the federal government was forced to recognize people of color within the United States as entitled to the equal protection of the law, and implementation of this constitutional guarantee was a major focus of the civil rights movement of the 1950s and '60s. In international law, World War II and the subsequent decolonization movements forced the powerful European and Euroderivative states to condemn racial discrimination, most notably in the Convention on the Elimination of All Forms of Racial Discrimination.<sup>51</sup> These are critically important legal guarantees, but they are not sufficient. Among other things, the right not to be discriminated against does not protect us from efforts to erase our histories and cultures in the name of assimilation.

When racial identity could no longer be legitimately invoked (overtly, anyway) to serve those purposes, the official policy became colorblindness.<sup>52</sup> The playing field was declared level, precluding the need for redress for centuries of racially contingent exploitation. Thus, just seventeen years after the abolition of slavery,

the Supreme Court declared that “[w]hen a man has emerged from slavery, . . . there must be some stage in the progress of his elevation when he . . . ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.”<sup>53</sup> Colorblindness conveniently allows for racial disparities in virtually all dimensions of life to be attributed to poverty, or some variant of cultural inadequacy, rather than structural racism—just as, in the international realm, “underdevelopment” rather than colonialism is blamed for the problems of the Third World or the global South.<sup>54</sup> Within this paradigm, equal protection becomes the sole remedy for racial subordination, and assimilation would seem to be the natural path to achieving equality.

Assimilationism is the flip side of attacks on identity extremism; to condemn those who prioritize their non-statist identities is to implicitly require conformity to the tenets of a Euroderivative settler culture. Assimilationist ideology allows racialized exclusions to be framed as temporary; it puts the burden of behavioral change on those who are excluded, and it provides an excuse to suppress the cultures, histories, and identities of those deemed Other. The horrors of governmentally imposed assimilation programs are both well documented and beyond the scope of this essay,<sup>55</sup> but a few points are worth noting. One is that, as Lorenzo Veracini has pointed out in the context of settler societies, the quest for assimilation is futile because its success is “never dependent on indigenous performance” but, instead, requires absorption by settler society.<sup>56</sup> This absorption never occurs because settler societies, like other forms of colonialism, rely on what Anthony Anghie calls the “dynamic of difference,” an “endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized.”<sup>57</sup>

The dynamic of difference, in turn, provides the rationale both for perpetually excluding those deemed other and for requiring them to comply with assimilationist policies intended to systematically destroy them as “a national, ethnical, racial or religious group, as such.”<sup>58</sup> Such destruction is, of course, the textbook definition of genocide. As Raphael Lemkin, who coined the term, explained, “[g]enocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor.”<sup>59</sup> To the extent that we accept the identity extremist paradigm, we give law enforcement agencies the discretion to obliterate “separatist” groups targeted not because they pose a threat to others but because they refuse to recognize the legitimacy of the state. A prime example is the 1985 bombing by the Philadelphia police of the house occupied by members of MOVE, a group that followed the teachings of John Africa, including “a communal ‘back to nature’ lifestyle, vegetarianism, reverence for all animal life, and scorn for ‘The Establishment.’”<sup>60</sup> City officials not only bombed the house but decided to let it burn, allowing eleven MOVE members, including five children, to burn to death and over sixty houses to be destroyed.<sup>61</sup> The invocation of “identity extremism” for such purposes sanctions the state in its exercise of a claimed sovereign power described by Giorgio Agamben as “the originary exception in which human life is included in the political order in being exposed to an unconditional capacity to be killed.”<sup>62</sup>

The distinction between equal protection under law and the right to maintain an independent identity in community with others who share that identity has been recognized by colonized peoples the world over. The Algerians, for example, fought a long and bitter war for independence, rejecting French attempts to avoid decolonization by incorporating Algeria into the French polity.<sup>63</sup> This distinction is also repeatedly articulated in international law. Beyond the prohibition on genocide, international human rights law specifically requires states to ensure that “ethnic, religious or linguistic minorities” have the ability to enjoy their culture, practice their religion, and use their own language “in community with other members of their group.”<sup>64</sup> The UN Declaration on the Rights of Indigenous Peoples, long-delayed and watered down as it is, explicitly recognizes that “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture,” and that states must act to prevent and provide redress for “[a]ny action which has the aim of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.”<sup>65</sup>

### **Prioritizing Self-Determination**

International law not only recognizes but prioritizes the right of all peoples to self-determination. According to the International Court of Justice, “the right of peoples to self-determination, as it evolved from the UN Charter and from United Nations practice, has an erga omnes character”—in other words, it is binding on all.<sup>66</sup> The Charter identifies the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” as one of the United Nations’ primary functions.<sup>67</sup> The General Assembly’s 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514) “[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.”<sup>68</sup> It states forthrightly: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>69</sup> This is repeated almost verbatim in Common Article 1 of the ICCPR and the International Convention on Economic, Social and Cultural Rights.<sup>70</sup> It has been recognized as a norm of customary international law and, by some, as a *jus cogens* norm from which no derogation may be permitted.<sup>71</sup>

According to the UN Human Rights Committee, the right to self-determination was given such primacy because it is a foundational precept, one whose “realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”<sup>72</sup> Implied in this construction is the very powerful point that our struggles to promote and strengthen the right to be free from racial discrimination cannot be effective except to the extent they are waged within a social order firmly grounded in the realization of the right to self-determination. There is considerable debate over whether self-determination gives people of color in the United States any right beyond that of participating in processes of democratic governance.<sup>73</sup> Not surprisingly, states do not see it as in their interest for peoples under their (claimed) jurisdiction to exercise their right to self-determination



and, as a result, have developed strategies for resisting such movements or minimizing their impact.

The first argument invoked is often the international legal principle of “non-interference in the internal affairs” of states that is considered essential to the protection of their “territorial integrity.”<sup>74</sup> Settler states and other entities with internally colonized peoples also invoke the “salt water” or “blue water” doctrine which attempts to limit decolonization to territories that are “geographically separate” as well as “distinct ethnically and/or culturally” from the “administering” state.<sup>75</sup> Finally, because self-determination is articulated as a right of “peoples,” states often claim that particular groups are simply “minorities,” or subsets of the general population, rather than distinct “peoples.”<sup>76</sup> That is why the Trump administration would like to classify American Indians as a “race” rather than peoples or nations.

None of these arguments, however, can overcome the fundamental illegality of colonial occupation. As stated in the 1976 Universal Declaration of the Rights of Peoples (“Algiers Declaration”), “[e]very people has an imprescriptible and unalienable right to self-determination” including “the right to break free from any colonial or foreign domination, whether direct or indirect, and from any racist regime.”<sup>77</sup> Settler states have no superior rights to the “integrity” of colonized territories simply because they have claimed particular boundaries.<sup>78</sup> And, as Howard Vogel observes, “the definition of the term ‘peoples’ in a minority rights context must be left to the people themselves.”<sup>79</sup> In the *Namibia* case, the International Court of Justice rejected South Africa’s argument that Namibian “tribalism” precluded recognition of Namibians as a people.<sup>80</sup> Perhaps more significantly, the Court’s Vice President Fouad Ammoun pointed out that the Namibian people had achieved recognition of “its international personality” by the UN General Assembly and the Security Council, as well as the Court, “by taking up the struggle for freedom.”<sup>81</sup> In other words, we have agency in the process of decolonization.

As Richard Falk notes, much hinges on “whether the criteria relied upon to clarify the right to self-determination are to be determined in a top-down manner through the mechanisms of statism and geopolitics or by a bottom-up approach that exhibits the vitality and potency of emergent trends favoring the extension of democratic practices and the deepening of human rights.”<sup>82</sup> Viewed from the bottom, the arguments summarized above, when invoked by the United States, look very much like a desperate attempt to avoid coming to terms with the fact that this is, still, a settler colonial state whose existence depends on the illegal occupation of Indigenous lands and the appropriation of Indigenous resources, and whose wealth is built upon the labor of enslaved, imprisoned or grossly underpaid workers, many of whom are the descendants of entirely involuntary migrants.<sup>83</sup>

## Conclusion

*She dreamed of land, a spacious house, fresh air, organic food, and endless meadows without boundaries, free of evil and violence, free of toxins and environmental hazards, free of poverty, racism, and sexism . . . just free.*

-Robin D.G. Kelley<sup>84</sup>



“Identity extremism” is a construct that is being used by law enforcement agencies to transform those who do not comply with state-imposed assimilationist measures into enemies of the state. I do not feel threatened by people who contest racialized injustice and are willing to protect their communities; nor by those who have a genuine interest in their religious traditions. I deeply appreciate those willing to risk the wrath of the state and powerful corporate interests to protect the earth and water and air, for without those none of the rest of this matters. From my perspective, the identity extremism that actually threatens our collective wellbeing is reflected in Donald Trump’s 2018 triumphalist commencement address at the U.S. Naval Academy, in which he proclaimed that “our ancestors trounced an empire, tamed a continent, and triumphed over the worst evils in history,” adding that “[w]e are not going to apologize for America.”<sup>85</sup> It is a narrative of identity that reinforces the AngloAmerican settler presumption of sovereign entitlement, the colonizers’ right to exercise exclusive control over stolen lands and to decide who is allowed to remain on those lands, who is to be exterminated or relocated, who may or may not migrate and who will be forced to do so.<sup>86</sup> It creates hierarchies of racialized privilege and subjugation while simultaneously erasing the identities of the subordinated. Ngũgĩ wa Thiong’o calls such erasure the “cultural bomb” of colonialism, that which “annihilate[s] a people’s belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and ultimately in themselves,” with the result that they “want to identify with that which is furthest removed from themselves.”<sup>87</sup>

The history of the United States is one of the forcible inclusion of peoples who were always intended to be excluded from settler society. American Indians have been overrun by European invasions; subjected to genocidal campaigns of extermination and assimilation; had their identities defined and re-defined at the will of the federal government; and were ultimately declared to be U.S. citizens without consultation or consent.<sup>88</sup> Indigenous peoples from Africa were kidnapped, forcibly relocated, and enslaved in North America for centuries before their descendants were unilaterally “granted” birthright citizenship in 1868.<sup>89</sup> The northern half of Mexico, the Kingdom of Hawai’i, and Alaska were all claimed and absorbed by the United States, without the consent of their residents.<sup>90</sup> The Philippines, Puerto Rico and Guam were claimed as external colonies in 1898; the latter two, along with the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa remain “unincorporated territories,” i.e., external colonies, of the U.S.<sup>91</sup> The histories of all of these lands and peoples embody forms of “inclusive exclusion,” the phrase employed by Agamben to describe the process “by which something is included solely through its exclusion.”<sup>92</sup>

The exclusions represented by racial domination and subordination cannot be remedied without also addressing the harm embodied in the underlying inclusions. To focus solely on the exclusions legitimizes the process of colonization that established the state and this, in turn, reinforces the structural racism that undergirds and perpetuates the status quo. This is why, in international law, the prohibition on discrimination is prefaced by recognition of the right to self-determination. What does it mean to “remedy the inclusion” in real life? The beauty of self-determination is that we don’t know the end of the story. And we

don't get to tell other people what they "should" want. But we know that it is a right realized by human agency, not state action, and that we can create spaces within which communities are empowered to realize their own visions. We can claim identities that are not merely "intersectional" but multiple and overlapping; we can envision ways of organizing society not limited to state formations; we can move beyond the linear, universalizing claims of "Western civilization" to acknowledge a pluriverse of worldviews.<sup>93</sup>

For those of us who are lawyers, we can heed the late Robert Cover's reminder, found in his powerful essay "Nomos and Narrative," that "[t]he position that only the state creates law [] confuses the status of interpretation with the status of political domination."<sup>94</sup> What if we were to insist that treaties with American Indian nations be honored, or Indigenous rights to unceded territories acknowledged? Or the history of American imperial expansion acknowledged and rectified? Or the wealth generated by enslaved African and Indigenous peoples recognized and their descendants provided with meaningful redress? Put in such broad terms, these issues can seem overwhelming, but each embodies countless struggles in discrete communities; struggles that are small, but may be decisive; struggles that are happening today and could use our help. These are struggles for self-determination that the state is trying to crush, in part, by condemning nationalism and vilifying unsanctioned assertions of identity as "extremism."

"Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence," Cover said. "We ought to stop circumscribing the *nomos*; we ought to invite new worlds."<sup>95</sup> We do not need to accede to the political domination embodied in the construct of identity extremism, or to accept that we will achieve racial equality only at the expense of self-determination. Like Robin Kelley's mother, described in the quote that began this section, we can dream of being not merely "equal" but free.

## Notes

1 International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR] and International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, *entered into force* Jan. 3, 1976, 999 U.N.T.S. 3 [hereinafter ICESCR], common art. 1(1). The United States signed both treaties in 1977; the ICCPR was ratified in 1992 but the ICESCR has not been ratified.

2 I have capitalized the terms White and Black to indicate their use not as descriptive adjectives but as proper nouns that, thanks to the racial classifications imposed upon people in the United States, reference, respectively, individuals of (purportedly) exclusive European descent and those with any trace of African descent.

3 FEDERAL BUREAU OF INVESTIGATION, BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS" [hereinafter FBI REPORT], <https://privacysos.org/wp-content/uploads/2017/10/FBI-BlackIdentityExtremists.pdf>.

4 *Ibid.* at 7; see also Khaled A. Beydoun and Justin Hansford, Op-Ed, *The F.B.I.'s Dangerous Crackdown on "Black Identity Extremists,"* N.Y. TIMES, Nov. 15, 2017, <https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html>.

- 5 Jana Winter and Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: "Black Identity Extremists,"* FOREIGN POLICY, Oct. 6, 2017, <https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/>.
- 6 PBS News Hour, *Lawmaker asks Sessions why there's an FI report about black 'extremists,' but not one about those who are white,* <https://www.pbs.org/newshour/politics/watch-lawmaker-asks-sessions-why-theres-an-fbi-report-about-black-extremists-but-not-one-about-those-who-are-white> (providing video of House Judiciary Committee hearing).
- 7 KHALED BEYDOUN, AMERICAN ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR (2018).
- 8 The White House, Office of the Press Secretary, *Fact Sheet: The White House Summit on Countering Violent Extremism*, Feb. 18, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/fact-sheet-white-house-summit-countering-violent-extremism>.
- 9 *Ibid.* at 121-122.
- 10 See generally Sahar F. Aziz, *Losing the "War of Ideas": A Critique of Countering Violent Extremism Programs*, 52 TEX. INT'L L.J. 255 (2017).
- 11 ANDREW CROSBY AND JEFFREY MONAGHAN, POLICING INDIGENOUS MOVEMENTS: DISSENT AND THE SECURITY STATE 15-16 (2018).
- 12 DEPARTMENT OF HOMELAND SECURITY, FIELD ANALYSIS REPORT, "TTPs Used in Recent US Pipeline Attacks by Suspected Environmental Rights Extremists" pp. 2, 4, May 2, 2017, <https://theintercept.com/document/2017/12/11/may-2017-field-analysis-report/> [hereinafter DHS FIELD ANALYSIS REPORT]. "TTPs" refers to "targeting, tactics and procedures." See generally Will Parrish, *An Activist Stands Accused of Firing a Gun at Standing Rock. It Belonged to Her Lover—an FBI Informant*, THE INTERCEPT, Dec. 11, 2017, <https://theintercept.com/2017/12/11/standing-rock-dakota-access-pipeline-fbi-informant-red-fawn-fallis/>.
- 13 See Levi Rickert, *Trump Administration Wants American Indians To Be Considered a Race Rather Than Sovereign Nations*, NATIVE NEWS ONLINE.NET, Apr. 22, 2018, <https://native-newsonline.net/currents/trump-administration-wants-american-indians-to-be-considered-a-race-rather-than-sovereign-nations/>; Dan Diamond, *Trump challenges Native Americans' historical standing*, POLITICO, Apr. 22, 2018, <https://www.politico.com/story/2018/04/22/trump-native-americans-historical-standing-492794>.
- 14 Karen Bass makes this point, see *supra* note 6; see also WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES, 242-302 (American Indian Movement), 68-90 (Puerto Rican Independence Movement), 91-164 (Black Liberation Movements) (2d Ed. 2001). See generally Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051 (2002).
- 15 See CHURCHILL & VANDER WALL, *supra* note 14 at 123-164; SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. Rep. No. 755, 94th Cong., 2d Sess. bk. III, at 22 (1976) [hereinafter SENATE SELECT COMMITTEE, FINAL REPORT].
- 16 FBI REPORT, *supra* note 3 at 2 fn.b. "Environmental Rights Extremists" are defined by the Department of Homeland Security "as groups or individuals who facilitate or engage in acts of unlawful violence against people, businesses, or governmental entities perceived to be destroying, degrading, or exploiting the natural environment." DHS FIELD ANALYSIS REPORT, *supra* note 12. The Report acknowledges that they may only be engaged in property damage but claims that poses a threat to life.
- 17 The Committee "temporarily" suspended its investigation prior to scheduled hearings on operations targeting the American Indian Movement and organizations supporting Puerto Rican independence; these hearing were never held. CHURCHILL & VANDER WALL, *supra* note 14 at 119-134, 366-370.
- 18 SENATE SELECT COMMITTEE, FINAL REPORT, *supra* note 15 at 3.
- 19 See Erroll G. Southers, *President Trump wants "the facts" on right-wing extremism. Here they are.* USA TODAY, Aug. 18, 2017 (noting that of the 372 people killed by "extremists" between 2007-2016, 74% were murdered by right wing extremists), <https://www.usatoday.com/story/opinion/2017/08/18/president-trump-wants-facts-right-wing-extremism-here-they-are-erroll-southers-column/577308001/>.

- 20 See Martin de Bourmont, *Is a Court Case in Texas the First Prosecution of a "Black Identity Extremist"?* FOREIGN POLICY, Jan. 30, 2018, <https://foreignpolicy.com/2018/01/30/is-a-court-case-in-texas-the-first-prosecution-of-a-black-identity-extremist/>. See also FBI REPORT, *supra* note 3 (retroactively identifying individuals and groups active decades ago as BIEs).
- 21 Bourmont, *supra* note 20 (noting that one of the items seized in the raid of Daniels' apartment was a copy of Robert F. Williams' book, *Negroes With Guns*); Alex Macon, *Charges Dropped Against Alleged "Black Identity Extremist" in Dallas*, D MAGAZINE, May 11, 2018, <https://www.dmagazine.com/frontburner/2018/05/rakem-balogun-dallas/>.
- 22 DHS FIELD ANALYSIS REPORT, *supra* note 12 at 1 fn.\*, 2. See also Jamie Bartlett, *The Next Wave of Extremists Will Be Green*, FOREIGN POLICY, Sept. 1, 2017 ("We will not easily forgive ourselves if our attention is exclusively occupied by the Islamic State of the far-right when the coming wave of environmental radicalization hits."), <http://foreignpolicy.com/2017/09/01/the-green-radicals-are-coming-environmental-extremism/>.
- 23 As an example, see Thomas Dresslar, American Civil Liberties Union, *How Many Law Enforcement Agencies Does It Take to Subdue a Peaceful Protest?* <https://www.aclu.org/blog/free-speech/rights-protesters/how-many-law-enforcement-agencies-does-it-take-subdue-peaceful> (documenting the deployment of officers from 76 law enforcement agencies to Standing Rock to protect construction of the Dakota Access Pipeline).
- 24 Airtel of Mar. 4, 1968, from FBI Director to all special agents assigned to "Racial Intelligence," reproduced in CHURCHILL & VANDER WALL, *supra* note 14 at 108-111 (quote at 110-111).
- 25 For a cogent summary of illegal practices employed by the FBI during this era, see generally Ward Churchill, *"To Disrupt, Discredit and Destroy": The FBI's Secret War Against the Black Panther Party*, in LIBERATION, IMAGINATION AND THE BLACK PANTHER PARTY 78-117 (Kathleen Cleaver & George Katsiaficas eds., 2001).
- 26 See Southern Poverty Law Center, *Hate Map*, <https://www.splcenter.org/hate-map>; see also *Frequently asked questions about hate groups*, <https://www.splcenter.org/20171004/frequently-asked-questions-about-hate-groups#violence%20play%20a%20role>.
- 27 Mark Potok, *Political Extremism and Domestic Terrorism in America*, 6 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 90, 99 (2016).
- 28 Southern Poverty Law Center, *Black Nationalist*, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/black-nationalist>.
- 29 See generally Noah Benjamin Novogrodsky, *Judging Stories*, 18 LEWIS & CLARK L. REV. 37 (2014) (providing examples from Julius Streicher's conviction at Nuremberg through cases handled by the International Criminal Tribunals for Rwanda and the Former Yugoslavia).
- 30 I am using the term "supremacist" to distinguish individuals and groups that promote the subordination or elimination of people of color from those that do not advocate or engage in attacks on people of color but focus on subsisting independently of the state. On the complex history of White separatist and supremacist organizations in the United States, see generally BETTY A. DOBRATZ AND STEPHANIE L. SHANKS-MEILE, *THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES* (2000).
- 31 See generally Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. LEGIS. 259 (2017).
- 32 Southers, *supra* note 19.
- 33 See generally Farah Peterson, *Foreword*, 104 VA. L. REV. ONLINE 1 (2018).
- 34 See Mark Juergensmeyer, *Christian Violence in America*, 58 ANNALS AM. ACAD. POL. & SOC. SCI. 88, 95-98 (1998); see generally Dobratz and Shanks-Meile, *supra* note 29.
- 35 Jackie Calmes, *Trump responds to Charlottesville violence with vague statements blaming "many sides"*, L.A. TIMES, April 17, 2017, <https://www.latimes.com/politics/la-pol-updates-trump-tweets-charlottesville-violence-htmlstory.html>.
- 36 See *supra* note 18 and accompanying text.
- 37 On Black nationalism, see KEISHA N. BLAIN, *SET THE WORLD ON FIRE: BLACK NATIONALIST WOMEN AND THE GLOBAL STRUGGLE FOR FREEDOM* 5 (2018) (noting that while "black nationalism is neither static nor monolithic," its core tenets encompass "racial separatism, black pride and unity, political self-determination, and economic self-sufficiency"); for background see generally IS IT NATION TIME? CONTEMPORARY ESSAYS ON BLACK POWER AND BLACK NATIONALISM (Eddie

- S. Glaude, Jr., ed., 2002); ROD BUSH, *WE ARE NOT WHAT WE SEEM: BLACK NATIONALISM AND CLASS STRUGGLE IN THE AMERICAN CENTURY* (2000).
- 38 FBI REPORT, *supra* note 3 at 2.
- 39 *Ibid.* at 4-6. The report goes on to state that “BIE violence peaked in the 1960s and 1970s in response to changing socioeconomic attitudes and treatment of blacks during the Civil Rights Movement,” providing “criminal incidents” involving the Black Liberation Army as its sole examples. *Ibid.* at 6.
- 40 *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/>.
- 41 Anti-Defamation League, *ADL Report: White Supremacist Murders More Than Doubled in 2017*, Jan. 17, 2018, <https://www.adl.org/news/press-releases/adl-report-white-supremacist-murders-more-than-doubled-in-2017>.
- 42 BLAIN, *supra* note 37 at 6.
- 43 FBI REPORT, *supra* note 3 at 2 fn. b.
- 44 Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 760 (referencing a 1963 speech found at Malcolm X, *Malcolm X Speaks* 31 (1965)).
- 45 See, e.g., Meshea L. Poore, *The Power of One*, 2018-Wtr W. VA. LAW. 6 (2017-2018) (describing individual actions capable of overcoming hate and fear in the interest of a racially harmonious America).
- 46 I am using the term “state” to refer to the political constructs currently recognized as the primary actors in international law and “nation” to refer to the perhaps 5,000 peoples who see themselves as such based on their common history, culture, language, and/or geographic ties. See generally Bernard Neitschmann, *The Fourth World: Nations Versus States*, in REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 237 (George J. Demko & William B. Wood, eds., 1994).
- 47 See, e.g., David Brooks, *The Retreat to Tribalism*, N.Y. TIMES, Jan. 1, 2018 (lamenting that “we’ve regressed from a sophisticated moral ethos to a primitive one”), <https://www.nytimes.com/2018/01/01/opinion/the-retreat-to-tribalism.html>. See also *Montoya v. U.S.*, 180 U.S. 261, 264-265 (1901) (explaining that due “to the natural infirmities of the [American] Indian character, their fiery tempers, . . . their nomadic habits, and lack of mental training” as well as the fact that they had “no established laws” or “recognized method of choosing their sovereigns,” they should not be recognized as “nations” but only as “tribes” and “bands”); Dan Gunter, *The Technology of Tribalism: The Lemhi Indians, Federal Recognition, and the Creation of Tribal Identity*, 35 IDAHO L. REV. 85, 99-104 (1998) (discussing the relationship between “tribalism” and “Orientalism”).
- 48 ICCPR, *supra* note 1, art. 26.
- 49 *Ibid.* at art. 1(2).
- 50 For a brief summary, see Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M UNIV. L. REV. 1, 47-64 (2014).
- 51 International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195. On the significance of international human rights law and this treaty in particular to the struggle for racial justice in the United States, see Jeremy I. Levitt, “*Fuck Your Breath*”: *Black Men and Youth, State Violence, and Human Rights in the 21st Century*, 49 WASH. U. J.L. & POL’Y 87, 100-111 (2015). Levitt’s title derives from the final works spoken by a Tulsa, Oklahoma police officer to Eric Harris, an unarmed Black man who could not breathe because the officer had just fatally shot him in the chest. *Ibid.* at 99.
- 52 See generally Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991).
- 53 *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (declaring sections of the Civil Rights Act of 1875 mandating equal access to public accommodations to be unconstitutional).
- 54 See generally Natsu Taylor Saito, *Decolonization, Development, and Denial*, 6 FLA. A & M U. L. REV. 1 (2010); Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT’L L.J. 1 (2004).
- 55 For examples and analysis, see generally WARD CHURCHILL, *KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS* (2004); Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY

- L. REV. 665 (1995); George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999).
- 56 LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 38 (2010).
- 57 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 4 (2007).
- 58 International Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, *entered into force* Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277, art. II.
- 59 RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944).
- 60 Eric Ledell Smith, *MOVE Bombing* in THE CIVIL RIGHTS MOVEMENT IN AMERICA: FROM BLACK NATIONALISM TO THE WOMEN'S POLITICAL COUNCIL 230-232, 230 (Peter B. Levy, ed., 2015); *see also In re City of Philadelphia Litigation*, 938 F.Supp. 1278 (E.D. Pa. 1996).
- 61 Smith, *supra* note 60 at 231-232. *See also* AKINYELE OMOWALE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT 194-210 (2013) (describing governmental attacks on the "Republic of New Africa" in Mississippi in the early 1970s). While it is beyond the scope of this essay, a similar case could be made regarding nonviolent White separatist movements, as illustrated by the FBI's chemical attack on a compound in Waco, Texas that killed 76 Branch Davidians, including 27 children. *See generally* DAVID B. KOPEL & PAUL H. BLACKMAN, NO MORE WACOS: WHAT'S WRONG WITH FEDERAL LAW ENFORCEMENT AND HOW TO FIX IT (1997).
- 62 GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 85 (Daniel Heller-Roazen, trans., 1998).
- 63 *See* Fiona Barclay, Charlotte Ann Chopin & Martin Evans, *Introduction: Settler Colonialism and French Algeria*, 8(2) *Settler Colonial Studies* 115 (2017).
- 64 ICCPR, *supra* note 1, art. 26.
- 65 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Sept. 13, 2007, art. 8(1) and (2)(a). For critiques of the process and its outcome, *see generally Special Issue: The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival—Where To From Here?*, 20(3) GRIFFITH LAW REVIEW LAW 507 (2011).
- 66 *Case concerning East Timor (Portugal v. Australia)*, 1995 I.C.J. 90, 102 (June 30, 1995).
- 67 U.N. Charter, art. 1(2). For background on the intent of the parties drafting this provision; *see* W. OFUATEY-KODJOE, PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 104-113 (1977).
- 68 UNGA Resolution 1514 (XV) UN GAOR, 15<sup>th</sup> Sess., Supp. 16, UN Doc A/4684 (December 14, 1960). For background, *see* OFUATEY-KODJOE, *supra* note 67 at 115-22.
- 69 UNGA Resolution 1514, *supra* note 68, para. 2.
- 70 ICCPR and ICESCR, *supra* note 1, common art. 1(1). On the evolving concept of self-determination, *see* Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the New U.S. Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMPLE INT'L & COMP. L.J. 443, 448-78 (2006). For a more orthodox summary, *see generally* Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993).
- 71 *See generally* Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT'L L.J. 209 (1991) (explaining the norm as customary law, binding on all states); Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession as International Law*, 51 HARV. INT'L L.J. 553, 567 (2010) (noting that "the classical right of colonial self-determination has acquired jus cogens status").
- 72 Office of the High Commissioner for Human Rights, Human Rights Committee, General Comment No. 12, art. 1: The Right to Self-Determination of Peoples, para. 1. 21<sup>st</sup> Sess., Annex, UN Doc. CCPR/C/21/Rev.1 (April 12, 1984).
- 73 *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 100 (1979) (noting that "self-determination units" may encompass "entities part of a metropolitan State [] which have been governed in such a way as to make them in effect non-self-governing territories").
- 74 UNGA Resolution 1514, *supra* note 68, para. 6; *see also* U.N. Charter, art. 2(4) (prohibiting "the threat or use of force against the territorial integrity or political independence of any state"). For a critique of "territorial epistemology," *see generally* Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, (2010).



- 75 See UNGA Resolution 1541 (XV), UN GAOR, 15<sup>th</sup> Sess., Supp. 16, UN Doc A/4684 (December 14, 1960), Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information called for Under Article 73e of the Charter, prin. IV. For analysis, see IRENE WATSON, *ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW: RAW LAW* 88 (2015).
- 76 See Erica-Irene A. Daes, *An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations*, 21 CAMBRIDGE REV. INT'L AFF. 7, 12-13 (2008). The United States and other settler states delayed finalization of the UN Declaration on the Rights of Indigenous Peoples by many years with their attempt to substitute the term "populations" for "peoples." See Erica-Irene A. Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 11-40, 18 (Stephen Allen & Alexandra Xanthaki, eds., 2011).
- 77 Universal Declaration of the Rights of Peoples, Algiers, July 4, 1976, arts. 5-6, reproduced in UN LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 219-223 (Antonio Cassese, ed., 1979).
- 78 See Patrick Wolfe, *Structure and Event: Settler Colonialism, Time, and the Question of Genocide* in *EMPIRE, COLONY, GENOCIDE: CONQUEST, OCCUPATION, AND SUBALTERN RESISTANCE IN WORLD HISTORY* 102-132, 122 (A. Dirk Moses, ed., 2008).
- 79 Vogel, *supra* note 70 at 447.
- 80 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. Reports 16, 63 (declaration of President Muhammad Zafrulla Khan).
- 81 *Ibid.* at 69 (separate opinion of Vice-President Fouad Ammoun).
- 82 Richard Falk, *Preface* in Y.N. KLY & D. KLY, IN PURSUIT OF THE RIGHT TO SELF-DETERMINATION, 6-11, 6 (2000).
- 83 For an expanded version of this argument, see generally Saito, *Tales of Color and Colonialism*, *supra* note 50.
- 84 ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* 2 (2003)
- 85 Jason Le Miere, *Donald Trump Says, "Our Ancestors Tamed a Continent" and "We Are Not Going To Apologize for America,"* NEWSWEEK, May 25, 2018, <https://www.newsweek.com/donald-trump-tame-continent-america-945121>.
- 86 See VERACINI, *supra* note 56 at 53-55.
- 87 NGŪGI WA THIONG'O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 3 (1986).
- 88 For background, see generally DAVID STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* (1993); WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT* (1997). On identity and citizenship, see generally Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACK LETTER L.J. 107 (1999).
- 89 See generally VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* (1981).
- 90 See generally Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283 (2003); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77 (1991); Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self-Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska's Native Americans?* 12 J. ENVIRON. L. & LITIG. 305 (1997).
- 91 See generally FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall, eds., 2001).
- 92 AGAMBEN, *supra* note 62 at 21, 18.
- 93 See GUSTAVO ESTEVA & MADHU SURI PRAKASH, *GRASSROOTS POSTMODERNISM: REMAKING THE SOIL OF CULTURES* 125 (1998).
- 94 Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 43 (1983).
- 95 *Ibid.* at 68.



**WHY THE BLACK MAN  
IS REALLY GRAY**

**INTRODUCTION**

*Gray are the handcuffs that discriminatorily restrain  
Gray are the cell bars that disparately lock away  
Gray is the dream for coaches and athletes looking the same  
Gray is the hope for directors and musicians of a certain shade  
The black man isn't black; the black man is really gray*

It is no secret that racism and discrimination have an extensive, divisive history in America. From slavery to Jim Crow to the recent string of shootings of unarmed Black men, America has been riddled with issues involving racial prejudice and inequality. Although our national history of racism has improved immensely, there is still much progress to be made before “all men are created equal”<sup>1</sup> is a factual reality.

Today, there are more Black adults incarcerated and under correctional supervision than were enslaved in 1850.<sup>2</sup> According to the 2010 U.S. Census, Black individuals comprise thirteen percent of the nation’s total population, but account for forty percent of the nation’s incarcerated population.<sup>3</sup> Mass incarceration, while a result of racism, also causes it. In her groundbreaking book *The New Jim Crow*, author Michelle Alexander likens the mass incarceration of Black and Brown men today to the Jim Crow laws that enforced racial segregation and nurtured inequality in the 1950’s.<sup>4</sup> The War on Drugs, along with modern-day debtors’ prisons and private prisons, also nurtures mass incarceration, in turn furthering racial inequality.<sup>5</sup>

The publicity of extensive police brutality toward Black individuals also reflects present-day racial oppression. In 2017, there were 987 individuals fatally shot by the police.<sup>6</sup> Of these, twenty-three percent were Black.<sup>7</sup> Further, Black men are about three times more likely to be shot and killed than their White counterparts.<sup>8</sup> What is most outstanding about this oppression is that the officers involved are rarely held accountable for their misconduct. As noted by CNN, in the twelve-year span between 2005 and April 2017, only eighty police officers were arrested on “murder or manslaughter charges for on-duty shootings.”<sup>9</sup> During this same period, there were roughly 12,000 police shootings.<sup>10</sup> And of the officers charged, only “[thirty-five percent] were convicted, while the rest were pending [conviction] or not convicted.”<sup>11</sup>

The media’s depictions of the victims of police killings differ if the victims are White or Black, further perpetuating racial stereotypes, profiling, and

biases. This is true even where the White victims were suspected of committing far more serious crimes.<sup>12</sup> For instance, various headlines described White victims as follows: “Santa Barbara shooting: Suspect was ‘soft-spoken, polite, a gentleman,’ ex-principal says;” “Ohio shooting suspect, T.J. Lane, described as ‘fine person;”” “Bank robbery suspect was outstanding Blue Hills student.”<sup>13</sup> By contrast, Black victims of police brutality received the following coverage: “Ohio man was carrying variable pump air rifle – not a toy – when cops killed him: attorney general;” “Shooting victim had many run-ins with law;” “Police: Warren shooting victim was gang member.”<sup>14</sup>

The entertainment and sports industries also have a long history of perpetuating racial oppression. From the Negro leagues<sup>15</sup> to the use of “blackface”<sup>16</sup> in theatrical performances to the recent allowance of rap lyrics as evidence in criminal proceedings, racism in the entertainment and sports industries seems to be ever-present. For example, Black, first-time NFL head coaches are hired less than White first-, second-, third-, and fourth-time head coaches.<sup>17</sup> In fact, “teams had hired [W]hite head coaches 120 times in 141 chances over the past two decades . . . [s]econd-, third- and fourth-time white head coaches outnumber all minority hires by a 40-21 margin during that span.”<sup>18</sup> The entertainment industry is no different in this respect. Less than one percent of television stations are owned by Black individuals.<sup>19</sup> Specifically, only ten television stations are owned by Black individuals, which is an increase from last year’s figure of two.<sup>20</sup>

This Article discusses the reasons for the pervasive discrimination in modern society, and how the constant depictions of negative racial stereotypes in the news, sports, and entertainment industries have fueled the mass incarceration of, and police brutality toward, Black individuals. Part I provides background, contextualizing how mass incarceration came into existence and continues to exist, and analyzes the racial implications of mass incarceration. Part II examines the root causes of police brutality against Black individuals and highlights the low rates of convictions for police shootings. Part III parallels the depictions and treatment of Black individuals in sports and entertainment with the racial inequalities faced in the criminal justice system. The conclusion provides recommendations and solutions to promote change in a racist society.

## I. MASS INCARCERATION

*“Prison is a business, America’s the company. Investing in injustice, fear and long suffering.”*<sup>21</sup>

The concept of mass incarceration was first publicized in a report by The Sentencing Project in 1990.<sup>22</sup> The report uncovered the chilling statistic that about one in four Black men between the ages of twenty and twenty-nine were under the control of the penal system, “either in prison or jail, on probation, or on parole.”<sup>23</sup> By 1995, The Sentencing Project revealed that the rate had increased to one in three.<sup>24</sup> During that five year period, in Washington, D.C. and Baltimore, more than half of Black men in their twenties were under criminal supervision.<sup>25</sup> Today, about three in four young Black men in D.C. “(and nearly all those in the poorest neighborhoods) can expect to serve time in prison.”<sup>26</sup> These numbers beg

the question: what is the phenomenon to blame for mass incarceration and its discriminatory consequences? The answer is the War on Drugs, failing public defense systems, debtors' prisons, and the privatization of the carceral state.<sup>27</sup>

### **a. The War on Drugs**

Many people falsely believe that the War on Drugs was a response to the crack epidemic in inner-cities in the late 1980's. But, the reality is that the War on Drugs was officially launched by President Reagan in 1982, several years prior to the crack crisis and its ensuing media coverage.<sup>28</sup> In fact, only after the War on Drugs was announced did crack use rapidly spread in impoverished Black neighborhoods.<sup>29</sup> The Reagan administration was responsible for publicizing the prevalence of crack cocaine in 1985 to legitimize a patently racist campaign to imprison minorities and gain further public support for that endeavor.<sup>30</sup> Regan's exploitation of the media in this regard was a "success" because it catapulted the War on Drugs "from an ambitious federal policy to an actual war."<sup>31</sup> Regan's use of the media also filled the nation with images of Black "crack whores," "crack dealers," and "crack babies," which reinforced atrocious racial stereotypes about inner-cities, Black people, and Black communities.<sup>32</sup>

During the time the War on Drugs was declared, illicit drug use was actually on the decline nationwide.<sup>33</sup> Yet, the presidential declaration of war caused an exponential rise in arrests and convictions for drug-related offenses, particularly among minorities.<sup>34</sup> This increased criminalization of drug crimes warped public perception about the extent of the drug usage. It also resulted in as many as eighty percent of young Black individuals living with criminal records in major cities across the country.<sup>35</sup> Indeed, in certain states, Black men were (and continue to be) sent to prison for drug offenses at rates twenty to fifty times greater than White men.<sup>36</sup> Research indicates, however, that White individuals, and White youth in particular, are more likely to commit a drug crime than their minority counterparts.<sup>37</sup>

In the course of thirty years, from 1980 to 2010, the population under correctional control increased from about 300,000 to more than 2 million and drug convictions are mainly to blame.<sup>38</sup> The United States has the highest incarceration rate in the world and incarcerates more of its racial or ethnic minorities than any other country.<sup>39</sup> In fact, "[t]he United States imprisons a larger percentage of its [B]lack population than South Africa did at the height of apartheid."<sup>40</sup> Although the War on Drugs sparked the creation of mass incarceration, failing public defender systems, as well as the proliferation of modern-day debtors' prisons and private prisons. The War On Drugs also exacerbated the penal population's racial disparity.<sup>41</sup>

### **b. Underfunded and Overextended Public Defender Systems**

Many indigent defendants do not have effective counsel. The severity of the problem has become so grave that in Louisiana, for instance, the Lawyers' Committee for Civil Rights Under Law, partnering with other organizations and firms, sued the state due to its failure to fix (and fund) the state's broken public defender system, which was causing poor individuals to be denied their constitutional

right to effective counsel.<sup>42</sup> Notably, in Louisiana, about eighty-five percent of all criminal defendants are indigent and approximately seventy percent of incarcerated individuals are minorities, most of whom are Black.<sup>43</sup> Thus, there is a substantial need for an adequate public defender system and the lack of effective counsel contributes to the mass incarceration of poor, Black individuals.

Louisiana is not an outlier. Many states do not provide a state-wide public defender system.

### **c. Modern-Day Debtors' Prisons**

"Modern-day debtors' prison" is a term used to describe the jailing of indigent individuals simply because they are unable to pay fines and fees associated with minor offenses, such as traffic violations and shoplifting.<sup>44</sup> With increasing court costs and decreasing budgets, court systems frequently turn to the debtors' prison system to raise revenue.<sup>45</sup> The problem with modern-day debtors' prisons, however, is that the courts order the "arrest and jailing of people who fall behind on their payments, without affording any hearings to determine an individual's ability to pay or offering alternatives to payment such as community service."<sup>46</sup> Not only do modern-day debtors' prisons violate the Fourteenth Amendment, which grants due process and equal protection under the law, but incarcerating individuals simply because they cannot afford to pay fines or fees violates the Supreme Court case *Bearden v. Georgia*.<sup>47</sup>

In *Bearden*, Mr. Bearden was sentenced to probation and ordered to pay a \$500 fine plus \$250 in restitution after pleading guilty to burglary and theft by receiving stolen property.<sup>48</sup> After Mr. Bearden made the first couple of payments, he was laid off from his job and could not obtain other employment. In turn, the court revoked his probation and placed him in prison.<sup>49</sup> On appeal, the Supreme Court held that if a court imposes a fine or fee for a crime, then it may not imprison a person simply because he lacked the ability to pay that fine or fee.<sup>50</sup> Put differently, the sole justification for imprisonment cannot be poverty when an individual has demonstrated bona fide efforts to pay.<sup>51</sup> On this reasoning, the Court reversed the lower court's decision to imprison Mr. Bearden.<sup>52</sup>

Despite the holding in *Bearden*, debtors' prisons live on. Harriet Cleveland, a forty-nine-year-old with three children, worked at a day care in Montgomery, Alabama prior to being laid off in 2009.<sup>53</sup> In 2013, while babysitting her grandson, she was arrested for an unpaid debt of \$1,554 – operating a vehicle without insurance and then, once her license was suspended, operating without a valid license.<sup>54</sup> "She slept thirty-one days on a jail cell floor, 'block[ing] the sewage from a leaking toilet' with old blankets."<sup>55</sup>

Similarly, Twanda Brown, a single mother who lived in Section 8 housing in Lexington County, South Carolina received a number of traffic fines.<sup>56</sup> Brown was a fast food restaurant employee and was regularly making payments toward her fines, but when she defaulted on her payments, she was arrested and jailed for fifty-seven days.<sup>57</sup> The poverty rates for Black and Hispanic residents of Lexington County are more than double the rate for White residents, and imprisonment for poverty would, accordingly, disproportionately affect those minority groups.<sup>58</sup>

There are thousands of people like Ms. Cleveland and Ms. Brown who are trapped in the cycle of imprisonment simply because they are poor. Indeed, the poverty rate for the total prison population in the United States is roughly thirteen percent, but the poverty rate for imprisoned Black individuals is twenty-two percent (the highest poverty rate among all races).<sup>59</sup> Thus, imprisoning the poor for being poor furthers the racial disparity in the criminal justice system.

Not only are modern-day debtors' prisons unconstitutional, they are also a waste of taxpayer money.<sup>60</sup> Indefinitely jailing individuals who will likely never be able to pay their debts imposes direct costs on taxpayers and the government, causing the criminal justice system to experience financial strife.<sup>61</sup> "According to CBS MoneyWatch and the ACLU, the cost to taxpayers of arresting and incarcerating a debtor is generally more than the amount to be gained by collecting the debt."<sup>62</sup>

In sum, modern-day "debtors' prisons create a racially-skewed, two-tiered system of justice in which the poor receive harsher, longer punishments for committing the same crimes as the rich, simply because they are poor."<sup>63</sup>

#### **d. Private Prisons**

Modern-day debtors' prisons are not the only prison systems causing mass incarceration. The privatization of prisons is also a significant contributing factor.<sup>64</sup> Private prisons are "prison facilities run by private prison corporations whose services and beds are contracted out by state governments or the Federal Bureau of Prisons (BOP)."<sup>65</sup> Although the use of private prisons seems like an attractive solution to mass incarceration because it allows states and the federal government to redirect tax dollars to other services, the reality is that private prisons cost more, operate less efficiently, and ultimately give rise to numerous constitutional dilemmas revolving around the rights of inmates to be treated as human beings.<sup>66</sup>

Moreover, the private prison system is a billion-dollar industry exploiting predominately Black and Hispanic inmates.<sup>67</sup> These for-profit prisons have been on the rise since the 1980s, especially following the commencement of the War on Drugs.<sup>68</sup> More than half of states depend on private prisons to hold nearly 90,000 inmates annually.<sup>69</sup> The cost of housing inmates is high, and overcrowding is a major issue in the penal system, so utilizing private prisons seems like a grand solution to states struggling with budget constraints and deficits.<sup>70</sup> However, for private prisons to turn a profit (they are businesses, after all), more inmates need to be locked up for lengthier amounts of time.<sup>71</sup> Indeed, the "private prison industry doesn't want to release people any more than a hotel would want to reduce its number of guests."<sup>72</sup> In this regard, the private prison industry inherently creates a need for mass incarceration.<sup>73</sup> Conversely, prisons run by the government are, at least theoretically, somewhat incentivized to rehabilitate inmates, so that inmates can eventually be safely released and prisons save money.<sup>74</sup>

Since the "almighty dollar" is a high priority for for-profit prisons, "private prisons seek the least expensive prisoner to generate the highest possible profit."<sup>75</sup> Therefore, it is not surprising that Black inmates are more likely to be held in private prisons than White inmates.<sup>76</sup> Inmates who are over fifty years old are

more likely to be White, while inmates who are under fifty years old – particularly those closer to thirty years of age – are more likely to be Black or Hispanic.<sup>77</sup> It costs \$68,270 per year to house an inmate fifty years-old or older, but it only costs \$34,135 annually to house more youthful inmates.<sup>78</sup> Thus, statistically, it is fiscally cheaper to house Black inmates than it is to house White inmates in private prisons. Private prisons have the luxury of contractually exempting themselves from housing more expensive prisoners; thus, allowing them to house more Black inmates and less White inmates.<sup>79</sup> In California, Georgia, Texas and Oklahoma, minorities are incarcerated in private prisons at least ten percent more than in publicly-run institutions.<sup>80</sup> Thus, private prisons demonstrate how certain facially neutral policies have a disparate impact on minorities.<sup>81</sup>

“Cutting costs and generating revenue at the expense of people of color is a tradition deeply woven in the fabric of American history.”<sup>82</sup> Some have likened the private prison industry to slavery or indentured servitude, arguing that private prisons violate the Thirteenth Amendment.<sup>83</sup> For instance, private prison companies are publicly traded and, therefore, “inmates have quite literally become commodities rather than liabilities.”<sup>84</sup> Private prisoners also live in, clean, and maintain the prison, and are required to engage in other forms of labor by the prison, such as crop growing.<sup>85</sup> Inmates in private prisons also live and work in worse conditions than those in public prisons, and private prisoners are put to work to cut costs as opposed to working for rehabilitation purposes as prisoners do in public prisons.<sup>86</sup>

Additionally, many private prisons have been criticized for improper training and oversight of wardens, guards, and staff; being highly dangerous and violent; and, being extremely dirty and a cesspool for disease.<sup>87</sup> For example, the American Civil Liberties Union, along with the Southern Poverty Law Center and Law Offices of Elizabeth Alexander, filed an action against the East Mississippi Correctional Facility, a private prison, alleging that the prison was “hyper-violent, grotesquely filthy and dangerous;” “operates in a perpetual state of crisis;” and, “prisoners are at grave risk of death and loss of limbs.”<sup>88</sup> Many other cases with similar allegations have been filed elsewhere.

The racism inherent in the War on Drugs, the ability to obtain effective counsel, modern-day debtors’ prisons, and private prisons creates and maintains systems of oppression and inequality.

## II. POLICE BRUTALITY

*“Cops give a damn about a negro. Pull the trigger, kill a \*\*\*\*\*, he’s a hero.”<sup>89</sup>*

Those born prior to this century know too well how big of an issue police brutality has been in America. Even before Mike Brown and Tamir Rice, there was Rodney King, whose beating led to the 1992 Los Angeles rebellions. Even prior to Rodney King, there was police use of water cannons against protestors in the 1960s. Police brutality has plagued the nation for ages. Today, it has almost become commonplace to turn on the news and see another instance of a police officer shooting an unarmed Black individual.

As the years go by, new “solutions” to police brutality are implemented, but

seem to have little effect. For example, many police departments now make their officers wear body cameras. In 2015, “95 percent of large police departments reported they were using body cameras or had committed to doing so in the near future.”<sup>90</sup> The purpose was to record police shootings and create greater accountability in response to police misconduct.<sup>91</sup> However, studies show that the cameras have virtually no deterrent effect on officers and do not modify behavior.<sup>92</sup> In fact, body cameras actually raise other concerns about surveillance and individual privacy.<sup>93</sup> One researcher noted that the “cameras raised significant privacy issues, particularly in low-income, minority neighborhoods, and that vendors were beginning to experiment with incorporating facial recognition software.”<sup>94</sup>

True police reform is not possible until the root cause of police misconduct is identified. One of the main reasons that Black individuals are being slaughtered at such a disproportionate and high rate is that police, and White individuals in general, have implicit biases towards various minority groups.<sup>95</sup> Studies show that an acknowledgment and awareness of implicit bias is a key component to lessening racial profiling and saving Black lives.<sup>96</sup> But in order to improve the relationship between the police and minority communities, implicit bias needs to be better understood.

### **a. Implicit Bias**

Implicit bias is discriminatory bias based on an implicit stereotype or attitude.<sup>97</sup> Everybody is racist, and nobody is colorblind.<sup>98</sup> “Implicit stereotypes are the ‘introspectively unidentified . . . traces of past experience’ that result in a belief that all members of a social category share certain qualities.”<sup>99</sup> “[I]mplicit attitudes can result in actions that indicate ‘favor or disfavor toward some object’ without being ‘understood by the actor as expressing that attitude.’”<sup>100</sup> Expressions of implicit discrimination and systematic discrimination are the result of unconscious or spontaneous prejudicial behaviors or actions.<sup>101</sup>

However, one of the reasons that implicit bias studies have received backlash is because most people cringe at the thought of being considered racist; many individuals profess that they are “colorblind” and claim that they do not see race.<sup>102</sup> But pretending to not notice race, or that race does not matter, is itself a form of racial bias.<sup>103</sup> For instance, “colorblindness foists ‘whiteness’ on everyone” because it is essentially viewing everyone as if they are White; therefore, one’s “default color for sameness is white.”<sup>104</sup> It also “strips non-[W]hite people of their uniqueness” and “suppresses critically important narratives of oppression” by dismissing non-[W]hite individuals’ experiences, traditions, and cultures.<sup>105</sup> “Colorblindness assumes everyone has the same experience here in America,” and, “colorblindness promotes the idea that non-[W]hite races are inferior.”<sup>106</sup> Moreover, it’s warranted to be conscious of race.<sup>107</sup> For example, if an officer is looking for a suspect, knowing if the suspect is White or Black is far more helpful than knowing that the suspect has black hair.<sup>108</sup>

Recently, two studies dealing with Black job applicants during college admission interviews and implicit bias demonstrated how implicit bias had a negative impact on the applicants.<sup>109</sup> The first study determined that White college students showed greater levels of discomfort when conversing with Black experimenters



than with White experimenters.<sup>110</sup> The students displayed their discomfort by talking and smiling less frequently, and hesitating and making speech errors more often when conversing with Black experimenters.<sup>111</sup> The second study found that White interviewers displayed more discomfort and talked less to Black applicants than White applicants.<sup>112</sup> Additionally, the study revealed that White applicants did poorly in interviews when paired with White interviewers that were asked to be less conversant and to display verbal discomfort.<sup>113</sup> These studies, in addition to others, demonstrate how implicit bias may disadvantage Black applicants.<sup>114</sup>

When regard to police biases, research studies tend to show a similar preference towards White individuals and, concurrently, a discriminatory outcome for Black individuals. For example, in a series of four studies, researchers attempted to emulate the experience of an officer who, when confronted with a potentially dangerous suspect holding either a gun or a nonthreatening item, must decide whether or not to shoot.<sup>115</sup> The goal of these studies was to analyze the effect the suspect's race had on the officer's decision to shoot.<sup>116</sup> Participants were told to shoot only armed targets.<sup>117</sup>

In the first study, the participants shot more rapidly when the target was Black than White, and decided not to shoot an unarmed target more rapidly when the target was White than Black.<sup>118</sup> In the second study, researchers tried to increase error rates by forcing the participants to make their decisions more hastily.<sup>119</sup> Under these modified conditions, implicit racial bias was still obvious: the participants failed to fire at an armed target more often when the target was White than Black.<sup>120</sup> And, when the target was unarmed, the participants fired at the target more often when the target was Black than White.<sup>121</sup> Further, if a target was Black, "participants generally required less certainty that [the target] was, in fact, holding a gun before they decided to shoot [the target]."<sup>122</sup> In the third study, researchers replicated the first study and observed that the bias of the shooter conformed with those who reported greater contact with Black individuals and those who believed that there exists a strong stereotype depicting Black individuals as "aggressive, violent and dangerous." The study indicated that "mere knowledge of [a] stereotype is enough to induce the bias."<sup>123</sup> In the final study, researchers tested both White and Black participants, and found that both sets of participants exhibited equal levels of bias.<sup>124</sup> Collectively, these results revealed that in speed and accuracy, the decision to shoot an armed target was faster when the target was Black, whereas the decision not to shoot an unarmed target was faster when the target was White.<sup>125</sup> The results also demonstrate that Black individuals tend to exhibit some form of implicit bias towards Blacks.<sup>126</sup>

Because all police officers interact with Black individuals; must make "lightning-quick, high-stakes judgments about individuals' propensity for criminality and violence with very little individuating information;"<sup>127</sup> rely on their "gut instincts" and "hunches" to determine who to investigate, interrogate;<sup>128</sup> and determine who to use deadly force against,<sup>129</sup> they must all learn about, identify, and combat their implicit biases for the sake of justice and saving Black lives.

## **b. Lack of Criminal Liability**

As discussed above, criminal convictions against police officers for brutality and shootings of Black individuals are rare<sup>130</sup> and police officers are almost never

prosecuted for their use of excessive force.<sup>131</sup> There are various reasons for this phenomenon. First, the law gives officers wide discretion in their use of force.<sup>132</sup> Generally, an officer need only perceive a threat to justify his use of deadly force.<sup>133</sup> Second, investigations into an officer's use of force are typically conducted by the same county or state department where the officer works, thus creating an obvious conflict of interest.<sup>134</sup> Third, often the only available evidence of police misconduct comes from eyewitness testimony, which tends not to be viewed as credible as the officer's testimony.<sup>135</sup>

Typically, police misconduct cases end up in civil court where the aggrieved party has a better chance of success. But criminal sentencing is the "most powerful social mechanism" for expressing collective condemnation and sending a message to other police officers.<sup>136</sup> The National Police Misconduct Reporting Project examined 3,238 criminal cases against officers from April 2009 through December 2010; it found that thirty-three percent of the officers were convicted, and thirty-six percent of the officers who were convicted actually served prison sentences.<sup>137</sup> "Both of those are about half the rate at which members of the public are convicted or incarcerated."<sup>138</sup> Unsurprisingly, however, an officer's (minority) race or ethnicity may increase the likelihood of his or her conviction. For example, Peter Liang, a Chinese-American, was convicted of manslaughter for the fatal shooting of Akai Gurley at a New York housing project and faced up to fifteen years in prison.<sup>139</sup> However, because many supporters accused the prosecution for targeting him due to his ethnic background, a judge, following the prosecution's request, lessened Liang's conviction to criminal negligence and sentenced Liang to five years' probation and 800 hours of community service.<sup>140</sup> Liang is one of the very few officers to be convicted in a high-profile case.<sup>141</sup>

Although a minority police officer is more likely to be convicted for excessive use of force, some argue that having more diversity on the police force will lessen instances of police brutality. The logic is persuasive, but ultimately not true.<sup>142</sup> Studies demonstrate that the racial composition of a police department did not matter for police shootings generally, but the racial makeup of the city did.<sup>143</sup> In all of the cities that were measured, an increase in Black residents was correlated with an increase in police shootings.<sup>144</sup> In this regard, "[t]he quickest way to predict the number of police shootings in a city is to see how many [B] lacks live there."<sup>145</sup> Moreover, Black police officers only account for ten percent of police shootings, but seventy-eight percent of the individuals they kill are Black.<sup>146</sup> In general, more White individuals are killed by police officers than Black individuals, but Black individuals are more than two times more likely to be killed in proportion to their population than Whites.<sup>147</sup>

The media only aggravates the situation of police killings of Black individuals. For example, following the death of Freddie Gray, then-president Barack Obama referred to citizens from Baltimore as "criminals and thugs" when he responded to a question about the ensuing protests that occurred.<sup>148</sup> "The use of the term 'thug' by President Obama became the zenith of the word's use to characterize primarily individuals and groups of Black males."<sup>149</sup> Indeed, the term "thug" was the term of choice used by many news and social media outlets.<sup>150</sup> Baltimore councilman Carl Stokes, a Black male, refused to call the protesting citizens

“thugs” and responded during a CNN interview to the use of the word, saying, “C’mon, so calling them thugs, just call them ni\*\*ers, just call them ni\*\*ers.”<sup>151</sup> “Councilman Stokes was calling attention to the use of coded language that is in some ways explicitly and other ways implicitly used as a substitute for personally mediated racism, specifically the term ‘ni\*\*er.’”<sup>152</sup> Put differently, the characterization of the Baltimore protesters as thugs shows how the media’s use of certain words tends to perpetuate racial stereotypes. Unarmed Black victims of police killings are portrayed in a similar fashion by media. Typical headlines highlight four main themes when discussing Black victims: the behavior or actions of the victim during the time of his or her death; the appearance of the victim at the time of the his or her death; the location where the victim’s death happened (also many times the area the victim lived); and, the lifestyle and culture(s) that the victim associated with.<sup>153</sup> For instance, here is a sample of news headlines following the police killing of Eric Garner: “The 350-pound man, about to be arrested on charges of illegally selling cigarettes, was arguing with the police;” “But the 350-pound Garner’s poor health, including ‘acute and chronic bronchial asthma; obesity; hypertensive cardiovascular disease,’ were also ‘contributing conditions’ to his death, it added;” “The pending cases, which have now been dismissed and sealed, included selling untaxed cigarettes, driving without a license, and possession of marijuana, said a law enforcement official.”<sup>154</sup> Many of the articles seemed to paint Garner as a villain and the officer as a hero, trivializing the death of a human being. The criminal justice system works similarly in police shooting cases: Black victims deserved death.

### III. SPORTS AND ENTERTAINMENT INDUSTRIES

*“Why is a brother up north better than Jordan, that ain’t get that break . . . Why Denzel have to be crooked before he took it?”<sup>155</sup>*

#### a. Sports Industry

Sports have the uncanny ability to both divide and unite. If one is a Philadelphia Eagles fan, then he is probably not too fond of Dallas Cowboys fans. If one is a Boston Celtics fan, then he is likely hoping for the Los Angeles Lakers’ demise. However, simply being a sports fan bonds strangers to one another. Sports provide contexts to conversations, people come together to watch the sporting events, and individuals of all colors and creed chant and cheer in unison for their team. Sports also have the power to contribute to social and political movements. For instance, during the time of apartheid in South Africa, soccer was a contributing factor in desegregating the nation. Likewise, the Olympics was useful in proving Adolf Hitler’s racist theories wrong. Although sports have many great qualities, however, the vile, racist history of sports still reveals itself today.

White quarterbacks are a dime a dozen. Historically, Black players were precluded from playing quarterback in the National Football League (NFL).<sup>156</sup> The only Black quarterback in the NFL Hall of Fame, Warren Moon, encountered racism throughout his playing years and was repeatedly urged to play another position by his coaches because they assumed he did not have the mental capability to play quarterback and lead his team.<sup>157</sup> Although progress has been made since Moon’s era, there are still a minute amount of Black quarterbacks in the league. To be sure, the NFL’s percentage of Black quarterbacks increased only

one percent—from eighteen percent to nineteen percent—in the last fourteen years.<sup>158</sup> Interestingly, though, more than seventy percent of the players in the NFL are Black.<sup>159</sup> It still seems like the “golden boy,” master position of quarterback is reserved for Whites and the slave positions, like wide receiver and running back, are reserved for Blacks.

Even the rhetoric used to describe Black and White athletes is different. In a 1992 study of football announcers, researchers found announcers focused on Black athletes’ physical attributes and White athletes’ cognitive attributes.<sup>160</sup> Likewise, the success of Black players tends to be attributed to their “innate natural athletic ability,” while the success of White players is typically attributed to “intelligence or mental effort and hard work,” reinforcing the stereotypes that Black people are naturally lazy and unintelligent.<sup>161</sup> Additionally, announcers and commentators talk quantitatively more about White athletes and praise them more, even though White athletes are the minority population in football, and also make more excuses for their failures than for Black athletes.<sup>162</sup> Moreover, the media tends to use “trigger words” that are negatively associated with Black individuals. For instance, Stanford graduate and NFL player, Richard Sherman, was called a “thug” for his post-game interview following the National Football Conference (NFC) Championship game.<sup>163</sup> Sherman did not use vulgar language and did not discuss violence or criminal action, but his physical appearance and loud voice was seemingly enough to be deemed a “thug.”<sup>164</sup> Maybe worse than that is how the Houston Texans’ owner, Bob McNair, described NFL players as “inmates,” saying the NFL can’t have “inmates running the prison.”<sup>165</sup> These comments were made in a meeting in regards to the protests during the national anthem, which the media has continuously and incorrectly attributed to protesting the flag and military. Rather, the true purpose of the protest is to “raise awareness of police brutality in America against people of color.”<sup>166</sup>

Aside from players, minority coaches are also underrepresented and face their fair share of racism. For example, the NFL implemented the “Rooney Rule” to increase the chances of minority individuals to be hired as head coaches.<sup>167</sup> The Rooney Rules require NFL teams to interview at least one minority candidate when in pursuit of a new head coach and the interview must be “meaningful.”<sup>168</sup> The problem is, however, that “94 percent of head coaches hired over the past 20 years (133 of 141) had been NFL coordinators, pro head coaches (including interim) or college head coaches previously”<sup>169</sup> and, historically, minorities have had fewer opportunities to hold these type of “prerequisite” positions.<sup>170</sup> The Rooney Rule also applies to personnel executives, such as general managers, but the population of personnel executives and owners is even less diverse than that of head coaches.<sup>171</sup> Many believe the Rooney Rule should extend to coordinators as well but, here too, “80 of the NFL’s current 85 offensive coordinators, quarterbacks coaches and offensive quality control coaches are White, including all 37 with the word ‘quarterback’ in their titles . . . 23 of 32 defensive coordinators are White.”<sup>172</sup>

Another issue with the Rooney Rule is that minority interviewees tend to be considered only “for the camera” or quota-meeting. Many teams thus face a dilemma: teams can schedule an interview with a minority candidate and “face

the inevitable blowback of it being a sham,” or teams can pay a fine for “flouting the Rooney Rule.”<sup>173</sup> For example, in 2003, the Detroit Lions elected to pay a \$200,000 fine for not following the Rooney Rule.<sup>174</sup>

The sports industry, as well as the entertainment industry, tends to reflect the racism of the country. Thus, as long as racial disparity exists in society, sports will continue to reflect and represent that toxic racial climate.

## **b. Entertainment Industry**

The entertainment industry is not much different from the sports industry in its discrimination toward, and lack of opportunity for, minorities. For instance, lack of minority representation in the television industry prompted Byron Allen, founder and chief executive officer of Entertainment Studios, to file a \$20 billion lawsuit against Comcast and Time Warner Cable.<sup>175</sup> He alleged that that the conglomerates discriminated against black-owned media companies by creating and reserving only “‘a few spaces’ for their channels at ‘the back of the bus.’”<sup>176</sup> The lawsuit is currently on appeal in the Court of Appeals for the Ninth Circuit.<sup>177</sup>

For decades, Black individuals have had a difficult time even entering the television industry as actors, executives, or owners.<sup>178</sup> Prior to the 1970’s, there simply were no television stations owned by Black individuals.<sup>179</sup> During the 1970s, the Federal Communications Commission (FCC) created the “Minority Ownership Policy,” which led to there being ten Black-owned television stations today.<sup>180</sup> Yet, even with the enhanced representation of Black individuals in executive roles, Black individuals are still typecast in stereotypical acting roles. A 2016 study found that Black actors credited as a “police officer” represented eighteen percent of all actors.<sup>181</sup> Far more prevalent, however, was the obvious stereotyping of Black actors. For instance, Black women were typically only casted in television and movie roles if they agree to portray characters that are “loud, vindictive, petty and always ready for some mess.”<sup>182</sup> Black men were similarly more likely to be cast in criminal roles.<sup>183</sup> Sixty-two percent of all actors credited as “gang member” were Black; sixty-one percent of all actors who were credited as “gangster” were Black; sixty percent of all actors who were credited as “gangbanger” were Black; and, sixty-six percent of all actors who were credited as “thug” were Black.<sup>184</sup> By comparison, “the slightly more dignified ‘henchman,’ was [eighty-one] percent [W]hite and only [four] percent [B]lack.”<sup>185</sup> Finally, of all of the actors who were credited as “doctor” and “pilot,” which are two common background roles, only nine and three percent were Black, respectively.<sup>186</sup>

Furthermore, in order for Black actors to have the best chance to win awards and accolades, they must portray slave roles or negative, crooked roles. Denzel Washington has only won a leading-role Oscar for his portrayal of a crooked cop in the movie “Training Day;” many argue that was not his best movie and he deserved Oscars for other, more outstanding performances.<sup>187</sup> Similarly, Washington won his first Oscar for his supporting role in “Glory” for his portrayal of a slave.<sup>188</sup> Part of this problem is that the Oscars has a history of lacking minority representation. In 2016, many were protesting the Oscars because there were no people of color nominated in the four major categories the year before.<sup>189</sup>

The music industry is similarly racist. Recently, rap lyrics have been allowed as evidence in court. Much controversy has been bred from the allowance of rap lyrics to be used as evidence in trials. Some scholars argue that allowing rap lyrics to be admissible in court aids in reinforcing racial biases.<sup>190</sup> For example, in 1996, social psychologist Carrie Fried conducted a study to demonstrate how lyrics from various genres of music affect individuals' perceptions.<sup>191</sup> The study used the lyrics from a 1960s folk song by Kingston Trio called "Bad Man's Blunder," which is about a person who murders a police officer.<sup>192</sup> The participants were put into three groups and were told that the lyrics were attributed to performers from different genres of music.<sup>193</sup> One group was told that the lyrics were written by the Kingston Trio (folk music), the second group was told that the lyrics were by a country singer, and the third group was told that the lyrics were written by a rapper.<sup>194</sup> The results determined that a bias exists. For instance, when participants thought the lyrics were from a rap song or from a Black artist, they found the lyrics "objectionable, worr[ied] about the consequences of such lyrics, and support[ed] some form of government regulation."<sup>195</sup> Conversely, when the lyrics were thought to be from a country or folk song or from a White artist, the participants were far less critical.<sup>196</sup> One takeaway from this study is that "[c]ourts must . . . recognize the very real likelihood that rap lyrics will trigger racialized stereotypes when assessing the prejudicial effect of the evidence."<sup>197</sup> Indeed, scholars argue that jurors will believe the violent and drug-referencing lyrics to be autobiographical rather than artistic or fictional, to the prejudice of the defendant.<sup>198</sup> Likewise, some lyrics may cause jurors to mistakenly believe that black individuals are all criminals, which is obviously untrue.<sup>199</sup>

Moreover, some believe that the proliferation of White rappers is an example of "modern blackface."<sup>200</sup> During the era of slavery, images of Black individuals often depicted docile characters.<sup>201</sup> These images served as a way to control Blacks' and Whites' minds, by creating the idea that slavery was what was best for Black individuals.<sup>202</sup> "The images of buffoonery, blissful ignorance, and juvenile angst were seen as the primary traits of enslaved Blacks. [Later, through] the use of Blackface . . . White actors popularized minstrel shows, depicting stereotypes of Black life as foolish, messy, and overall comedic at the expense of Black culture."<sup>203</sup> Today, minstrel shows still exist; many White rappers are culturally appropriating Black culture.<sup>204</sup> For instance, Aamer Raman, a comedian who frequently comments on racism, said: "A [W]hite rapper like Iggy Azalea acts out signifiers which the [W]hite majority associates with [B]lack culture—hyper sexuality, senseless materialism, an obsession with drugs, money and alcohol—as well as adopting clothing, speech and music—as a costume that they can put on and discard at will."<sup>205</sup> Black rappers like Childish Gambino, on the other hand, tend to not be associated with their Black identities because they do not adhere to the stereotypical Black roles of a "thug" or "gangster."<sup>206</sup> Childish Gambino's lyrics in his song "Backpackers" reflect that sentiment: "that well-spoken token that ain't been heard, the only [W]hite rapper who's allowed to say the N word."<sup>207</sup> The eradication of the Black rapper and propagation of the White rapper attempting to mimic "Black culture" is dangerous to the fight against racial stereotypes and prejudices.



## CONCLUSION

*“No consolation prize for the dehumanized. For America to rise it’s a matter of Black Lives. And we gonna free them, so we can free us. America’s moment to come to Jesus”*<sup>208</sup>

The issue of mass incarceration and its maintenance of racial inequality and oppression has been born through society’s negative stereotypes of Black individuals. The various causes of mass incarceration must also be eliminated or reformed.

First, the vestiges of the Jim Crow era, maintained through various institutions, must be abolished. There must be a shift in the criminalization of drugs and addiction, which disproportionately targets minority communities. There must be a robust federal and state public defender system. This system should be adequately funded by the taxpayers and organized regionally. Likewise, modern-day debtors’ prisons must be done away with. Community service, like clearing trash and cleaning up parks, is a better way for debtors to pay off their fines.<sup>209</sup> “Michigan, in some cases, allows people to reduce their debt by meeting education requirements like getting a GED diploma.”<sup>210</sup> This is a much better alternative. Private prisons should also be abolished. Alternatively, private prisons need meaningful oversight and accountability, improvement of safety conditions, and better training for staff and guards.<sup>211</sup>

Second, there needs to be meaningful police training and accountability. Police need training on implicit bias.<sup>212</sup> Understanding and being aware of possible unconscious biases will likely help police perceive real threats and simply not “Black” threats.<sup>213</sup> In addition, homicidal officers need to be convicted at higher rates, because convictions and sentencing provide for greater accountability and deterrence.<sup>214</sup> Additionally, the media needs to focus on the actual circumstances surrounding police shootings, and less on the characteristics of the victims. Put in a nutshell, victims should not be demonized.<sup>215</sup>

Lastly, the sports and entertainment industries must provide more opportunities for minorities and these opportunities should not simply be in usual or stereotypical positions, but in leadership and executive roles.<sup>216</sup> It is also time to give awards to Black actors and directors for movies and roles other than those depicting negative racial stereotypes. Specifically, the association of criminality and Black needs to stop; there cannot be advancement if all a Black individual will ever amount to is a “thug.” These changes would ideally help shift the cultural depictions of Black men and women, and would aid in the eradication of racism and discrimination.

The Black man ought not be gray, the Black man need be Black and proud.



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**BOOK REVIEWS:  
HOW FREE SHOULD SPEECH BE?**

I recall the days of my youth when everything was clear, when I knew all the right answers to the most vexing problems facing humanity. Those days are long gone. Bright lines are replaced by ever-expanding gray areas. I almost envy the clarity Erwin Chemerinsky and Howard Gillman express in their new book, *Free Speech on Campus*, and Nadine Strossen expresses in hers, *Hate: Why We Should Resist It with Free Speech, Not Censorship*. Chemerinsky and Gillman recognize that private colleges and universities are free to establish whatever speech codes they choose, but argue, based on First Amendment principles, that any such restrictions be minimal. Strossen, on the other hand, addresses the strictures that should be imposed on governmental regulation of speech.

It would be a fool's errand to debate these eminent authorities on judicial interpretation of the First Amendment's free speech clause. Collectively – and, likely, individually – their knowledge and understanding of First Amendment jurisprudence is unexcelled anywhere in the country. One may, however, question whether the jurisprudence permits too much, or too little, speech or whether its requirement of imminent threat or fighting words definitively separates protected from unprotected speech.

Both books have substantial merit. They address problems that are roiling the United States, both on campus and generally. Strossen argues her point, encapsulated in her title, carefully, logically and persuasively although, I confess, her penultimate chapter on “Non-Censorial Strategies” for combating hate speech did not strike me as either complete or completely persuasive. Similarly, Chemerinsky and Gillman make cogent arguments about the need for students to confront and debate ideas they are uncomfortable with or even offended by. What I find concerning is that both books tend to pick extreme examples of hypersensitivity and resulting undue censorship rather than grappling with more difficult questions.

For example, Chemerinsky and Gillman assert that “*some* students expect that a supportive campus environment is one in which their views are not challenged (emphasis added)” and, as well they should, decry that attitude. They argue, “A campus can't censor or punish speech merely because a person or group considers it offensive or hateful. A campus can censor or punish speech that meets the legal criteria for harassment, true threats, or other speech acts unprotected by the First Amendment.” My concern is that the definition of what constitutes unprotected speech remains unclear. The question they do not answer is what constitutes “harassment, true threats, or other speech acts unprotected by the First Amendment.”

Interestingly, an episode of 1A, the NPR show hosted by Joshua Johnson, aired from the University of Michigan and addressed the struggle over free speech.

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One of the panelists was Jesse Arm, a senior and Chairman of the American Enterprise Institute's Michigan Executive Council. Another was Ph.D. candidate Maximillian Alvarez, co-founder of the Campus Antifascist Network. Arm said he chose to attend Michigan in order to be exposed to views other than his, but that he was always being attacked and harassed for his conservative positions he claimed were not tolerated by his professors and classmates. Alvarez responded that he was simply being challenged, which is why Arm said he chose to attend Michigan in the first place. The point is that it is easy to say that diversity of viewpoints and having one's beliefs challenged is good and that shutting down views one does not like is bad, but determining which is which is no simple task. It is certainly not as simple as Chemerinsky and Gillman would have it.

They also argue that "(a) faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position." They say, for instance, that a professor who expresses sympathy with Nazis or the KKK privately should not face discipline so long as that does not translate into destructive behavior in class. If, for instance, the professor teaches mathematics, those views would be irrelevant to the course material. But one must ask, and the authors do not, could such a professor possibly be fair to African-American or Jewish students. We know that implicit bias affects the ways in which the best-intentioned of us view others. How could explicit bias not be worse?

First Amendment absolutists like these authors argue that all other rights are dependent on the right to free speech. Parenthetically, there is no such thing as an absolute First Amendment absolutist, but I cannot think of a better term. Everyone agrees that some speech cannot be tolerated. People disagree on where the line should be drawn and those I label absolutists simply draw the line somewhat differently than I might. More precisely, they draw the line based on Supreme Court doctrine that only true threats can be proscribed but defining true threat is purely subjective, as the University of Michigan debate highlights.

Beyond that, however, there is, I think, a division between constitutional advocates and human rights defenders. International human rights principles hold that human rights are universal, inalienable and indivisible. That is, a diminution of any right diminishes all and one human right cannot be elevated over others. This, too, is easy to proclaim as some platonic ideal, but is difficult to apply when rights come into conflict. Chemerinsky and Gillman take a different position. They say, "... we believe that freedom of expression is an indispensable condition of all other freedoms and deserves a preferred place in our system." That may be a fair and defensible position but they do not seek to explain their conclusion; they simply conclude and opposing positions are equally fair and defensible. One may well be persuaded they are right, but they merely posit their contention with no acknowledgment that it conflicts with, among other things, international human rights law.

Notably, as well, the description of a particular right as the *sine qua non* upon which all other rights are dependent is hardly unique to freedom of speech, as these constitutional scholars should know. The Supreme Court said much the same

thing about the right to vote. “Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.”<sup>1</sup> But much the same can be said about any other human right. The right to speak freely or vote or run for office is pretty hollow for a homeless person living out of their car, so one can just as well say all other rights are illusory if one does not enjoy the human right to adequate housing and nutrition. It is precisely for this reason that human rights advocates refuse to establish a hierarchy of rights and it is perhaps their contention that free speech is somehow transcendent that is my fundamental concern with these authors. That argument, which they make without proof, creates a hierarchy of rights (or at least one right), thus not dealing with, much less resolving, the very difficult questions that arise when rights come into conflict.

Strossen cites with approval the successful ACLU defense of the proposed Nazi march through the streets of Skokie, home to many Holocaust survivors. Courts had little trouble saying that the right of the Nazis to march and express their abhorrent beliefs had a “preferred place” vis-à-vis the feelings of Skokie’s residents. Strossen would argue that was so because the march did not threaten imminent harm (she also argues that, in retrospect, it had other positive effects, but that is not the point here). Again, one can make that claim, but consider how many of the Skokie residents may have suffered from PTSD and how utterly destructive to their well-being it would have been to see marchers parading through the streets where they lived brandishing swastikas. Courts have not been shy to require protesters at women’s clinics providing reproductive services to stay a certain distance away from entrances. One might say such injunctions are to prevent violence, but it is equally true that women seeking abortions have a basic right, as Samuel Warren and Louis Brandeis argued, to be let alone.<sup>2</sup> The right of protesters to protest needs to be balanced against such rights as the right to be let alone and the right to an education. My issue with these authors is not that they are necessarily wrong, but they do not recognize how delicate that balance is. Again, it is easy to advocate for any right in the abstract. But the exercise of a particular right – and certainly the right to engage in controversial speech – inevitably raises the danger that it will come into conflict with some other right. It is simply too facile to say that free speech trumps everything short of a true threat.

The most persuasive argument both books make is that, to paraphrase Winston Churchill (loathe as I am to venerate so repugnant an individual), permitting the expression of repulsive views is the worst possible means of combating those views except for all the others. It is, indeed, a slippery slope to pick and choose what speech is permissible and what is not. Saying that harassment and true threats are not permissible provides a guideline rather than a bright line. Other criteria may well do the same. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) states:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination

and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

One may well ask why these requirements are any less specific or appropriate than the requirement of harassment or true threat. Yet the authors find the latter clear and appropriate and the former an unlawful and undesirable infringement on freedom of expression. To be fair, Strossen recognizes that “no statutory wording can eliminate all ambiguities (and) First Amendment law therefore recognizes that some degree of vagueness and overbreadth is unavoidable. . .” Yet, she finds Supreme Court doctrine acceptable but not the proscriptions contained in CERD, because the latter is necessarily vague, overbroad or both.

Strossen argues that prohibitions on racist and hateful speech have proven ineffective. She cites the rise of the National Front in France and right-wing extremist violence in Germany as evidence. Again, she may be right but the fact that hate speech laws in Europe have not eradicated racism and xenophobia there is not proof that they are ineffective. One need only look to the United States and Donald Trump’s presidency for a counter-argument. Trump’s rhetoric has certainly unleashed a rising tide of racist violence and activity here. One can only speculate on whether laws prohibiting the most blatant of Trump’s lies, such as Muslims in New Jersey celebrating the 9/11 attacks, would have made a difference, although post-Trump racist and fascist rhetoric is far more prevalent and public now than it was before. What is clear is that the rise of right-wing “populism” in European countries where laws against such speech existed corresponds to its rise in the United States, where that populism led Trump to the presidency and a compliant Congress to stop criticizing him for even his most revolting proclamations.

To be clear, if there is ever a choice between allowing or prohibiting certain speech, my inclination is to the former. In particular, as the authors all point out, prohibitions and restrictions on speech have far more often been used to suppress the left than the right. Of course, as with so many things, the gains won by progressives and radicals in securing greater freedom of speech are now being usurped by the right and corporate monopolies. We can certainly expect that to be the case in the future and, indeed, Trump has threatened as much. The arguments the authors make for more, rather than less, speech on campus and in society

generally are cogent and deserve serious consideration. They cite disturbing, if extreme and uncommon, examples of suppression going too far.

There are those who can be persuaded they are wrong. That can only happen when they are challenged with a level of respect, if not for their opinions, at least for their sincerity. There was a time in my life when I had no tolerance for those who disagreed with me on even the most arcane political issues. Not surprisingly, I won very few to my positions. Remarkably, when I recognized that others had good reasons for thinking as they did, even if they disagreed with me, and I did not dismiss their ideas out of hand, I found I had a better chance of changing their minds or, perhaps better, reaching consensus. We cannot dismiss everyone who disagrees with us as hopeless.

At the same time, there are those who are hopeless and dangerous. Steve Bannon comes to mind, as do most Fox News commentators. While I am not at all sure how best to deal with them, I know they will not be persuaded they are wrong and they will not stop spreading their venom. It is easy to say that we need to persuade those who can be persuaded, as the authors all argue. But they do not really grapple with the difficult questions of how best to defeat retrograde ideas, except perhaps with the bromide that the best way to combat bad speech is with good speech (one is tempted to say that is the First Amendment equivalent of the NRA's Second Amendment pronouncement that the way to stop a bad guy with a gun is a good guy with a gun, but that would be going a bit far).

Both books are worth the time. Both address important issues and make cogent arguments. But they should be the start of a conversation on the limits of speech, not the final word. The issues they address are too complex for these short volumes and the authors' certainty. Their virtue is the clarity of their vision. Their vice is their failure to see nuance and to grapple with the hard questions their arguments inspire. Finding the proper balance between free expression and protection of other important human rights is not easy. As I said at the outset, the older I get, the more difficult I find it. These authors, for better or worse, believe they have found it. I am not yet convinced.

## Notes

1 *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

2 Brandeis, Louis & Warren, Samuel, *The Right to Privacy*, IV Harv. L. Rev. No. 5 (December 15, 1890).

## National Lawyers Guild Review

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