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## The New Racial Justice: Moving Beyond the Equal Protection Clause to Achieve Equal Protection

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# THE NEW RACIAL JUSTICE: MOVING BEYOND THE EQUAL PROTECTION CLAUSE TO ACHIEVE EQUAL PROTECTION

EMILY CHIANG<sup>†</sup>

## ABSTRACT

*Since handing down Washington v. Davis and Arlington Heights v. Metropolitan Housing Development, the United States Supreme Court has significantly curtailed the ability of plaintiffs to bring disparate impact claims under the Equal Protection Clause. Many academics continue to talk about the standards governing intent and disparate impact. Some recent scholarship recognizes that reformers on the ground have shifted away from equality-based claims altogether. This Article contends that civil rights advocates replaced the old equal protection framework some time ago and that they did so deliberately and with great success. It expands upon and refines the strategy shift some scholars have identified, with a particular focus on racial inequality, the foundation on which equal protection rests. It does so by focusing on three particularly timely reform movements: indigent defense reform, the fight to end the school-to-prison pipeline, and challenges to immigration-related laws. The Article uses these various reform movements to identify and analyze the true breadth of the new racial justice reformers have wrought.*

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## I. INTRODUCTION

Racial inequality endures in America. Whether the disparities—in education,<sup>1</sup> employment,<sup>2</sup> incarceration,<sup>3</sup> or any number of other areas<sup>4</sup>—constitute inequity may be a matter of debate, but the fact of continued inequality is not.<sup>5</sup> And yet, the Equal Protection Clause of the Fourteenth Amendment is increasingly ill suited to address this state of affairs. In the wake of decisions such as *Washington v. Davis*<sup>6</sup> and *Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>7</sup> litigation seeking racial justice on the basis of disparate impact theories of discrimination under the Constitution has been all but foreclosed.<sup>8</sup>

A number of commentators have noted that those seeking to address inequality have had to accommodate a Court and culture in-

1. See, e.g., *infra* Part III.B.1.

2. According to data provided by the Bureau of Labor Statistics, the unemployment rate for African Americans in 2011 and 2012 was roughly double than what it was for whites. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT., <http://www.bls.gov/cps/cpsaat05.htm> (last modified Feb. 5, 2013). As others have noted, these statistics grossly underestimate the true African American unemployment rate, because they do not include prisoners. BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 52-53 (2012); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 97 (2006); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 229 (The New Press rev. ed. 2012) (noting that the true jobless rate among noncollege black men during the 1990s was 42%, and 65% among black male dropouts). At the highest level, only thirteen African Americans have ever been chairperson or CEO of a Fortune 500 company. See *African American Chairmen & CEO's of Fortune 500 Companies*, BLACK PROFILES, <http://www.blackentrepreneurprofile.com/fortune-500-ceos/> (last updated Feb. 5, 2014).

3. In 2005, 2290 per 100,000 black people were incarcerated, compared to 412 white people, a ratio of approximately 5.6. See George Coppolo & Kevin McCarthy, *Crime Rate and Conviction Rates Broken Down by Race*, OLR RES. REP. (Jan. 18, 2008), available at <http://www.cga.ct.gov/2008/rpt/2008-R-0008.htm>. African Americans make up 13% of the general U.S. population and constitute: 28% of all arrests; 40% of all inmates held in prisons and jails; and 42% of the population on death row. See James E. Johnson et al., BRENNAN CTR. FOR JUST., N.Y. UNIV. SCH. OF L., RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 20 n.1 (2010), available at [http://www.brennancenter.org/sites/default/files/legacy/Justice/ProsecutorialDiscretion\\_report.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/ProsecutorialDiscretion_report.pdf).

4. The U.S. Census Bureau reports that the 2011 median household income was \$55,412 for whites, \$32,229 for blacks, and \$38,624 for Hispanics. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011 8-9 (2012). The percentages of those below the poverty line were 9.8% for non-Hispanic whites, 27.6% for blacks, and 25.3% for Hispanics. *Id.* at 14.

5. See, e.g., Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 982-89 (2010) (providing statistical evidence of racial disparity in poverty, income and wealth, homeownership, employment, education, and the criminal justice system).

6. 426 U.S. 229 (1976).

7. 429 U.S. 252 (1977).

8. See *infra* Part II.A.

creasingly discomfited by claims of group-based discrimination. This unease has variously been described as “pluralism anxiety,”<sup>9</sup> an “antibalkanization” perspective,<sup>10</sup> and “the strain of difference.”<sup>11</sup> Some of these scholars have in turn noted a shift in the Court’s jurisprudence; in Kenji Yoshino’s words, a shift from “group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments.”<sup>12</sup>

The conversation about the future of equal protection and the meaning of equality has never been more important. This Article contends that the dialogue cannot be fully realized until we re-engage with the paradigmatic application of equal protection principles to race.<sup>13</sup> It argues that racial justice advocates have engaged in a wholesale replacement of the equal protection framework over the last several decades, and that they have done so deliberately and with great success. An understanding of the tools they used and the new racial justice they have built is to the benefit of all who seek equality.

This Article identifies and explores three frontiers in the new racial justice: public defense, the school-to-prison pipeline, and immigration. Civil rights litigators have adapted to the Court’s restrictive equal protection jurisprudence without ceding the battle for racial equality in each of these areas, a fact made all the more remarkable for the endemic disparate racial impact at the heart of these problems. Their approach to these issues serves to highlight the variety of strategies at their disposal, many of which will be useful in other contexts. To procure public defense reform, they have relied upon other individual liberties protected by the Bill of Rights, the Sixth Amendment in particular. To fight the school-to-prison pipeline, they have used a rich federal statutory landscape to their advantage. And to challenge restrictive immigration bills, they have mustered structural arguments, such as federal preemption.

These claims have played a critical role in reducing the disparate racial impact of poor public defense systems, the school-to-prison pipeline, and punitive immigration laws—and they have done so by providing a true alternative to the Equal Protection Clause in the

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9. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 (2011).

10. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1357 (2011).

11. Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1531 (2002).

12. Yoshino, *supra* note 9, at 748.

13. *Cf.* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 781 (2002) (noting that “racial minorities and women have much to gain from a theory of discrimination that focuses on the harms of coerced assimilation” for lesbians and gay men).

form of remedies that are structural, prospective, and class-based in nature, not just individual and retrospective. Not only have these claims proven more successful than traditional, explicitly race-based claims, but they have not even been predicated upon racial inequality, much less inequity.<sup>14</sup>

Some scholars have questioned whether a race-neutral approach to race-based problems is appropriate, criticizing it as a misguided embrace of a “post-racial” society.<sup>15</sup> This Article offers a response grounded in *realpolitik*: litigators have not given up the fight for racial justice, but their pleadings now work around the doctrinal dead end of explicitly race-based claims. Far from conceding the fight for racial justice, these advocates have embraced a strategy that rewrites the rules in their favor, resulting in real, measurable gains for equality.

Part II of this Article describes the death of the Equal Protection Clause as a useful means of vindicating racial justice claims. It unpacks the commentary surrounding the cultural and doctrinal shifts in the Court’s jurisprudence that have made equal protection claims less appealing both to advocates and judges. It concludes that a return to the conversation about racial equality would enrich our understanding of equal protection for all groups and that this discussion should begin with what advocates on the ground have been doing. Part III of the Article identifies the primary ways in which civil rights litigators have continued to make strides in combating racial inequality without resorting to equal protection claims. It pairs areas in which disproportionate racial impact is rampant with the most meaningful alternatives to the Equal Protection Clause identified by reformers thus far. In each area, it outlines the scope of the disparate impact, the reform response, and the lessons each strategy has to offer for others. This narrative provides the contours of the new racial justice, which has evolved to combat the racial inequalities of the modern age.

## II. THE DEATH OF THE EQUAL PROTECTION CLAUSE FOR CLAIMS PREMISED ON RACIAL DISPARITY

The aftermath of *Washington v. Davis*, which all but foreclosed claims of racial discrimination based upon a disparate impact theory, has been amply documented.<sup>16</sup> This Part will provide a brief overview

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14. See *infra* Part II.B.

15. See, e.g., ALEXANDER, *supra* note 2, at 239; Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1327-40 (2011).

16. See *infra* Part II.A.

of the doctrine as it stands today and summarize the academic commentary thus far as to the resultant state of civil rights work.

### A. *Disparate Impact After Davis*

Any narrative of disparate impact claims must begin with *Washington v. Davis*<sup>17</sup> and *Arlington Heights v. Metropolitan Housing Development Corp.*<sup>18</sup> In *Davis*, the Court held that administration of a test for authorities such as police officers did not violate equal protection despite the resultant exclusion of a disproportionate number of African American applicants:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny . . . .<sup>19</sup>

The Court concluded that absent a showing of discriminatory intent—that the state action was taken because of its disproportionate racial impact rather than in spite of it—disparate impact is insufficient as grounds for relief.<sup>20</sup> It noted that there is no requirement that “the necessary discriminatory racial purpose must be express or appear on the face of the statute” and that such purpose could “often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”<sup>21</sup>

One term later in *Arlington Heights*, the Court explained that plaintiffs must be able to offer “proof that a discriminatory purpose has been a motivating factor in the decision” being challenged and that absent a “stark” pattern of disparate impact, courts would have to delve into factors such as the historical background of the decision, the sequence of events leading to the decision, substantive and procedural departures from the normal operating procedure, and the legislative and administrative history.<sup>22</sup>

*Davis* and *Arlington Heights* both dealt with state action in which the state could plausibly contend the disparate impact was unfore-

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17. 426 U.S. 229 (1976).

18. 429 U.S. 252 (1977).

19. *Davis*, 426 U.S. at 242 (internal citation omitted).

20. *Id.* at 239.

21. *Id.* at 241-42.

22. *Arlington Heights*, 429 U.S. at 265-67.

seeable, and thus in which evidence of discriminatory intent would prove elusive. In *Personnel Administrator of Massachusetts v. Feeney*,<sup>23</sup> the Court confronted state action that would inevitably and invariably lead to disparate impact, in the form of a veterans' preference statute that "operates overwhelmingly to the advantage of males."<sup>24</sup> The Court upheld the preference, noting that, "Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences."<sup>25</sup> Thus, although "it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men," there was no equal protection violation because there was no evidence of legislative intent to discriminate against women.<sup>26</sup>

The Court has evidenced somewhat more flexibility in its approach under two circumstances. First, the Court is more likely to grant relief when the state action in question is more akin to state *inaction* that perpetuates a pre-existing system of inequality. Thus, where school districts pursue policies that result in continued school segregation (as distinct from desegregation), the Court has indicated, "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."<sup>27</sup> Similarly, where a county seeks to maintain an at-large electoral system in a district that dilutes the black vote, the Court has found that "discriminatory intent need not be proved by direct evidence."<sup>28</sup>

Second, the Court may grant relief when "the statistical disparities . . . warrant and require a conclusion that [is] irresistible, tantamount for all practical purposes to a mathematical demonstration that the State acted with a discriminatory purpose."<sup>29</sup> To date, the Court has only found statistical disparities that rose to this level twice. In *Yick Wo v. Hopkins*, every single white applicant for a permit to operate a laundry in a wooden building was granted one, and

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23. 442 U.S. 256 (1979).

24. *Id.* at 259.

25. *Id.* at 279.

26. *Id.* at 278.

27. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979).

28. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *see also id.* at 624 (noting district court findings of past discrimination against African Americans, historical exclusion of African Americans from the political process, and depressed socio-economic status of African Americans in the county).

29. *McCleskey v. Kemp*, 481 U.S. 279, 293-94 n.12 (1987) (internal citations and quotation marks omitted); *see also id.* at 293 (noting that an exception to the general rule that statistical evidence of disparate impact is insufficient may also exist in the "selection of the jury venire in a particular district," where a "stark pattern" of disparity may suffice "as the sole proof of discriminatory intent" (quotation marks omitted)).

not one of over two hundred Chinese applicants was granted one.<sup>30</sup> In *Gomillion v. Lightfoot*, the state had altered the boundaries of a city from a square to “an uncouth twenty-eight-sided figure” that excluded 395 of 400 black voters and not a single white voter.<sup>31</sup> Both of these cases pre-date *Washington v. Davis*; *Yick Wo* is more than a century old.

The Court’s limited flexibility is thus of small comfort to plaintiffs who wish to challenge new state action or those who cannot show the stark statistical disparity the Court envisions. In the wake of the Court’s jurisprudence, legislators have reacted predictably: they “do not make a practice of justifying legislation on the grounds that it will adversely affect groups that have historically been subject to discrimination.”<sup>32</sup> The Court has in turn acknowledged the difficulty it has created, noting that “[p]roving the motivation behind official action is often a problematic undertaking.”<sup>33</sup>

This combination of the Court’s jurisprudence and increased savviness on the part of state actors has proven nearly fatal for plaintiffs seeking relief on the basis of racially disparate impact. The Court has been unwilling to find discriminatory intent in claims as wide-ranging as those involving disparate application of the death penalty,<sup>34</sup> juror selection,<sup>35</sup> and a road closure that disproportionately affected African-American members of a community.<sup>36</sup>

### B. *Moving Beyond the Equal Protection Clause*

This Article will not rehash the already familiar criticisms of the Court’s various holdings in the area of disparate impact. Suffice it to say that the shortcomings of a doctrine requiring proof of discriminatory intent are nearly self-evident.<sup>37</sup> Nor will it delve into the myriad

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30. 118 U.S. 356, 359 (1886).

31. 364 U.S. 339, 340-41 (1960).

32. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135-36 (1997) (“[D]octrines of heightened scrutiny have created incentives for legislators to explain their policy choices in terms that cannot be so impugned.”).

33. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

34. *McCleskey*, 481 U.S. at 292 (rejecting equal protection claim based on racially disparate application of the death penalty).

35. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 361 (1991) (deciding to remove Spanish-speaking jurors on the grounds that they would not consider only the court interpreter’s version of testimony did not violate equal protection).

36. *City of Memphis v. Greene*, 451 U.S. 100, 119 (1981).

37. See, e.g., Siegel, *supra* note 32, at 1136 (“[T]he discriminatory purpose requirement now insulates many, if not most, forms of facially neutral state action from equal protection challenge.”); see also Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J.

criticisms of the Court's equal protection jurisprudence or suggestions for reform of the doctrine governing disparate impact.<sup>38</sup>

The dismay created by *Davis* and its progeny stems largely from three observations about race in America, each of which is empirically verifiable: first, that African Americans are disproportionately affected by laws that burden the poor or the socially disadvantaged, because they are disproportionately poor and socially disadvantaged;<sup>39</sup> second, that most of the racism that remains in America is of the subconscious variety, as opposed to the explicit state-driven Jim Crow variety;<sup>40</sup> and third, that racial inequalities (in a purely numer-

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CRIM. L. 7, 19 (2011) ("The Court has, as a practical matter, closed the door to claims of racial bias in the criminal justice system. It has immunized the new caste system from judicial scrutiny for racial bias, much as it once rallied to legitimate and protect slavery and Jim Crow."); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1066 (2011) ("[T]he Court has largely ignored the history of the moment that produced the Reconstruction Amendments and created a framework for equal protection analysis that all but ensures only a narrow group of discrimination claims will be actionable or succeed."); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977) ("A legislature oblivious to [the] existing stigma of caste will nonetheless reinforce the stigma when it produces racially discriminatory effects through ostensibly 'neutral' legislation."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (describing criticisms of *Davis* as falling into two categories, those who object to the motive requirement and those who argue that racial inequality exists regardless of motive).

38. See, e.g., Lawrence, *supra* note 37, at 324 (proposing new "test to trigger judicial recognition of race-based behavior"); see also Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 960 (1993) (proposing requirement that government justify all facially neutral decision making criteria that have disparate effects); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 491 (2004) (proposing single standard of review for Equal Protection claims); Karst, *supra* note 37, at 52 n.287 (proposing that government take into account principle of equal citizenship and justify racially disproportionate results); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1111 (1978) (arguing government should have to produce credible explanations when confronted with disparate impact); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956 (1989) (proposing rigorous application of intent requirement, as requiring government to act as if it does not know the race of those affected by the decision).

39. See, e.g., Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 557 (1977).

40. There is a whole body of literature, both in legal commentary and in scientific studies, that identifies and explores the phenomenon of unconscious racism. See, e.g., Lawrence, *supra* note 37, at 336-44 (discussing unconscious racism and citing studies); see also IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 19-44, 165-314 (2001) (gathering evidence of disparate treatment in the retail sales of new cars, disparate impact in access to kidney transplantation, and the setting of bail rates); Flagg, *supra* note 38, at 983-85 (gathering studies indicating unconscious racial bias in employment, mortgage lending, retail bargaining, psychiatric diagnoses, and other settings); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995) (discussing unconscious bias in the context of Title VII). A number of scholars have concluded that the Court's disregard for this research has resulted in a

ical sense of the word “inequality”) persist in America regardless of why anyone thinks this may be the case.<sup>41</sup> Much has been written about whether these inequalities constitute inequity, that is, whether they reflect structural or institutional racism, but that conversation is beyond the scope of this Article.<sup>42</sup>

Neither does this Article engage with the question of what should replace the current antidiscrimination framework.<sup>43</sup> Some have answered this question in a purely normative way, with various proposals for the Court to modify or discard pieces of its equal protection jurisprudence.<sup>44</sup> Others have answered this question more descriptively, advocating a particular approach (such as a move to liberty-

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doctrine “that does not reflect prevailing understandings of the ways in which racial or gender bias operates.” Siegel, *supra* note 32, at 1138; cf. Richard Delgado, *Centennial Reflections on the California Law Review’s Scholarship on Race: The Structure of Civil Rights Thought*, 100 CAL. L. REV. 431, 440-41 (2012) (noting the difference between the paradigm of racial liberalism, which believes that racism is not dead and that discrimination can take many forms, and that of racial conservatism). Much has also been made of the Implicit Association Test, which purports to identify and quantify implicit bias, or unconscious racism. See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited June 29, 2014). See, e.g., Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 827 (2012) (discussing unconscious racism in context of jury selection); see also Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235 (2007) (concluding that implicit bias in physicians influences treatment decisions); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 966 (2006) (concluding that “implicit race bias is pervasive and is associated with discrimination against African Americans” that results in disparate impact); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126-27 (2012) (applying science of implicit bias to the courtroom). The premise of this Article does not depend upon the existence or extent of unconscious racism; it merely depends upon the existence and extent of racial inequality.

41. See *infra* Parts III.A.1, III.B.1 & III.C.1.

42. See William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 13 (2012) (“Because of its invisibility, structural racism does its work in the Potemkin village of ‘race-neutral’ policies.”); cf. KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (Vintage Books 1992) (1967) (“Racism is both overt and covert.”); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) (building “a theory of racism that explains organizational activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent”).

43. See Barnes & Chemerinsky, *supra* note 37, at 1084-85 (arguing *Washington v. Davis* should be overturned).

44. See *id.* at 1075; see also John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 427 (2002) (examining the Equal Protection Clause and Civil Rights Act of 1964 through the lens of morality); Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1382 (2005) (arguing that the Equal Protection Clause reflects a commitment to a “new substantive value of ‘non-slavery’ and antisubordination to replace the old values of slavery and white supremacy”).

based claims) and supporting that position with the legal strategies adopted in some cases.<sup>45</sup>

This Article's contention is that reformers on the ground have already replaced the current antidiscrimination framework. They have done so deliberately and steadily over the last several decades, and they have done so with great success. It contends, moreover, that this success is attributable to the fact that reformers no longer overtly identify or describe their work as being explicitly concerned with antidiscrimination, or at least not in their legal pleadings. Reformers have absorbed both the Court's and the culture's discomfort with explicitly race-based claims and have turned instead to combating racial inequality using a different framework and vocabulary altogether.<sup>46</sup>

### 1. *The Interplay of Liberty and Equality-Based Claims*

The complementary nature of liberty and equality-based claims has long been noted.<sup>47</sup> Using *Lawrence v. Texas* as a focal point, Lawrence Tribe described the relationship between these two families of claims with customary aplomb: he speaks of "a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity."<sup>48</sup> *Lawrence*, in Tribe's view, is a case that "presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty."<sup>49</sup>

This Part identifies three overlapping strands in the recent scholarship on liberty- and equality-based claims. The first focuses on a

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45. See *infra* Part II.B.1.

46. In one of the few empirical studies conducted on disparate impact racial discrimination claims, Theodore Eisenberg and Sheri Lynn Johnson express surprise at how few such claims are filed. They state: "The Supreme Court's standard takes its toll not through an unusually high loss rate for those plaintiffs reaching trial or appeal, but by deterring victims from even filing claims." Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1153 (1991). Although this Article focuses largely upon systemic reform cases rather than individual claims, its contention is that rather than being deterred from filing claims at all, victims of this type of racial discrimination have simply found alternatives to the Equal Protection Clause.

47. See, e.g., William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1183 (2000) ("The Due Process Clause secures libertarian protections at the retail (individual) level that are important when the group is socially despised, while the Equal Protection Clause potentially offers minorities wholesale (group) level protection when (or if) the Court recognizes their legitimacy as partners in American pluralist democracy.").

48. Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

49. *Id.*

perceived shift in the Court's jurisprudence driven by a desire to avoid inter-group conflict in an increasingly diverse society. The second describes and advocates in favor of one type of claim as opposed to the other. And the third, "realist" position, takes the position that courts and reformers should simply use whichever claim fits best.

In the first group are Reva Siegel, Kenji Yoshino, and Rebecca Brown. Each of these scholars provides a psychological profile of sorts on the Court. Siegel identifies an antibalkanization perspective on the Court, which is concerned about threats to social cohesion.<sup>50</sup> She contends that moderates on the Court who hold this perspective are willing to:

allow government to engage in race-conscious efforts to integrate, providing that government proceeds in ways that lower the salience of race in its interactions with the public. Antibalkanization . . . is distinctively concerned about the appearance of race-conscious interventions – the risk that race-conscious civil rights interventions will heighten conflict or resentment.<sup>51</sup>

Where Siegel refers to an antibalkanization perspective, primarily in the context of race-based decision making, Yoshino identifies "pluralism anxiety" as being responsible for a larger shift in the Court's jurisprudence "away from traditional group-based identity politics in its equal protection and free exercise jurisprudence."<sup>52</sup> He explores a more general narrative in which equality-based claims writ large (as opposed to liberty-based claims) make the Court nervous, because they force the Court to pick favorites among groups; "[l]iberty claims, in contrast, emphasize what all Americans . . . have in common."<sup>53</sup>

Brown also alludes to the problem of "representation of an increasingly heterogeneous population for which there can be no serious contention that the interest of some is necessarily the interest of all."<sup>54</sup> Instead of an antibalkanization perspective or pluralism anxiety, Brown discusses "the strain of difference:"

[T]he shared sense of values does not exist for everything that all people value. Nor does it exist for the increasing, yet still small, number who may wish to enjoy common freedoms, but in ways

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50. Siegel, *supra* note 10, at 1278.

51. *Id.* at 1357.

52. Yoshino, *supra* note 9, at 755.

53. *Id.* at 796.

54. Brown, *supra* note 11, at 1528.

that can be understood as distinguishable from the manner in which the many enjoy them.<sup>55</sup>

Yoshino and Brown both also participate in the second strand of the conversation, describing and advocating a shift towards liberty-based claims. Yoshino observes that the Court has restricted equality-based claims but opened another avenue for relief, using “liberty analysis to mitigate its curtailment of group-based equality analysis.”<sup>56</sup> Brown also urges a new look at liberty claims, but her analysis is grounded in an understanding of equality as having already been largely attained: “As equality was to the last century, so should liberty be to the next. Equality jurisprudence, after all, has achieved the stunning accomplishment of reconciling a robust judicial enforcement with the demands of democratic constitutional theory.”<sup>57</sup> As Brown and others<sup>58</sup> tell the story, equality claims have largely succeeded while liberty claims have foundered.<sup>59</sup>

Others, such as William Eskridge, would respond that equality-based claims fill a role that liberty-based claims cannot, because they can provide relief for an entire group at a time:

[R]egular equal protection and due process scrutiny might be either interchangeable or interdependent at the *retail level*, that is, in challenges to particular discriminations, especially penalty-based ones. But the Equal Protection Clause alone offers a minority group a potential constitutional jackpot at the *wholesale level*, that is, in challenges to an array of interconnected discriminations in state benefits as well as burdens.<sup>60</sup>

Finally, some scholars take the approach closest to the hearts of litigation-minded reformers: the best type of claim is that which fits your agenda. Richard Delgado, for example, states:

[A]ttention to human needs, problems, deprivation, and flourishing may proceed under one of two banners, individual rights or equal

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55. *Id.* at 1531; see also Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 908-09 (2011) (“Equality norms can be framed and vindicated in a more palatable, legally tenable form, and tied to other interests to appeal more widely and ameliorate estrangement in a polarized polity.”).

56. Yoshino, *supra* note 9, at 776.

57. Brown, *supra* note 11, at 1492.

58. See, e.g., Carlos A. Ball, *Why Liberty Judicial Review Is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1, 3-4 (2011) (identifying the roots of the liberty/equality binary as a “legitimacy disparity” between the two, wherein judicial review founded on equality principles is lauded, as in the case of *Brown v. Board of Education*, 347 U.S. 483 (1954), but review founded on liberty principles is suspect, as in the case of *Roe v. Wade*, 410 U.S. 113 (1973)).

59. Brown, *supra* note 11, at 1494.

60. Eskridge, *supra* note 47, at 1216.

protection. Both approaches aim at the same goal, both result in heightened judicial scrutiny, and the choice to proceed under one banner or the other is largely a matter of tactics, ideological commitment, or perceived public sentiment.<sup>61</sup>

Each of these scholars has contributed invaluable and groundbreaking insight on the dynamic interplay between liberty and equality claims, and each offers a unique and valuable perspective on recent developments in that dynamic. Siegel provides a pinpoint identification of the problem that reformers concerned with racial equality confront, not just before the Supreme Court, but also in lower courts and in the court of public opinion: race continues to matter, but state actors (like school administrators) must pretend it does not. Yoshino and Brown provide a compelling description of the shift in the Court's jurisprudence away from equality-based claims. Delgado's work resonates with reformers on the ground who will gladly adopt any claim that serves their purposes. And Eskridge offers us a powerful reminder that structural problems demand structural solutions—solutions that are wholesale, not retail.

To this important body of literature, this Article offers several insights. First, critical work remains to be done, even when it comes to the most basic of equalities. Second, there is a rich world beyond the binary of liberty- and equality-based claims to help tackle that work. And third, reformers on the ground are already making use of a multitude of strategies to address racial disparity.

## 2. *Moving Beyond Liberty/Equality to Achieve Equal Protection*

This Article urges a return to the conversation about claims for racial equality, which remain salient in the national discourse but often are no longer identified as such by their proponents. The inclination to move beyond race is visible on several fronts: in society, in the Court's decisions, and within the academy. Thus, the debate over affirmative action is at once avoidant of race and yet indelibly stamped by it, taking place against the backdrop of a Court and society that increasingly seems to believe—rightly or wrongly—that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>62</sup> Most contemporary academic

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61. Delgado, *supra* note 40, at 450.

62. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007); *c.f.* Barnes & Chemerinsky, *supra* note 37, at 1064 (“Substantive racial equality clearly mattered to the Court once.”).

commentary on equal protection has, in turn, moved away from race and towards gay rights and same-sex marriage in particular.<sup>63</sup>

This Article contends that the discussion about equal protection is a richer one when informed by the traditional, racial underpinnings of the Equal Protection Clause. We must be careful, both as a society and an academy, not to be too quick to leave race behind. From a purely empirical perspective, race indisputably still matters.<sup>64</sup> But even more importantly, the scope of protection afforded under the Equal Protection Clause should matter not just to the old groups already under its ambit, but also to new groups seeking to join. Membership in the club might be less valuable if the benefits are not as extensive as one had assumed.

A return to the academic and social conversation about racial equality is not the same as a return to explicitly race-based claims in litigation; indeed, the primary descriptive insight this Article contributes is that such claims are largely doomed to fail.<sup>65</sup> But this refusal to revisit a doctrinal dead-end from a litigation standpoint is not an endorsement of a “post-racial” society.<sup>66</sup> Kimberlé Williams

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63. See, e.g., Katie R. Eyer, *Marriage This Term: On Liberty and the “New Equal Protection”*, 60 UCLA L. REV. DISCOURSE 2, 6 (2012) (arguing the LGB movement should continue to root its claims in equality, as opposed to liberty); Yoshino, *supra* note 9, at 778 (centering his claim that equality-based claims are giving way to liberty-based claims by citing *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)). Not coincidentally, gay marriage is on the Court’s mind as well. See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (holding proponents of California’s Proposition 8 did not have standing to appeal district court’s order finding the proposition unconstitutional).

64. See *supra* notes 39-42 and accompanying text. Racial inequality is unlikely to disappear anytime soon, and the sordid history of race in America will likely continue to manifest itself in differentiation between legislation with racial impact and legislation with impact on minorities of other types. See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1303 (1982) (“In contrast to the deep societal roots of governmental action against Blacks—the close fit between private terror, public discrimination, and political exclusion, directed against Blacks for a century—action against other minorities has usually been sporadic, transitory, and local.”); see also *id.* at 1308 (“[T]he apparently neutral structural characteristics of the Constitution had never been neutral concerning race.”). Further, although the Court’s holdings have adversely affected the ability of other groups to bring disparate impact claims, such as those based upon gender inequalities, nowhere has the effect been greater than on claims involving racial disparity.

65. Cf. Barnes et al., *supra* note 5, at 1000 (urging a change in “the way in which equality advocates frame the discussion” to “shift the underlying premise of equality arguments from a compensatory to a distributive justice rationale”); Fan, *supra* note 55, at 909 (arguing that “alternate approaches [to equality-based claims] must enfold antidiscrimination concerns and norms into the analysis rather than altogether elide address of the concerns”). This Article contends that successful reformers have avoided this strategy because it would defeat the purpose. They have, in other words, already reframed the discussion, and the new frame has nothing whatsoever to do with racial equality.

66. Cf. Crenshaw, *supra* note 15, at 1313-46 (describing and critiquing the phenomenon of post-racialism).

Crenshaw offers a powerful critique of the strategies described herein in a variation of the adage: “The master’s tools will never dismantle the master’s house.”<sup>67</sup> Crenshaw criticizes not just the concept of post-racialism, the idea that race no longer matters in our society, but also the “post-racial pragmatism . . . that urges scaling racial obstacles while declining to name them.”<sup>68</sup> She argues that such pragmatism entraps racial justice advocates and constituencies; silences racial justice advocacy; threatens to make the racial disparities described in this Article “unremarkable features of the post-racial world;” and renders civil rights advocates “yesterday’s news—irrelevant, delusional and unsophisticated.”<sup>69</sup>

In a similar vein, Michelle Alexander thoroughly documents the racial disparity in America’s mass incarceration, which she describes as “the New Jim Crow.”<sup>70</sup> Alexander criticizes the reform response to this phenomenon on several fronts: for being insufficient in scale and scope; focusing overly on litigation instead of grassroots reform; and considering race-neutral grounds for reform.<sup>71</sup> Specifically, Alexander argues, “The prevailing caste system cannot be successfully dismantled with a purely race-neutral approach.”<sup>72</sup> She notes that “opportunities for challenging mass incarceration on purely race-neutral grounds have never been greater,” but urges racial justice advocates not to take the “tempting bait.”<sup>73</sup>

This Article’s response to these powerful and persuasive criticisms is grounded more in *realpolitik* than ideology. While Alexander is undoubtedly correct that racial inequality will not be eradicated with any single lawsuit or legal strategy, litigation will continue to play an important role and litigators must take notice of doctrinal reality. Rather than cede the notion of the “reigned in” and narrowed “field of contestation” that Crenshaw depicts, reformers have broadened the legal grounds on which to fight.<sup>74</sup> They would surely agree that “there

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67. AUDRE LORDE, *SISTER OUTSIDER* 112 (rev. ed. 2007).

68. Crenshaw, *supra* note 15, at 1332.

69. *Id.* at 1327-1340. Reformers may find themselves stuck between a rock and a hard place in the academic commentary. Richard Thompson Ford criticizes those who perhaps belong to an older school for which Crenshaw may feel nostalgia. See RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* 24-25, 27 (2011) (“Civil rights have effectively ‘occupied the field’ of social justice, crowding out alternative ways of thinking and new solutions. . . . The civil rights tradition encourages us to look at disputes through a lens that is designed to focus on discrimination.”).

70. ALEXANDER, *supra* note 2.

71. *Id.* at 225-39.

72. *Id.* at 239.

73. *Id.*

74. Crenshaw, *supra* note 15, at 1343.

are limits to the degree that racial justice can be finessed,”<sup>75</sup> but the fight for racial justice is not over, and the advocates who continue to wage the fight are far from irrelevant, delusional, or unsophisticated in their tactics. For example, they are engaged in active battles over the school-to-prison pipeline and the disproportionate impact of the mortgage foreclosure crisis—two of the areas of racial disparity Crenshaw worries will become “unremarkable features of the post-racial world.”<sup>76</sup>

Civil rights advocates do not have the luxury of ignoring equal protection doctrine post-*Washington v. Davis*, which has essentially reified the concept of post-racialism in the courtroom; but neither have they walked away from the challenge.<sup>77</sup>

### III. THE NEW RACIAL JUSTICE

This Part begins the descriptive project of identifying and analyzing the ways in which reformers have begun to combat racial inequality without resort to the Equal Protection Clause.<sup>78</sup> I have identified three main areas in which they have done so, each of which serves to illuminate two larger groups of claims, one having to do with the nature of the right being vindicated and the other having to do with the nature of the disproportionate impact. The claims range from those rooted in the specific enumerations of the Bill of Rights to those that stem from the federalist structure of our legal system. The nature of the disproportionate impact addressed by these claims is similarly wide-ranging, from that which is caused with no explicit racial ani-

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75. *Id.* at 1346.

76. *Id.* at 1337-40.

77. 426 U.S. 229 (1976). The civil rights movement has a long history of pragmatism, dating back to *Plessy v. Ferguson*, which was brought as a test case by reformers who presented the Court with a plaintiff who was seven-eighths white. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); see also, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (bringing gender discrimination claim on behalf of men); *Frontiero v. Richardson*, 411 U.S. 677, 681-82 (1973) (same).

78. Others have written about circumventing the intent requirement to vindicate racial inequality, most notably in the area of environmental law. See, e.g., Julie H. Hurwitz & E. Quita Sullivan, *Using Civil Rights Laws to Challenge Environmental Racism: From Bean to Guardians to Chester to Sandoval*, 2 J.L. SOC'Y 5, 9-10 (2001); Suzanne Smith, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B.U. PUB. INT. L.J. 223, 249-50 (2002) (discussing administrative proceedings and private rights of action under section 602 of Title VI as possible alternatives to using the Equal Protection Clause to seek redress); Sandra L. Geiger, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. J.L. & SOC. PROBS. 201, 204 (1998); see also, e.g., Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 LAW & INEQ. 1, 4 (1992) (discussing statutory alternative to equal protection challenges on behalf of battered women); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (discussing equal protection challenges to racially biased decisions to prosecute).

mus, to that which nears explicit racial bias, but falls short of the Supreme Court's definition of discriminatory intent.

The first group of claims in Part III.A, indigent defense reform, represents not only those claims that implicate other explicitly enumerated constitutional rights, such as ones involving the criminal justice system and criminal procedure, but also claims in which any other enumerated constitutional right (other than equal protection) is at stake. These cases also serve to inform a discussion of disproportionate impact that stems purely from the economics of poverty, with no evidence of explicit animus.

The second constellation of claims in Part III.B, having to do with efforts to redress the school-to-prison pipeline, stand in for claims implicating statutory as opposed to constitutional rights, and claims in which the source of the disproportionate impact is perhaps less clear. These are claims for which the Equal Protection Clause might have held some promise in the absence of a discriminatory intent requirement, that is, where there is ample statistical evidence of racial disparity in treatment and perhaps some evidence of intent, but not enough to meet the requirements laid out in *Arlington Heights*.

Finally, Part III.C turns to immigration-related claims, challenges to state and local regulations directed at undocumented workers, or so-called "illegal immigrants." This group of claims represents structural interests beyond enumerated individual rights, such as the separation of powers. This group of claims also involves disproportionate impact in which racial animus likely plays a role but falls short of the explicit discriminatory intent the Court demands.

#### A. *Indigent Defense Reform, Other Constitutional Rights, and Purely Disproportionate Impact*

The problems that plague the state public-defense systems in this country are not new; much has been written to catalog them and this Article will take them as a given.<sup>79</sup> This Part uses public defense reform as a lens through which to view a particular type of racial justice claim: those that implicate criminal procedure, or more broadly,

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79. See, e.g., NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12-24 (2011), available at [www.americanbar.org/content/dam/aba/publications/books/ls\\_scl\\_aid\\_def\\_securing\\_reasonable\\_caseloads\\_supplement.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_scl_aid_def_securing_reasonable_caseloads_supplement.pdf); NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 49-101 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>; Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 447-50 & nn.20-39 (2010).

those for which a constitutional guarantee other than equal protection applies. This analysis is also intended to shed light on the fight against other similar problems that attend our criminal justice system as a whole.

### 1. *The Disparate Impact*

Although problems with state public defense systems do not solely affect people of color—and in some jurisdictions may not even primarily affect people of color—the effects of poorly functioning systems across the U.S. are disproportionately borne by people of color. First, problems with public defense systems are by definition borne by the poor, and greater percentages of African Americans and Hispanics live below the poverty line than do whites.<sup>80</sup> Second, all aspects of the criminal justice system disproportionately affect people of color and African-American men in particular.<sup>81</sup> Finally, statistical evidence indicates that a higher percentage of incarcerated African Americans and Hispanics had publicly appointed counsel than whites.<sup>82</sup>

This Part will assume that there is generally no evidence of racial animus in state and local government decisions to underfund or otherwise neglect their public defense systems, and certainly no evidence of discriminatory intent that rises to the level required by *Arlington Heights*. In other words, traditional equal protection

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80. DENAVAS-WALT ET AL., *supra* note 4, at 8-9. In 2011, the percentages of those below the poverty line were 9.8% for non-Hispanic whites, 27.6% for blacks, and 25.3% for Hispanics. *Id.* at 14.

81. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-73 (2004) (discussing the “community-level harms” that flow from “grossly disproportionate” rates of incarceration of African-American men); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 7 (2008) (surveying the empirical literature on the disproportionate burdens facing people of color in arrests, conviction, and sentencing, concluding that “political and ideological exigencies of the last quarter century have conduced to the adoption of crime control policies of unprecedented severity, the primary burdens of which have been borne by disadvantaged blacks (and, increasingly, Hispanics)”; Katherine J. Rosich, *Race, Ethnicity, and the Criminal Justice System*, AM. SOC. ASS’N 2-3 (Sept. 2007), <http://www.asanet.org/images/press/docs/pdf/ASARaceCrime.pdf> (surveying social science research on race and crime and identifying numerous areas of racial disparity); see also Alexander, *supra* note 37, at 18-19 (“Law enforcement officials are largely free to discriminate on the basis of race today, so long as no one admits it. That’s the key.”).

82. “While 69% of white state prison inmates reported they had lawyers appointed by the court, 77% of blacks and 73% of Hispanics had publicly financed attorneys. In federal prison black inmates were more likely than whites and Hispanics to have public counsel: 65% for blacks, 57% for whites and 56% for Hispanics.” *Indigent Defense Systems*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=28#defendants> (last visited June 29, 2014); see also CAROLINE WOLF HARLOW, U.S. DEP’T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES 9 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

claims to challenge this particular type of state action (or inaction) are foreclosed.

## 2. *The Reform Response*

Despite the lack of availability of traditional equal protection claims, indigent defense reform has been a veritable hotbed of litigation and other activity over the last decade, and a number of the lawsuits have been filed by organizations explicitly dedicated to racial justice.<sup>83</sup> For many, the connection between the pursuit of indigent defense reform and racial justice is explicit: “[T]he disproport-

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83. See, e.g., *Duncan v. State*, 784 N.W.2d 51, 53 (Mich. 2010), *vacated*, 790 N.W.2d 695 (2010) (alleging indigent criminal defendants are being denied their right to counsel and “effective assistance of counsel,” filed by the ACLU’s Racial Justice Project); *White v. Martz*, No. CDV-2002-133, 2006 Mont. Dist. LEXIS 136, at \*1 (Mont. Dist. Ct. Jan. 25, 2006) (alleging public defender programs in Montana counties lack the resources to provide statutorily and constitutionally adequate representation of indigent clients, filed by the ACLU’s Racial Justice Project); *Hurrell-Harring v. State*, 930 N.E.2d 217, 232 (N.Y. 2010) (alleging a claim for ineffective counsel of indigent criminal defendants, filed by the New York Civil Liberties Union); Brief for NAACP Legal Defense and Educational Fund, Inc. as Amici Curiae Supporting Appellants, *Richmond v. Dist. Court of Md.*, No. 24-C-06-009911 CN, 2007 WL 5446238 (Cir. Ct. Md. Dec. 7, 2007); see also SARAH GERAGHTY & MIRIAM GOHARA, ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS 6-8 (2003), available at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/download/s/sclaid/indigentdefense/ms\\_assemblylinejustice.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/download/s/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf). The Brennan Center for Justice at NYU School of Law has also identified indigent defense reform as a focus within the area of “racial justice.” *Racial Justice*, BRENNAN CTR. FOR JUST., [http://www.brennancenter.org/content/section/category/racial\\_justice/](http://www.brennancenter.org/content/section/category/racial_justice/) (last visited June 29, 2014); see also Brief for Brennan Center et al. as Amici Curiae Supporting Appellees, *DeWolfe v. Richmond*, 76 A.3d 1019 (Md. 2013) (No. 24-C-06-009911 CN), 2011 WL 4585691; Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Appellees, *DeWolfe v. Richmond*, 76 A.3d 1019 (Md. 2013) (No. 24-C-06-009911 CN), 2011 WL 4585691; Brief for Brennan Center et al. as Amici Curiae Supporting Appellees, *Duncan v. State*, 784 N.W.2d 51 (Mich. 2010) (No. 07-242-CZ), 2011 WL 4585691; Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Appellees, *Duncan v. State*, 784 N.W.2d 51 (Mich. 2010) (No. 07-242-CZ), 2011 WL 4585691; Brief of Former Prosecutors Michael A. Battle et al. as Amici Curiae Supporting Appellants, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (No. 2010-0066), 2010 WL 1775135. In a 2008 report, the Brennan Center discussed guidelines to determine eligibility for publicly appointed counsel. DAVID UDELL ET AL., BRENNAN CTR. FOR JUST., ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL 5-26 (2008), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>; see also THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CTR. FOR JUST., *GIDEON* AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 8-9 (2013), available at [http://www.brennancenter.org/sites/default/files/publications/Gideon\\_Report\\_040913.pdf](http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf). The Charles Hamilton Houston Institute for Race & Justice at Harvard Law School has a project entitled “MyGideon,” designed to provide resources to indigent and capital defense attorneys. *MyGideon*, THE CHARLES HAMILTON HOUS. INST. FOR RACE & JUST., HARV. L. SCH. (July 26, 2012), <http://www.charleshamiltonhouston.org/portfolio/my-gideon/>; see also Catherine V. Beane, *Indigent Defense: Separate and Unequal*, CHAMPION, May 2004, at 54, 55 (“NACDL’s Indigent Defense Committee welcomes your suggestions on ways that we can better address racial justice issues and the disproportionate impact that inadequate indigent defense has on communities of color.”).

tionate presence of racial minorities among the indigents relying on public defender services reinforces the need to ensure that all defendants receive competent representation, else the criminal justice system will create further disparities in treatment of persons of different races.”<sup>84</sup>

And yet no mention of racial justice is made in the reform work itself; the legal documents filed rely almost exclusively upon the guarantees of the Sixth Amendment. This Part will focus upon some of the most recent developments in this area and highlight the successes reformers have had in a variety of cases with different procedural postures.<sup>85</sup>

First, advocates have continued to file classic class action suits that seek wholesale reform at the state or county level. Litigation of this type builds upon successes like the statewide public defense system implemented by Montana in response to an ACLU lawsuit.<sup>86</sup> These claims typically request injunctive and declaratory relief on behalf of a class of indigent criminal defendants, alleging that the public defense systems in question are inadequately resourced and supervised.<sup>87</sup>

Litigation seeking state-wide reform was most recently successful in Michigan, where a suit filed by the ACLU in 2006 resulted in passage of a bill that created a public defense commission tasked with collecting data and implementing standards.<sup>88</sup> Similar litigation is

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84. Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 *LAW & CONTEMP. PROBS.* 81, 93 (1995).

85. The increase in litigation and other reform activity in this area has been so vast that this Article will not even attempt a comprehensive review. There have been a number of non-litigation successes as well, however, and they too have not resorted to explicit claims of racial injustice. *See, e.g.*, Order, In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases (Nev. 2008) (ADKT No. 411) (implementing comprehensive performance standards); H.R. 483, 51st Leg., 1st Sess. (N.M. 2013) (creating independent public defense commission in New Mexico); H.R. 147, 62d Leg., 1st Reg. Sess. (Idaho 2013) (establishing presumptive indigency guidelines in Idaho); H.R. 148, 62d Leg., 1st Reg. Sess. (Idaho 2013) (prohibiting attorneys from serving as both lawyer and guardian ad litem for children); H.R. 149, 62d Leg., 1st Reg. Sess. (Idaho 2013) (preventing juveniles from making uninformed waivers of counsel); Texas Fair Defense Act, S.B. 7, 77th Leg., Reg. Sess. (Tex. 2001), 2001 Tex. Gen. Laws 1800-01 (codified as amended at TEX. CODE. CRIM. PROC. ANN. art. 1.051 (West 2004)) (providing for state funding, requiring minimum standards in counties, guaranteeing access to necessary and sufficient support services for attorneys, and creating centralized data collection system in Texas).

86. *White*, 2006 Mont. Dist. LEXIS 136, at \*5.

87. Amended Complaint at 5, *White v. Martz*, No. CDV-2002-133, 2006 Mont. Dist. LEXIS 136 (Mont. Dist. Ct. Apr. 1, 2002).

88. Michigan Indigent Defense Commission Act, Act No. 93, 2013 Mich. Pub. Acts 53. The author worked on this litigation while at the Brennan Center for Justice, and subsequently at the ACLU.

still pending in New York.<sup>89</sup> Advocates filed suit in Georgia<sup>90</sup> and entered into a consent decree that revised the procedures for responding to requests for conflict-free appellate counsel, provided for additional full-time staff attorneys and workload controls for the appellate division of the public defender office, monitoring of contract attorneys working for the appellate division, and data collection.<sup>91</sup> County or municipality-based lawsuits are pending in Washington,<sup>92</sup> Texas,<sup>93</sup> Georgia,<sup>94</sup> and Pennsylvania.<sup>95</sup> Not one of these lawsuits includes a federal equal protection claim.

Second, some public defenders have successfully brought suits themselves, seeking to limit their own caseloads. These cases have a more mixed record than the prototypical class actions described above and some have yet to play out fully, but they remain a type of claim tethered to the Sixth Amendment that reformers may consider.<sup>96</sup> The Florida Supreme Court recently found in favor of the Miami-Dade County Public Defender's Office's right to move to decline appointment in future cases due to excessive caseloads.<sup>97</sup> Similarly, a suit filed by the Public Defender of Mojave County, Arizona, resulted in a ruling that permitted the office to withdraw from thirty-nine cases, and warned the county that future motions to withdraw would also be granted "until the court is convinced that the reasons for do-

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89. *Hurrell-Harring v. New York*, 914 N.Y.S.2d 367, 372 (N.Y. App. Div. Jan. 6 2011) (reversing lower court's denial of class certification and granting class certification).

90. Petition for Writ of Mandamus and Verified Complaint for Injunctive and Declaratory Relief, *Flournoy v. Georgia*, No. 2009CV178947 (Ga. Super. Ct. Dec. 15, 2009), 2009 WL 8728189 (seeking relief on behalf of class represented by state public defenders office's appellate division).

91. Consent Decree, *Flournoy v. Georgia*, No. 2009CV178947 (Ga. Super. Ct. Mar. 12, 2012), 2012 WL 5885196.

92. Order Denying Defendants' Motions for Summary Judgment and Plaintiffs' Motion for Preliminary Injunction, *Wilbur v. City of Mt. Vernon*, No. C11-1100RSL (W.D. Wash. Dec. 4, 2013), 2012 WL 600727; see also *Best v. Grant Cty.*, No. 04-2-00189-0 (Super. Ct. Wash. Aug. 26, 2004).

93. *Heckman v. Williamson Cty.*, No. 10-0671, slip op. at 2-3 (Tex. June 8, 2012) (seeking relief on behalf of class facing misdemeanor charges).

94. Verified Complaint at 4, 14, *Cantwell v. Crawford*, No. 09EV275M (Ga. Super. Ct. Apr. 7, 2009), 2009 WL 1043789 (seeking relief on behalf of class charged with felony offenses in five counties in Georgia).

95. Class Action Complaint, *Flora v. Luzerne Cty.*, No. 2072 CD 2013 (Pa. Commw. Ct. Apr. 10, 2012).

96. For a general discussion of this type of litigation and for specific information about these cases, see LEFSTEIN, *supra* note 79, at 161-90.

97. Pub. Defender, *Eleventh Jud. Cir. of Fla. v. State*, 115 So. 3d 261, 274 (Fla. 2013) (noting the court is "reaffirm[ing] that aggregate/systemic motions to withdraw are appropriate in circumstances where there is an office-wide or wide-spread problem as to effective representation").

ing so no longer exist.”<sup>98</sup> But relief was denied to defenders seeking relief in New Orleans<sup>99</sup> and Knoxville.<sup>100</sup> And although the Missouri Public Defender Commission fought successfully for the right to limit the caseloads of its attorneys,<sup>101</sup> a bill introduced in the 2013 legislative session sought to resolve the caseload problem by privatizing services for all non-serious felony cases through low-bid contracts.<sup>102</sup>

Claims brought by public defenders based explicitly upon a disparate impact theory under the Equal Protection Clause have not met with success at all, however. In Idaho, for example, contract attorneys filed suit against a county for breach of contract when the county sought to terminate their contract. The attorneys included an equal protection claim, alleging that the county’s attempts to jettison its contract with them in favor of a low-bid contract would have a disproportionate impact on Idaho’s racial minorities because 20% of Idaho’s racial minorities and 25% of Idaho’s total Hispanic population reside in the county in question.<sup>103</sup> Their claim was denied.<sup>104</sup>

Finally, advocates of improved public defense services have had notable success before the Supreme Court. The Court has continually expanded entitlement to counsel under the Sixth Amendment, requiring in recent years, for example, the appointment of counsel at pretrial interrogations<sup>105</sup> and in misdemeanor cases where there is a substantial likelihood of incarceration.<sup>106</sup> The Court has also recently held that failure to communicate a plea offer to a defendant constitutes deficient performance by counsel under the Sixth Amendment and that defendants may be prejudiced by counsel’s deficient performance in recommending that a plea offer be rejected.<sup>107</sup> Although none of these cases are systemic reform cases (each is a claim for post-conviction relief on behalf of a particular defendant); the last two cases, *Missouri v. Frye* and *Lafler v. Cooper*, are not public defense cases at all. Each will have a salutary effect on racial justice, as

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98. *Arizona v. Lopez*, No. CR-2007-1544, slip op. at 9-10 (Mohave Cnty. Sup. Ct. Dec. 17, 2007).

99. *Loisiana v. Edwards*, No. 2007-K-639 (La. Ct. App. Aug. 16, 2007).

100. Petition for Writ of Certiorari, *In re* Pet. of Knox Cnty. Pub. Defender, No. 174552-C (Tenn. Knox Cnty. Ch. Ct. Mar. 9, 2009).

101. *State ex rel. Mo. Pub. Defender Comm’n v. Pratte*, 298 S.W.3d 870, 887 (2009).

102. H.B. 215, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

103. Complaint for Declaratory and Injunctive Relief at \*4, *Wiebe & Fouser, P.A. v. Idaho*, No. CV09-4413-C, 2009 WL 3072841 (Dist. Ct. Apr. 24, 2009).

104. *Wiebe & Fouser, P.A. v. Idaho*, No. CV-2009-4413-C, 2009 WL 2980444, at \*1 (Dist. Ct. July 31, 2009).

105. *Kansas v. Ventris*, 556 U.S. 586, 590 (2009).

106. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

107. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

reflected by a number of the amicus briefs submitted by various public interest organizations.<sup>108</sup> Again, however, nowhere is the Equal Protection Clause mentioned in the actual legal claims.

### 3. *Beyond Public Defense Reform—Lessons for Other Claims*

Each of the success stories in public defense reform has made a real difference for the millions of people of color caught up in the criminal justice system, with nary a mention of racial justice or equal protection. Of the claims described in this Article, these are perhaps closest in temperament to the “liberty-based” claims Yoshino describes and prescribes, as they seek to vindicate a right (to counsel) functionally denied to some by relying on the universality of the right’s guarantee to all.

The Bill of Rights has held great promise for other areas in which notable racial disparity exists. For example, capital defense reform, a close cousin of public defense reform, has also benefited enormously from the tactics described above.<sup>109</sup> The disparate racial impact of the death penalty is clear. The current death row population is 41% black and 43% white.<sup>110</sup> Of the defendants executed in the United States since 1976, 35% were black and 56% were white.<sup>111</sup> And infamously, the racial disparity when it comes to victims of crimes for which the death penalty was inflicted is even starker: 15% of the victims were black, compared to 77% who were white.<sup>112</sup>

Despite the racial disparity, perhaps nowhere are claims based on disparate impact under the Equal Protection Clause more plainly foreclosed. The Supreme Court dealt explicitly with the issue in

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108. See, e.g., Brief for the Constitution Project as Amicus Curiae in Support of Respondents at 19, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (No. 10-209), *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (No. 10-444) (arguing the following as its second ground on appeal: “Because Indigent Defendants Plead Guilty At An Even Higher Rate Than Others, Petitioners’ Proposed Standard For Prejudice Would Deprive Most Indigent Defendants Of Full Protection Under The Sixth Amendment”); Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Respondents, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (No. 10-209), *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (No. 10-444).

109. Capital defense reform is understood to encompass an array of projects, including the following: elimination of the death penalty, whether wholesale or piecemeal; improvements in legal representation for those facing the death penalty, including the implementation of standards governing who may represent those facing capital charges; and direct representation.

110. *Race of Death Row Inmates Executed Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#defend> (last visited June 29, 2014).

111. *Id.*

112. See *id.* Similarly, 19 white defendants were executed for murdering one or more black victims, while 257 black defendants were executed for murdering one or more white victims. *Id.*

*McCleskey v. Kemp*, finding that statistical evidence that the death penalty was imposed far more frequently on black defendants who killed white victims than on white defendants who killed black victims, even after controlling for a number of other factors, was insufficient to demonstrate a violation of the Equal Protection Clause.<sup>113</sup> The Court held that in order for McCleskey to prevail on his claim, he “would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”<sup>114</sup> Such evidence, of course, would be virtually impossible to come by.<sup>115</sup>

McCleskey also raised an Eighth Amendment issue. But in contrast to the use of rights other than those associated with equal protection that this Article advocates, his claim was doomed because it was premised on the same racial disparity he sought to address with the equal protection claim: he argued that the statistical evidence of racial disparity in the imposition of the death penalty made the death penalty “cruel and unusual” as applied to him.<sup>116</sup> The successful strategies this Article explores are based instead on assertions of rights wholly independent of racial disparity challenges.

Death penalty abolitionists and racial justice advocates have succeeded in continually chipping away at the death penalty—and its attendant racial disparities—through the Eighth Amendment. In *Atkins v. Virginia*,<sup>117</sup> the Court agreed that imposing the death penalty upon the intellectually disabled constitutes “cruel and unusual punishment” for Eighth Amendment purposes.<sup>118</sup> The Court premised its holding on “the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty” and noted also that “some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”<sup>119</sup> According to the Death Penalty Information Center, the United States executed forty-four defendants with intellectual disa-

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113. 481 U.S. 279, 297-99 (1987).

114. *Id.* at 298.

115. *Cf.* *United States v. Armstrong*, 517 U.S. 456, 458 (1996) (denying request for discovery in selective prosecution claim based on disparate racial impact between prosecutions for crack cocaine and powder cocaine because respondents “failed to show that the Government declined to prosecute similarly situated suspects of other races”).

116. *McCleskey*, 481 U.S. 297.

117. 536 U.S. 304 (2002).

118. *Id.* at 321.

119. *Id.* at 317.

bilities between 1984 and 2002.<sup>120</sup> Thirty-two percent of those were white, 62% were black.<sup>121</sup>

Similarly, in *Roper v. Simmons*,<sup>122</sup> the Court held that the Eighth Amendment forbids “imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”<sup>123</sup> In so holding, the Court noted the diminished culpability of juveniles and stated “retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”<sup>124</sup> According to the Death Penalty Information Center, as of the end of 2004 (when *Simmons* was decided) there were seventy-one people on death row for crimes committed as juveniles.<sup>125</sup> Sixty-four percent were people of color;<sup>126</sup> 41% were black, and 34% were white.<sup>127</sup> And, in a set of statistics that would be familiar to McCleskey, 71% of the victims whose race was known were white and 28% were black.<sup>128</sup>

Reformers seeking to address racial disparity in public defense—and the criminal justice system more generally—have found success pursuing claims under other provisions of the Bill of Rights, as long as those claims are founded in the “liberty” strand of doctrine described above, premised on rights held by all rather than the denial of a right to some.<sup>129</sup> Those who have made the greatest strides in

120. *List of Defendants with Mental Retardation Executed in the United States*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states> (last visited June 29, 2012) (citing Denis Keyes et al., *People with Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed*, 40 MENTAL RETARDATION 243, 243-44 (2002)).

121. *Id.*

122. 543 U.S. 551 (2005).

123. *Id.* at 578.

124. *Id.* at 571.

125. *Juvenile Offenders Who Were on Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/juvenile-offenders-who-were-death-row#streiboverview> (last visited June 29, 2012) (citing VICTOR L. STREIB, *THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY, 1, 1973 - APRIL 31, 2004* (2004), available at <http://www.internationaljusticeproject.org/pdfs/JuvDeathApril2004.pdf>).

126. *Id.*

127. *Id.*

128. *Id.*

129. This reform work does not even include the on-going effort on behalf of the wrongfully convicted to pursue exonerations largely on the basis of DNA evidence via state statutory claims and federal and state habeas petitions. Poor lawyering at the trial level is frequently implicated. The Innocence Project, perhaps the most well-known of the organizations pursuing exonerations on behalf of the wrongfully convicted, explicitly identifies “bad lawyering” as one of the six potential causes of wrongful convictions, *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/>

ensuring the provision of adequate counsel to the people of color most gravely affected by shortcomings in our indigent defense system and who have succeeded in protecting the most vulnerable from a death penalty system riddled with disparate impact, have done so without reference to race. There is every reason to believe that the reformers tackling the next frontiers in this type of claim, such as the problem of mass incarceration in our society, can and will do the same.<sup>130</sup>

*B. School-to-Prison Pipeline, Statutory Claims, and Unconscious Bias*

The “school-to-prison-pipeline”<sup>131</sup> is a term used by advocates, scholars, and reformers to describe the phenomenon by which children are funneled out of the educational system and into the criminal

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(last visited June 29, 2014), and notes, “Improving resources for public defense and ensuring the proper training and oversight of all defense lawyers can prevent wrongful convictions.” William Fleener, Staff Att’y, Cooley Innocence Project, *Testimony to the Indigent Defense Advisory Commission*, MICH. CAMPAIGN FOR JUST. (Dec. 16, 2011), <http://www.michigancampaignforjustice.org/docs/Fleener%20Testimony%20to%20the%20Indigent%20Defense%20Advisory%20Commission%20final.doc>; see also SAMUEL R. GROSS & MICHAEL SHAFFER, NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012 42 (2012), available at [http://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) (“For 104 exonerations, our information includes clear evidence of severely inadequate legal defense, but we believe that many more of the exonerated defendants – perhaps a clear majority – would not have been convicted in the first instance if their lawyers had done good work.”).

And the racial disparity being addressed is undeniable. According to the National Registry of Exonerations, 1040 people had been exonerated as of the date of this Article. *About the Registry*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited June 29, 2014). Of 802 crimes for which the race of the defendant was known, 50% of the exonerees were black and 38% were white. See GROSS, *supra* note 129, at 31 (noting “[i]t’s no surprise that black defendants are heavily overrepresented among exonerees: they are heavily overrepresented among those arrested and imprisoned for violent crimes and drug crimes. But the disproportions we see are greater than what one would expect.”). The racial disparities were even greater for sexual assault (63% black versus 32% white), attempted murder (59% black versus 12% white), robbery (64% black versus 18% white), and drug crimes (60% black versus 10% white). See *id.*

130. This is not to say that claims based upon the Equal Protection Clause or disparate impact are dead altogether. The recent challenges to the New York City Police Department’s “stop and frisk” policies and practices, for example, combine classic liberty claims under the Fourth Amendment with equal protection (and an array of common law tort) claims. Complaint at 4, 48-49, *Ligon v. City of N.Y.*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013) (No. 12 Civ. 2274 (SAS)), 2012 WL 1031760; Complaint at 2, 40, 42, 50, *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) (No. 10 Civ. 0699 (SAS)), 2010 WL 9937605; Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages at 2, 34, 36, 42, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012) (No. 08 Civ. 01034 (SAS)); see also Opinion and Order at 6, *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012) (No. 08 Civ. 01034 (SAS)) (noting that 2.8 million people were stopped between 2004 and 2009 and that over 52% of those stops were of blacks, 31% were of Latinos, and 10% were of whites).

131. This phenomenon is also sometimes referred to as “schoolhouse to the jailhouse.”

justice system.<sup>132</sup> The funneling effect of the pipeline can take place at any number of junctures within the education system and via any number of different administrative and educational policies and practices.<sup>133</sup> Examples of the pipeline at work include overuse of the school disciplinary system (sometimes through zero tolerance policies) that results in students being kept out of school,<sup>134</sup> and referrals to the criminal justice system for infractions traditionally handled by schools.<sup>135</sup>

### 1. *The Disparate Impact*

The statistical evidence of the disparate impact the phenomenon has on children of color is wide-ranging.<sup>136</sup> In 2009-2010, the national graduation rate for black male students was 52% and for Latino males it was 58%; in contrast, white males graduated at a rate of 78%.<sup>137</sup> A recent survey conducted by the Department of Education of 72,000 schools (covering 85% of students nationwide) found that black students constitute 18% of the student body population, but 35% of the students suspended at least once, 46% of those suspended more than once, and 39% of those expelled.<sup>138</sup> In fact, black students

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132. See, e.g., ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2005).

133. See, e.g., Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFF. L. REV. 615, 621-22 & nn.23-29 (2012) (describing facets of the pipeline and providing citations); Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 268 (2008) (discussing schools' uses of the juvenile justice system as a disciplinary tool).

134. ADVANCEMENT PROJECT, *supra* note 132, at 7; THE C.R. PROJECT AT HARV. UNIV. & ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 1 (2000) [hereinafter HARV. UNIV. C.R. PROJECT].

135. HARV. UNIV. C.R. PROJECT, *supra* note 134, at 15; CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 3, 113-14 (2010).

136. See DANIEL J. LOSEN & JONATHAN GILLESPIE, THE C.R. PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 6-7 (2012), available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf>.

137. THE SCHOTT FOUND. FOR PUB. EDUC., THE URGENCY OF NOW: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 7 (2012), available at <http://blackboysreport.org/urgency-of-now.pdf>.

138. ED Data Express: Data About Elementary & Secondary Schools in the U.S., DEP'T OF EDUC., <http://eddataexpress.ed.gov/state-tables-main.cfm> (last visited June 29, 2014) (select "All States" under section one; then select "Achievement Data" under section three; then select "Graduation Rate Data"; then select "Display Report" at the bottom of the page); Michael Harris, *New National Data Shows Racial Disparities in School Discipline*, NAT'L CTR. FOR YOUTH L., [http://www.youthlaw.org/publications/yln/2012/apr\\_jun\\_2012/new\\_national\\_data\\_shows\\_racial\\_disparities\\_in\\_school\\_discipline/#sdfnote1sym](http://www.youthlaw.org/publications/yln/2012/apr_jun_2012/new_national_data_shows_racial_disparities_in_school_discipline/#sdfnote1sym) (last visit-

were more than three and a half times as likely to be suspended or expelled as white students.<sup>139</sup> More than 70% of students arrested in school or referred to law enforcement were Hispanic or black.<sup>140</sup> Studies also confirm that these disparities cannot be explained by worse behavior or socioeconomic status.<sup>141</sup>

These disparities in school discipline rates have consequences beyond the disparity in graduation rates. In an analysis of the data released by the Department of Education, the Center for American Progress found:

Students who were suspended or expelled for even one discretionary violation in Texas were 2.85 times more likely than their peers to be in contact with the juvenile justice system within the following year. Each subsequent violation exponentially increased [a] student's chances of juvenile justice involvement—nearly half (46 percent) of students with at least 11 disciplinary actions came into contact with the juvenile justice system, compared to only 2.4 percent of students with no disciplinary violations.<sup>142</sup>

In 2009, the arrest rate for juveniles aged 10-17 per 100,000 people was 4,644.3 for whites but 10,096.3 for blacks.<sup>143</sup> The Department of Justice Office of Juvenile Justice and Delinquency Prevention notes also that “between 1980 and 2010, the total juvenile arrest rate decreased 54% for Asians, 51% for American Indians, and 30% for whites, while the overall rate for black juveniles increased 8% during this period.”<sup>144</sup> Black juveniles constituted 16% of this age group but 51% of arrests for violent crimes and 33% of arrests for property crimes.<sup>145</sup> After they are arrested, black juveniles represent 31% of

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ed June 29, 2014). The *New York Times* analysis of the data noted that in districts with expulsions under zero tolerance policies, Hispanic and black students represented 45% of students but 56% of those expelled. Tamar Lewin, *Black Students Punished More, Data Suggests*, N.Y. TIMES, Mar. 6, 2012, at A11.

139. Harris, *supra* note 138.

140. Lewin, *supra* note 138.

141. See LOSEN & GILLESPIE, *supra* note 136, at 32.

142. Rachel Wilf, *Disparities in School Discipline Move Students of Color Toward Prison*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), <http://www.americanprogress.org/issues/race/news/2012/03/13/11350/disparities-in-school-discipline-move-students-of-color-toward-prison/>.

143. *Juvenile Arrest Rate Trends*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, [http://ojjdp.gov/ojstatbb/crime/JAR\\_Display.asp?ID=qa05260&text=yes](http://ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05260&text=yes) (last visited June 29, 2014).

144. *Id.*

145. CHARLES PUZZANCHERA & BENJAMIN ADAMS, OFF. OF JUV. JUST. & DELINQ. PREVENTION, *JUVENILE ARRESTS 2009* (2011), available at <http://www.ojjdp.gov/pubs/236477.pdf>.

referrals to juvenile court and 41% of waivers to adult court.<sup>146</sup> In 2008, 37.2% of black men with less than a high school education were incarcerated.<sup>147</sup>

As with public defense systems, it is difficult, if not impossible, to demonstrate that educators and school administrators are intentionally discriminating against children of color.<sup>148</sup> Some scholars have advocated for education reform via the few remaining traditional desegregation cases stemming from *Brown* and its progeny.<sup>149</sup> While this strategy would indeed provide plaintiffs seeking to shut down some aspects of the school-to-prison pipeline with some measure of relief under the Equal Protection Clause, these cases are exceptions that prove the rule: few districts remain under desegregation orders and their issuance depended upon the very discriminatory intent so difficult to demonstrate today. As a result, reformers have evidenced little desire to return to the old racial justice paradigm of equal protection litigation to combat the pipeline.

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146. THE SENT'G PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM 2 (2000), available at [http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf).

147. PETTIT, *supra* note 2, at 15.

148. See, e.g., Chauncey D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1026-28 (2009). Smith notes:

[H]istorical and present-day actions that contribute to the pipeline can be categorized into three dimensions—criminalization, sorting, and economic policy. Together, these dimensions form a structural racism framework that largely encompasses the dynamic nature of disparate minority student pushout and incarceration. Thus, in contrast to a motive-centered approach, evaluating the pipeline's criminalization, sorting and economic dimensions reveals how fragmented inequities have a drastically unequal cumulative impact on students of color.

*Id.* at 1026-27; see also Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y. L. SCH. L. REV. 1071, 1074 (2009/10) ("A similar analysis in the area of racial disparities in discipline shows a distinct gap between the scientific knowledge base regarding racial disparities in discipline and the absence of a legal strategy accepted by the courts to address such disparities. Analysis of case law reveals that this gap appears to be related to the court's adherence to a colorblind interpretation of the Constitution.").

149. See, e.g., Danielle Holley-Walker, *A New Era for Desegregation*, 28 GA. ST. U. L. REV. 423, 426-27 (2012).

## 2. *The Reform Response*<sup>150</sup>

### (a) *Claims Under the Equal Protection Clause*

There is surprisingly little difference in the outcomes of cases challenging racial disparities under the Equal Protection Clause in the imposition of school discipline before and after *Washington v. Davis*: claims that succeed involve either (1) a flat-out admission of racial discrimination or (2) evidence that white students were either not disciplined at all for the same infractions or disciplined less harshly. Neither of these elements is easy to come by and claims based purely upon disparate impact have never had great success.

Both before and after *Davis*, courts have been satisfied by open admissions of racial discrimination. In *Hawkins v. Coleman*, a 1974 case, the Northern District of Texas upheld a claim based upon statistical evidence demonstrating black students were disciplined more frequently than white students.<sup>151</sup> But the school district had been segregated until three years before the court's opinion was issued,<sup>152</sup> and the superintendent of the school district testified in the case that the high number of suspensions of black students was because "we are a White controlled institution, institutional racism, [and] racism among individuals."<sup>153</sup> Similarly, in 1985, in *Sherpell v. Humnoke School District No. 5 of Lonoke County, Arkansas*,<sup>154</sup> the Eastern District of Arkansas ruled in favor of plaintiffs where there was evidence teachers referred to black students as "niggers," "blue-gums," and "coon."<sup>155</sup> In *Mayorga Santamaria v. Dallas Independent School District*,<sup>156</sup> the Northern District of Texas found in favor of plaintiffs'

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150. This Part provides only a brief overview of the reform response to the school-to-prison pipeline problem to illustrate the direction reformers have taken away from claims under the Equal Protection Clause and towards other alternatives. It also omits discussion of claims for individual relief, e.g. claims brought on behalf of a single child to petition for services under a statute or to challenge an individual instance of school discipline. For a much more comprehensive discussion of the reform response, see generally KIM ET AL., *supra* note 135; Frances P. Solari & Julienne E.M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools*, 29 N.C. CENT. L.J. 147 (2007).

151. 376 F. Supp. 1330 (N.D. Tex. 1974).

152. *Id.* at 1331.

153. *Id.* at 1336.

154. 619 F. Supp. 670 (E.D. Ark. 1985).

155. *Id.* at 673. A teacher in *Sherpell* also testified she "personally witnessed the discipline of a black child by an administrative official which resulted in broken skin and blood; that during [her] nine-year tenure, she had not witnessed any white child subjected to such treatment." *Id.* at 674; *cf.* *Coleman v. Franklin Parish Sch. Bd.*, 702 F.2d 74, 77 (5th Cir. 1983) (permitting equal protection claim to proceed because "plaintiffs pleaded intent and purpose to discriminate on the part of the defendants").

156. No. Civ.A.3:06CV692-L, 2006 WL 3550194 (N.D. Tex. Nov. 16, 2006).

equal protection claim where there was evidence that school administrators had intentionally and explicitly segregated students by race and national origin.<sup>157</sup>

Both before and after *Davis*, courts have required plaintiffs lacking evidence of intentional discrimination to demonstrate not just statistical disparity in the imposition of discipline, but evidence that white students were not similarly disciplined for similar infractions.<sup>158</sup> And even where some evidence is offered that white students were not similarly disciplined, courts have been reluctant to grant relief unless the students are nearly identically situated.<sup>159</sup> These claims are most likely to succeed when there is evidence that two students involved in a fight were treated differently. For example, in *Payne v. Worthington Schools*,<sup>160</sup> the (black) plaintiff was given a one-day, in-school suspension and the school merely called the other (white) child's parents.<sup>161</sup> Similarly, in *Antoine v. Winner School District*,<sup>162</sup> plaintiffs were able to secure a consent decree in part because they offered not only statistical evidence of disparate discipline but also evidence that Native American students were disci-

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157. *Id.* at \*32-39; see also *People Who Care v. Rockford Bd. of Ed. Sch. Dist. #205*, 851 F. Supp. 905, 933 (N.D. Ill. 1994) (upholding equal protection claim where school administrators intentionally segregated students).

158. See, e.g., *Tasby v. Estes*, 643 F.2d 1103, 1108 (5th Cir. 1981) (“[A]bsent a showing of arbitrary disciplinary practices, undeserved or unreasonable punishment of black students, or failure to discipline white students for similar misconduct, the plaintiffs have not satisfied their burden of proving that the disproportionate punishment of black students in the [school district] is the product of a racially discriminatory purpose.”); *Sweet v. Childs*, 507 F.2d 675, 681 (5th Cir. 1975) (“There was no showing of arbitrary suspensions or expulsions of black students nor of a failure to suspend or expel white students for similar conduct.”); *Fuller v. Decatur Pub. Sch. Bd. of Ed. Sch. Dist. 61*, 78 F. Supp. 2d 812, 815 (C.D. Ill. 2000) (“[Plaintiffs] statistics failed to establish that any similarly situated Caucasian students were treated less harshly.”), *aff’d on other grounds*, 251 F.3d 662 (7th Cir. 2001); *Collins v. Chichester Sch. Dist.*, No. CIV.A. 96-6039, 1998 WL 351718, at \*6 (E.D. Penn. June 29, 1998); *Parker v. Trinity High Sch.*, 823 F. Supp. 511, 520 (N.D. Ill. 1993) (“Plaintiffs must show that those who determined the punishment improperly considered plaintiffs’ race. Stray remarks by nondecisionmakers or remarks unrelated to the disciplinary decision process do not satisfy this burden.”).

159. See, e.g., *Tasby*, 643 F.2d at 1107 n.1 (noting that “the statistics offered are based upon a breakdown of offenses far too general to prove disproportionate severity in punishment . . . [and] do not reflect other relevant circumstances surrounding each individual case of punishment . . . [such as] prior offenses”); *Parker*, 823 F. Supp. at 520 (refusing to grant relief in part because evidence that white students were not disciplined for fighting did “not represent a similar, repeated disregard for the authority of the teachers”).

160. *Payne v. Worthington Sch.*, No. C2-99-830, 2001 WL 506509 (S.D. Ohio Apr. 25, 2001).

161. *Id.* at \*8.

162. Consent Decree, *Antoine v. Winner Sch. Dist. 59-2*, No. Civ. 06-3007 (D.S.D. Dec. 10, 2007).

plined more harshly than Caucasian students for participating in the same fights.<sup>163</sup>

(b) *Other Constitutional Claims*

Absent the presence of these particularly egregious indicators of racial discrimination, reformers have had to rely upon other claims to combat the school-to-prison pipeline and its effects on children of color. This Part will focus primarily on the use of statutory claims as an alternative to the Equal Protection Clause, but as with indigent defense reform, claims under other constitutional guarantees are also effective.

Thus, in *Antoine v. Winner School District*, plaintiffs sought relief under the Fifth Amendment and successfully obtained a settlement agreement where school administrators routinely obtained confessions from students that were then used to prosecute them in juvenile court.<sup>164</sup> Plaintiffs have similarly invoked the Due Process Clause to challenge school discipline—most prominently in *Goss v. Lopez*,<sup>165</sup> which resulted in a Supreme Court decision that students have due process rights at school disciplinary proceedings<sup>166</sup>—and the Fourth Amendment to challenge school searches.<sup>167</sup>

Plaintiffs have also attempted to seek relief under a variety of common law tort claim theories, including negligence and intentional infliction of emotional distress, but with only a handful of exceptions, these claims have largely failed.<sup>168</sup> Setting aside the practical difficul-

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163. Complaint at 15, 25, 30, *Antoine*, No. Civ. 06-3007.

164. Consent Decree at 2-3, *Antoine*, No. Civ. 06-3007.

165. 419 U.S. 565, 581 (1975).

166. *Id.* at 574; *see also, e.g.*, Ruiz v. Pedota, 321 F. Supp. 2d 538, 540-41, 543 (E.D.N.Y. 2004) (approving settlement agreement in suit challenging exclusions of students from school in violation of Due Process Clause); D.C. v. Sch. Dist. of Phila., 879 A.2d 408, 419 (Pa. Commw. Ct. 2005) (holding students have right to opportunity to be heard prior to being transferred to an alternative school and, incidentally, declining to address state equal protection claim).

167. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 374-75 (2009) (invalidating strip search of student); New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (holding that the Fourth Amendment applies to students searched by school officials); Doe v. Little Rock Sch. Dist., 380 F.3d, 349, 356 (8th Cir. 2004) (invalidating mass search of entire student body); *Atlanta Independent School System Officials Will Ensure Students' Constitutional Rights Are Upheld After Settlement Of ACLU Lawsuit*, AM. C.L. UNION (Dec. 16, 2009), <http://www.aclu.org/racial-justice/atlanta-independent-school-system-officials-will-ensure-students-constitutional-right> (describing settlement agreement that included end to searches without reasonable suspicion).

168. *See, e.g.*, Rembert v. Monroe Twp. Bd. of Educ., No. Civ. 95-4818 (JEI), 1997 WL 189318, at \*7 (D.N.J. Apr. 14, 1997) (dismissing tort claims as being time-barred); Jackson v. Katy Indep. Sch. Dist., 951 F. Supp. 1293, 1306 (S.D. Tex. 1996) (dismissing intentional infliction of emotional distress claim because conduct was not sufficiently extreme or outrageous and negligence claims because of official immunity of defendants).

ties in making out these claims, such as the need to overcome various immunity doctrines, the very nature of tort relief is simply ineffective at combating structural racial inequalities.<sup>169</sup>

(c) *The Statutory Alternative*

Reformers have had greater success with claims for statutory relief, even (or particularly) where their statutory rights are not explicitly premised on racial equality. Title VI of the 1964 Civil Rights Act, for example, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal funding.<sup>170</sup> But because plaintiffs must still show discriminatory intent to prevail on a Title VI disparate impact claim,<sup>171</sup> such claims can be nearly as difficult to make out as those under the Equal Protection Clause.<sup>172</sup>

The Juvenile Justice and Delinquency Prevention Act of 2002, which requires states participating in a federal funding program to address disproportionate minority contact (DMC) within the juvenile justice system, has proven somewhat more helpful.<sup>173</sup> For example, the Department of Justice and a Tennessee juvenile court (in a jurisdiction where black children made up 97.8% of all juveniles referred to court) recently entered into an agreement to gather DMC

169. See, e.g., OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 90-91 (1978); Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 809 (1990); Chiang, *supra* note 133, at 680-82.

170. 42 U.S.C. § 2000d (2006); see also § 2000e-2(a) (prohibiting employment discrimination). Plaintiffs filing claims under Title VII are of course still free to allege disparate impact as a basis for relief, see § 2000e-2(k), and a fair amount has been written about the relationship between Title VII and the Equal Protection Clause. See, e.g., Mary C. Daly, *Some Runs, Some Hits, Some Errors – Keeping Score in the Affirmative Action Ballpark from Weber to Johnson*, 30 B.C. L. REV. 1, 6 (1988) (discussing relationship between Title VII and equal protection in the context of affirmative action); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1342-43 (2010) (querying whether Title VII's disparate impact standard conflicts with equal protection doctrine); see also Ricci v. DeStefano, 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring) (“[T]he war between disparate impact and equal protection will be raised sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”).

171. See Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (noting that Title VI prohibits only intentional discrimination).

172. See, e.g., Denney v. City of Albany, 247 F.3d 1172, 1186-87 (11th Cir. 2001) (dismissing plaintiff's Title VII claim for failing to prove discriminatory intent in promotion practices); Barnett v. Johnson City Sch. Dist., No. 3:04-CV-0763, 2006 WL 3423872, at \*12 (N.D.N.Y. Nov. 28, 2006) (dismissing claim for failure to show disparate treatment); Brown v. City of Grand Prairie, No. CIV.A. 3:01-CV-0139, 2002 WL 171728, at \*5 (N.D. Tex. Jan. 29, 2002) (dismissing plaintiff's equal protection claim for failure to prove discriminatory intent); Jackson, 951 F. Supp. at 1300 (dismissing Title VI claim for failure to prove discriminatory intent).

173. Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C. § 5633(a)(22) (2006).

data to seek alternatives to juvenile detention, to train juvenile court staff on racial bias recognition and reduction, and to form a plan to reduce DMC.<sup>174</sup>

The No Child Left Behind Act (NCLB) contains a number of race-conscious accountability requirements and is explicitly directed at “closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.”<sup>175</sup> Its efficacy as a tool for reform, however, has been largely limited to the data collection it enables.<sup>176</sup> For the first time, advocates are able to access education statistics disaggregated by race; although the disparate impact those statistics indicate may be insufficient for an equal protection claim, knowledge of its existence helps reformers to know they are targeting the right school or schools.<sup>177</sup>

Other federal statutes that do not explicitly address race have proven even more fruitful for litigators. Although there is no one statute suitable for every school-to-prison pipeline claim, or even most such claims, and although some claims cannot be addressed by an existing statute, the statutory landscape is sufficiently rich to provide a meaningful alternative to the Equal Protection Clause, particularly when one considers the overlap between the groups targeted for statutory protection and children of color.

The Equal Educational Opportunities Act (EEOA) provides protections for children who do not speak English as a native language.<sup>178</sup> Many if not all of these children are children of color, and many suffer from the effects of the school-to-prison pipeline.<sup>179</sup> The EEOA re-

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174. U.S. DEPT OF JUST., C.R. DIV., MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY 21-23, 26 (2012), *available at* [http://www.justice.gov/crt/about/spl/documents/shelbycountyjuv\\_agreement\\_12-17-12.pdf](http://www.justice.gov/crt/about/spl/documents/shelbycountyjuv_agreement_12-17-12.pdf). According to the Department of Justice, twenty-three states have full-time, state-level, DMC coordinators; thirty-one states have part-time or other state-level staff designated as DMC coordinators; thirty-four states have invested in targeted local DMC-reduction sites; and twelve states have laws intended to reduce DMC. JEFF SLOWIKOWSKI, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, DISPROPORTIONATE MINORITY CONTACT 3 (Oct. 2009), *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/228306.pdf>.

175. 20 U.S.C. § 6301(3) (2012).

176. Some have criticized NCLB for increasing school incentives to push low-performing students of color out of schools. *See, e.g.*, Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 290-94 (2004).

177. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1907, 115 Stat. 1425 (2002) (requiring states to collect school district data on annual school dropout rates disaggregated by race and ethnicity).

178. 20 U.S.C. § 1703(f) (2012).

179. KIM ET AL., *supra* note 135, at 44.

quires state and local educational agencies to help children with language barriers overcome those barriers and to provide them with an adequate education.<sup>180</sup> In particular, it mandates that English Language Learner students be provided with an education equal to that provided to native English speakers and that they be instructed in English.<sup>181</sup> Reformers have filed cases both directly under the EEOA and through the U.S. Department of Education, Civil Rights Division to enforce these provisions.<sup>182</sup>

The Individuals with Disabilities Education Act (IDEA),<sup>183</sup> section 504 of the Rehabilitation Act,<sup>184</sup> and Title II provide an array of protections for students with disabilities.<sup>185</sup> Black students are often over-identified for certain types of disabilities and under-identified for others.<sup>186</sup> Disabled students of color are segregated from mainstream education more often than disabled white students.<sup>187</sup> Disa-

180. § 1703(b), (f).

181. *Castaneda v. Pickard*, 648 F.2d 989, 1011 (5th Cir. 1981).

182. *See, e.g., Gomez v. Ill. St. Bd. of Educ.*, 811 F.2d 1030, 1044-45 (7th Cir. 1987) (dismissing equal protection claim for failure to allege intent to discriminate but permitting EEOA claim to proceed); *Castaneda*, 648 F.2d at 1015 (denying Title VI claim for lack of intent to discriminate but remanding for further proceedings on EEOA claim); *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000) (holding that state disbursement of 150 dollars per Limited English Proficient student violated the EEOA by providing insufficient English instruction for students not proficient in English); U.S. DEPT OF JUST., AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE LEWISTON, ME SCHOOL DEPARTMENT 3-4 (2010), available at <http://www.justice.gov/crt/about/edu/documents/LewistonAgree.pdf>; Letter from March Roosevelt, Superintendent of Pittsburgh Pub. Schools, to Michael Branigan, U.S. Dep't of Educ. (May 15, 2006) (on file with author) (listing actions district will take to provide required services to Somali-speaking students); *see also Morales v. Shannon*, 516 F.2d 411, 415 (5th Cir. 1975) (holding that failure to take appropriate actions to overcome language barriers is unlawful); *Martin Luther King Jr. Elementary Sch. Child. v. Ann Arbor Sch. Dist. Bd.*, 473 F. Supp. 1371, 1390-91 (E.D. Mich. 1979) (holding that school district is obligated to develop a program to assist teachers to take home language into account in addressing children's reading problems).

183. 20 U.S.C. §§ 1400–1410 (2012).

184. Pub. L. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794 (2006)).

185. 42 U.S.C. §§ 12131–12165 (2006).

186. *See, e.g., U.S. DEPT OF EDUC., 29TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT*, 2007 123, 129 (2010) (noting that on average, across all fifty states and the District of Columbia, 1.81% of black students ages six through twenty-one were labeled mentally retarded, and 1.37% were labeled emotionally disturbed, whereas white students in that age range were given those labels nearly three times less often).

187. *See, e.g., KIM ET AL., supra* note 135, at 54 (“Racial disparities are most pronounced among those students who are educated in regular schools but in settings that are separate from their nondisabled peers for more than 60 percent of the school day.”). Systematic segregation from mainstream education can also occur when students of color with disabilities are disproportionately punished with out-of-school suspension. LOSEN & GILLESPIE, *supra* note 136, at 12-21 (noting that students of color with special needs “face double the risk” for suspension compared with their non-disabled peers).

bled black students are disciplined more frequently and more severely than their white counterparts.<sup>188</sup> And disabled black students receive supports and services that are inferior to those given to their white counterparts.<sup>189</sup>

The IDEA guarantees children with disabilities a free and appropriate public education in the least restrictive environment and in accordance with an individualized education plan;<sup>190</sup> requires states to make affirmative efforts to identify children with disabilities;<sup>191</sup> prohibits schools from disciplining disabled students without first establishing that the student's conduct was not a manifestation of his or her disability;<sup>192</sup> and requires schools to put together a behavior intervention plan when the misconduct at issue was in fact a manifestation of a disability.<sup>193</sup> Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal funding from discriminating on the basis of disability, and Title II prohibits such discrimination by public schools and state departments of education regardless of the receipt of federal funding.<sup>194</sup> Advocates have had success filing challenges under a number of these provisions.<sup>195</sup>

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188. See, e.g., KIM ET AL., *supra* note 135, at 170 n.22 (noting black students represented nearly half of all of the reported suspensions longer than ten days in 2005 for students with disabilities); DANIEL J. LOSEN & TIA ELENA MARTINEZ, THE C.R. PROJECT, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 11 (2013) (finding that 36% of all black male students with disabilities enrolled in middle and high schools were suspended at least once in 2009-2010, compared to 17% for white males with disabilities, and 6% for white females with disabilities).

189. David Osher et al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUITY IN SPECIAL EDUCATION 93, 93-116 (Daniel J. Losen & Gary Orfield eds., 2002).

190. 20 U.S.C. §1414 (2012).

191. § 1412(a)(3)(A).

192. 34 C.F.R. § 300.530(c), (e)(1)-(2) (2013).

193. *Id.* § 300.530(f)(1)(i)-(ii).

194. 42 U.S.C. §§ 12131-12165 (2006); Pub. L. 93-112, § 504, 87 Stat. 355, 394 (codified at 29 U.S.C. § 794 (2006)).

195. See, e.g., *Schmelzer v. New York*, 363 F. Supp. 2d 453, 461 (E.D.N.Y. 2003) (denying summary judgment under Rehabilitation Act because plaintiffs failed to prove discrimination against disabled children but granting injunctive relief under IDEA); *Corey H. v. Bd. of Educ. of Chi.*, 995 F. Supp. 900, 918 (N.D. Ill. 1998) (granting injunctive relief under IDEA for class of disabled children in Chicago); Order Preliminary Approving Settlement, Directing Notice to the Class and Setting a Hearing on Proposed Settlement, *Ray M. v. Bd. of Educ. of N.Y.C.*, 884 F. Supp. 696 (E.D.N.Y. 1995) (No. 94 Civ. 1103 (EHN)/(JLC)) (providing preliminary approval of settlement in case involving disabled preschool students who had not been evaluated for special education services in their native language); Settlement Agreement, *Kina K. ex rel. Jamie S. v. Milwaukee Bd. of Sch. Dirs.*, No. 01-C-0928 (E.D. Wis. Feb. 27, 2008); Settlement Agreement at 1, *P.J. v. Conn., Bd. of Educ.*, Civil Action No. 291CV00180 (RNC) (D. Conn. filed May 31, 2002) (settling IDEA case that covered all mentally retarded school-aged children in Connecticut).

The McKinney Vento Act provides education protections for students who are homeless or in foster care, requiring that: students who fall under its ambit be permitted to attend either their local school or school of origin (and be provided transportation if they wish to stay at their school of origin); such students be permitted to enroll at a new school even if unable to produce documents such as proof of residency or medical records; and such students receive services under Title I, Part A, of NCLB.<sup>196</sup> Although statistics on the racial composition of homeless students are hard to come by, there is evidence that children under eighteen form a disproportionate percentage of the homeless population, which is in turn disproportionately of color.<sup>197</sup> Reformers have had success filing claims under the McKinney Vento Act, particularly in the aftermath of natural disasters such as Hurricane Katrina.<sup>198</sup>

### 3. *Beyond the School-to-Prison Pipeline—Lessons for Other Claims*

When statutory relief is available, it is a powerful resource for advocates seeking to address racial disparities. Reformers in the school-to-prison pipeline context have had the greatest success when they have based their claims not on disparate impact, but rather on statutory rights to which anyone would be entitled—a legislative equivalent to the “liberty-based claim” referred to by Yoshino and others.

The statutory and regulatory regime is complex and wide-ranging. This Part covered only a handful of federal statutes relevant for pipeline purposes, but reformers seeking to address any sort of racial disparity look to state statutes as well. And even where there is no private right of action under a particular statute, the history of school-to-prison pipeline reform demonstrates that relief may nevertheless be available through work with government agencies or branches leveraging the statutory entitlements.

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196. 42 U.S.C. § 11432(g)(1)(J)(iii)(I), (g)(3)(C)(i), (g)(4)(A)-(B) (2006).

197. See, e.g., *Who Is Homeless?*, NAT'L COAL. FOR THE HOMELESS (July 2009), <http://nationalhomeless.org/factsheets/who.html> (noting that in 2003, children under eighteen comprised 39% of the homeless population and that a survey of twenty-five cities in 2006 indicated that the sheltered homeless population was 42% African-American).

198. See, e.g., Order at 1-2, *Boisseau v. Picard*, Civil Action No. 07-00565 (E.D. La. Jan. 7, 2008) (dismissing case following settlement of claims on behalf of children made homeless by Hurricane Katrina); see also Permanent Injunction at 1, *Bullock v. Bd. of Educ. of Montgomery Cnty.*, Civil Action No. DKC02CV798 (D. Md. Mar. 28, 2005) (enjoining school district to permit homeless children to attend any school in the feeder system for the school the student attended prior to homelessness, and to provide transportation services).

Where explicitly race-based statutory protections are available, reformers do and should make use of those protections. For example, the ACLU's Racial Justice Project recently sued Morgan Stanley for the disparate impact its sub-prime lending practices had on people of color in Detroit, relying primarily on the federal Fair Housing Act and the Equal Credit Opportunity Act, which prohibit racial discrimination in residential real estate and credit transactions.<sup>199</sup>

But the availability of federal statutory relief for claims based on racial disparity in the absence of discriminatory intent appears to be on the wane. Indeed, lower court skepticism about the substantive merit of claims under section 5 of the Voting Rights Act (an Act grounded in the Fifteenth Amendment and containing protections explicitly designed to protect racial minorities),<sup>200</sup> has recently given way to a Supreme Court decision that holds section 4 of the Act unconstitutional.<sup>201</sup> This Part catalogs some of the ways one group of reformers has attempted to address this problem and urges those who have not previously considered racially neutral statutory claims to do so.

### C. *Immigration, Structural Arguments, and Racial Animus*

Over the last decade, a number of states and localities have crafted legislation designed to discourage undocumented workers from entering their jurisdictions and to encourage those already present to leave. The bills passed typically contain some combination of the following provisions:<sup>202</sup> prohibitions on transporting or concealing un-

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199. Class Action Complaint at 1-3, *Adkins v. Morgan Stanley*, No. 12 CIV 7667(HB), 2013 WL 3835198 (S.D.N.Y. Oct. 15, 2012). The case survived a motion to dismiss. *Adkins v. Morgan Stanley*, No. 12 Civ. 7667(HB), 2013 WL 3835198 (S.D.N.Y. July 25, 2013).

200. *See, e.g.*, *South Carolina v. United States*, 898 F. Supp. 2d 30, 39 (D.C. Cir. 2012) (upholding South Carolina Voter Identification Act under section 5 of the Voting Rights Act); *Florida v. United States*, 885 F. Supp. 2d 299, 321-22, 353 (D.D.C. 2012) (denying claim that change in voting procedures would have retrogressive effect on minority voters in violation of Voting Rights Act and finding procedures were not enacted with discriminatory purpose); *Perez v. Texas*, 891 F. Supp. 2d 808, 834-35 (W.D. Tex. 2012) (denying claim that congressional redistricting constituted impermissible racial gerrymander in violation of Voting Rights Act). *But see* *Texas v. Holder*, 888 F. Supp. 2d 113, 143-44 (D.C.C. 2012) (denying motion state request for declaratory judgment that voter identification law did not violate the Voting Rights Act), *vacated and remanded*, 133 S. Ct. 2886 (2013).

201. *Shelby Cty. v. Holder*, No. 12-96, slip op. at 24 (U.S. June 25, 2013). In so holding, the Court repeatedly emphasized its view that minority voters no longer suffer any disparate impact as a result of state and local voting laws. *See id.* at 4 ("Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent.").

202. This list is by no means comprehensive. According to the National Conference on State Legislatures, lawmakers in forty-six states and the District of Columbia introduced 948 bills and resolutions related to immigration, and enacted 114 of those bills and adopted

documented workers,<sup>203</sup> inducing an undocumented worker to enter the state,<sup>204</sup> and/or hiring an undocumented worker;<sup>205</sup> requirements related to documentation immigrants must produce or can use to verify the lawfulness of their presence in the jurisdiction;<sup>206</sup> providing for additional state penalties for violating federal law;<sup>207</sup> and/or authorizing local law enforcement to determine whether a person is removable or detainable under federal law.<sup>208</sup> This Part will explore

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92 of those resolutions in the first half of 2012 alone. This flurry of activity actually marked a decline from 2011. *2012 Immigration-Related Laws and Resolutions in the States (January 1 – June 30, 2012)*, NAT'L CONF. ON ST. LEGS. (Aug. 6, 2012), <http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-and-resolutions.aspx>.

203. See, e.g., Fremont, Neb., Ordinance 5165 (June 21, 2010) (prohibiting the harboring of an illegal alien); H.R. 87, § 7, 151st Gen. Assemb., 2011 Reg. Sess. (Ga. 2011) (codified at GA. CODE ANN. § 16-11-200 (West 2014)) (prohibiting the transport or movement of an illegal alien “for the purpose of furthering the illegal presence of the alien in the United States” and the concealment or harboring of an illegal alien); H.R. 56, § 13, 2011 Reg. Sess. (Ala. 2011) (codified at ALA. CODE § 31-13-13(a)(1), (3) (2014)) (prohibiting the concealment, harboring or shielding from detection of any alien, as well as transporting an alien “in furtherance of the unlawful presence of the alien”); S. 20, § 4, 119th Gen. Assemb., Sess. (S.C. 2011) (codified at S.C. CODE ANN. § 16-9-460 (2014)) (making it a state crime for unlawfully present persons to shelter, harbor or transport themselves).

204. ALA. CODE § 31-13-13(a)(2) (2014); H.R. 87, § 7 (codified at GA. CODE ANN. § 16-11-202(b) (West 2014)) (prohibiting people from inducing an illegal alien to enter into Georgia).

205. ALA. CODE § 31-13-11(a) (2014) (criminalizing an unauthorized alien’s application for, solicitation of, or performance of work); ARIZ. REV. STAT. ANN. § 13-2928(C) (2014) (making it a misdemeanor for an unauthorized alien to seek or engage in work in the state); Fremont, Neb., Ordinance 5165, § 5(C) (June 21, 2010) (requiring employers to execute an affidavit that they have not knowingly employed any unauthorized aliens); S. 20, § 2 (codified at S.C. CODE ANN. § 8-14-10(9) (2014)) (creating sanctions on employers who knowingly hire unauthorized aliens).

206. ARIZ. REV. STAT. ANN. § 11-1051(B) (2014) (requiring officers in some circumstances to verify immigration status when conducting a stop, detention, or arrest); H.R. 87, § 8 (codified at GA. CODE ANN. § 17-5-100(b) (West 2014)) (authorizing but not requiring state officials to conduct inquiry into immigration status); S. 590, § 18, 117th Gen. Assemb., First Reg. Sess. (Ind. 2011) (codified at IND. CODE § 34-28-8.2-2 (2013)) (making it an infraction to knowingly offer or accept a consular identification card as a valid form of identification).

207. ALA. CODE § 31-13-10(a) (2014) (also making failure to comply with federal alien registration requirements a state misdemeanor); ARIZ. REV. STAT. ANN. § 13-1509 (2014) (making failure to comply with federal alien registration requirements a state misdemeanor); S. 20, § 5 (codified at S.C. CODE ANN. § 16-17-740 (2014)) (also making failure to comply with federal alien registration requirements a state misdemeanor).

208. ALA. CODE § 31-13-12(a) (2014) (requiring officers to determine immigration status when officer has reasonable suspicion a lawfully seized individual is unlawfully present); ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2014) (authorizing local law enforcement to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States”); GA. CODE ANN. § 17-5-100(e) (West 2014) (authorizing local law enforcement to detain unauthorized aliens, to transport them to a detention facility, and/or to notify the Department of Homeland Security); S. 590, § 19 (codified at IND. CODE § 35-33-1-1(a)(11), (12), (13) (2013)) (authorizing officials to make warrantless arrests of individuals when the officer has a removal order issued by an immigration court, a detainer or notice of action issued by the Department of Homeland Security, or the officer has probable cause to believe the person

the traditional equal protection claims available to combat any disparate racial impact these bills may have and identify the non-traditional legal challenges reformers have brought to bear in lieu of, or in addition to, equal protection claims.

### 1. *The Disparate Impact*

Setting aside the facial classifications on the basis of citizenship or alienage presented by these bills, this type of legislation also presents the type of racial disparate impact problem in which this Article is primarily interested. The reform response to these bills is animated largely by a suspicion that their enforcement will disproportionately target undocumented people of color, and more broadly, all persons who look Latino, regardless of actual ethnic heritage or legal status.<sup>209</sup>

A number of these immigration bills contain provisions calculated to inoculate the laws from traditional equal protection challenges by specifically prohibiting consideration of race, color, or national origin except as authorized by state and federal constitutions, and by requiring that implementation be consistent with federal laws governing civil rights.<sup>210</sup> They explicitly disavow discriminatory intent and thus seek to foreclose any cause of action via *Washington v. Davis*. Although there may be some atmospheric evidence of discriminatory intent, reformers seeking to combat the anticipated racial disparate impact have had to think beyond the Equal Protection Clause.<sup>211</sup>

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has been indicted for or convicted of one or more aggravated felonies); Fremont, Neb. Ordinance 5165, § 4(D) (June 21, 2010) (requiring city police to verify immigration status of building occupants who have not declared themselves to be U.S. citizens and to revoke occupancy licenses for unauthorized aliens); S. 20, § 6 (codified at S.C. CODE ANN. § 17-13-170(A) (2014)) (requiring officers to determine immigration status when there is reasonable suspicion a person being stopped or arrested is present unlawfully).

209. See, e.g., *State Anti-Immigration Laws*, AM. C.L. UNION, <http://www.aclu.org/immigrants-rights/state-anti-immigrant-laws> (last visited June 29, 2014) (“Laws inspired by Arizona’s SB 1070 invite rampant racial profiling against Latinos, Asian-Americans and others presumed to be ‘foreign’ based on how they look or sound.”).

210. ARIZ. REV. STAT. ANN. § 11-1051(B), (L) (2014); H.R. 87, § 8 (codified at GA. CODE ANN. § 17-5-100(d) (West 2014)), 2011 Ga. Laws 794, 805.

211. See, e.g., *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1192-93 (M.D. Ala. 2011) (stating that legislative history shows discriminatory intent behind Alabama immigration laws).

## 2. *The Reform Response*

### (a) *Facial Classification Based on Alienage*

As a whole, immigration-related bills, like problems with state public defense systems and the school-to-prison pipeline, have not proven particularly amenable to equal protection challenges.<sup>212</sup> The bills largely target undocumented immigrants, who do not qualify as a protected class and thus receive only rational basis review under traditional equal protection analysis.<sup>213</sup> To the extent that advocates have attempted to make claims based upon disparate racial impact, they have been foreclosed by the problem at the heart of this Article: the requirement of discriminatory intent.<sup>214</sup>

The legislation has presented reformers seeking to combat racial disparity with some low-hanging fruit, however. First, unlike the previous two types of state action described, the immigration-related bills sometimes present a facial classification based upon alienage (citizenship), which is a protected class entitled to heightened scrutiny.<sup>215</sup> Discrimination on the basis of citizenship or nationality is often inextricably linked with discrimination on the basis of race. Second, although state action involving the classification of undocumented adult aliens receives only rational basis review, it still must survive at least that minimal level of scrutiny.<sup>216</sup> And finally, the undocumented children of undocumented aliens may qualify for some additional protections under the Fourteenth Amendment.<sup>217</sup>

At least some of the bills in question have proven vulnerable on each of these fronts. It is worth noting that although these successful claims rely on the Equal Protection Clause, they rely on a race-neutral aspect of the Clause. In *Buquer v. Indianapolis*,<sup>218</sup> for example, the court found that a provision barring use of consular identification cards as valid identification did not satisfy rational basis review under equal protection analysis because it was “designed simply

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212. See, e.g., *Keller v. City of Fremont*, 853 F. Supp. 2d 959, 975 (D. Neb. 2012) (rejecting equal protection challenge to various immigration related bills because city articulated a rational basis for the different treatment afforded adults who are lawfully present and those who are not).

213. *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

214. See, e.g., *Keller*, 853 F. Supp. 2d at 982 (holding plaintiffs failed to state a claim based upon disparate impact, because they failed to show discriminatory intent).

215. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

216. See *Plyler*, 457 U.S. at 223-25.

217. *Id.* at 216-17.

218. 797 F. Supp. 2d 905 (S.D. Ind. 2011).

to target foreign nationals.”<sup>219</sup> Similarly, in *Hispanic Interest Coalition of Alabama v. Governor of Alabama*,<sup>220</sup> the Eleventh Circuit found that a state requirement that elementary and secondary schools determine the immigration status of students violated Equal Protection because the asserted state interest in collecting such information was insufficiently compelling and would impermissibly burden the right of such children to obtain an education.<sup>221</sup> In *Ruiz v. Robinson*,<sup>222</sup> the Southern District of Florida found unconstitutional a state law that denied in-state tuition benefits to U.S. citizen students who could not prove the federal immigration status of their parents.<sup>223</sup> The court reasoned that the facial classification upon which the statute rested (between U.S.-citizen students who could provide immigration papers for their parents versus those who could not) required heightened scrutiny because it punished citizen children for the acts of their parents and that the classification failed to survive that level of scrutiny.<sup>224</sup>

(b) *Federal Preemption*

The most successful across-the-board line of attack on these types of bills has been a structural argument that these provisions are preempted by federal law. The state legislation described follows a long history of anti-immigrant legislation in this country, at least two previous waves of which the Supreme Court has also dealt with on federal preemption grounds.<sup>225</sup> This time around, the Court ruled in *Arizona v. United States* that three of the four key Arizona immigration law provisions were federally preempted.<sup>226</sup> State and local laws may be preempted in one of three ways: express preemption, in which Congress explicitly withdraws specified powers from the states via statute; field preemption, in which Congress determines that an entire area of the law must be regulated by the federal government exclusively; and conflict preemption, in which compliance with both the

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219. *Id.* at 924.

220. 691 F.3d 1236 (11th Cir. 2012).

221. *Id.* at 1246-49.

222. 892 F. Supp. 2d 1321 (S.D. Fla. 2012).

223. *Id.* at 1333.

224. *Id.* at 1331.

225. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 69 (1941) (finding state-imposed alien registration requirements to be federally preempted and noting that “[o]ur Constitution and our Civil Rights Act have guaranteed to aliens the equal protection of the laws which is a pledge of the protection of equal laws” (quotation marks omitted)); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (finding California statute that required bond payment by certain foreign passengers to be federally preempted).

226. 132 S. Ct. 2492, 2510 (2012). *Arizona*, of course, rests firmly on the shoulders of precedent like *Hines*. *See generally Hines*, 312 U.S. 52.

state law and the federal law is impossible.<sup>227</sup> In the context of immigration, the Court has often emphasized the traditional federal power to determine immigration policy and the extensive way in which Congress had already done so, occupying the field.<sup>228</sup>

In *Arizona*, the Court held that the state could not make “willful failure to complete or carry an alien registration document” a state misdemeanor because Congress had occupied the entire field of alien registration.<sup>229</sup> It found the state could not prohibit aliens from applying for or soliciting work because Congress had already enacted a “comprehensive framework for ‘combating the employment of illegal aliens.’”<sup>230</sup> And it found that the state could not deputize state law enforcement officials to arrest anyone who they had probable cause to believe had committed an offense that would make them removable from the United States because “[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer.”<sup>231</sup>

In the wake of the Court’s decision, lower courts have found a spate of laws patterned upon those struck down in *Arizona* to be preempted on similar grounds.<sup>232</sup>

(c) *What Remains: Disparate Impact and a Return to the Bill of Rights*

The Court’s opinion in *Arizona* essentially deferred decision on the fourth provision of the Arizona bill, which requires state officials to make a reasonable attempt to determine the immigration status of anyone stopped, detained, or arrested if there is reasonable suspicion

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227. See generally *Arizona*, 132 S. Ct. at 2500-01 (summarizing basic preemption principles).

228. *Id.* at 2498-99 (“It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”).

229. *Id.* at 2501-02 (“[E]ven complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”).

230. *Id.* at 2504.

231. *Id.* at 2506. For discussion of the fourth provision of the Arizona legislation, which the Court permitted to survive, see *infra* Part III.C.2.c.

232. See, e.g., *Ga. Latino Alliance for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1266-67 (11th Cir. 2012); *United States v. Alabama*, 691 F.3d 1269, 1292 (11th Cir. 2012); *Keller v. City of Fremont*, 853 F. Supp. 2d 959, 973 (D. Neb. 2012). Of course, some lower courts had already invalidated similar provisions as being preempted even before the Court’s decision was announced. See, e.g., *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 817 (5th Cir. 2012); *United States v. South Carolina*, 840 F. Supp. 2d 898, 917-24 (D.S.C. 2011); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 920 (S.D. Ind. 2011).

that the person is an unlawfully present alien.<sup>233</sup> Lower courts confronted by similar provisions have likewise withheld judgment.<sup>234</sup> The Court has also refused to find preempted state statutes that require use of the federal E-Verify program to ascertain the work authorization status of employees.<sup>235</sup>

Advocates seeking to challenge these two types of state action—immigration status checks conducted by state law enforcement officials and use of E-Verify to check work authorization status—must look beyond preemption. Both of these types of legislation are facially neutral but raise potential disparate impact concerns that workers of certain races will be disproportionately subject to immigration or work authorization checks. If the enforcement of these provisions is sufficiently egregious with regard to racial impact, there is some precedent for further challenge under equal protection, but such claims are very difficult to make out.<sup>236</sup>

What remains, instead, is a return to the use of constitutional protections other than the Equal Protection Clause to vindicate racial inequality claims.<sup>237</sup> Justice Alito acknowledges this eventuality in *Arizona*: “If properly implemented, [the show-your-papers provision] should not lead to federal constitutional violations, but there is no denying that enforcement of [the provision] will multiply the occasions on which sensitive Fourth Amendment issues will crop up.”<sup>238</sup>

Some state provisions have in fact already been deemed unconstitutional on Fourth Amendment and due process grounds. For example, in *Buquer v. City of Indianapolis*,<sup>239</sup> the Southern District of In-

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233. *Arizona v. United States*, No. 11-182, slip op. at 23-24 (U.S. June 25, 2012). The Court, it seems, did not see fit to take the invitation of a previous Court’s decision in *Hines* to deem such provisions similarly preempted by an implicit Congressional desire “to leave [aliens] free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.” *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).

234. See, e.g., *Ga. Latino Alliance*, 691 F.3d at 1268; *Alabama*, 691 F.3d at 1292. *But see South Carolina*, 840 F. Supp. 2d at 924 (finding state equivalent immigration status check requirement preempted).

235. *Chamber of Com. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (upholding the Legal Arizona Workers Act of 2007, which permits state courts to suspend or revoke business licenses if an employer knowingly or intentionally employs an unauthorized alien and requires use of the federal E-Verify program).

236. It appears the Court has not struck down a restriction purely on the grounds of discriminatory enforcement since *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

237. See *supra* Part III.A.2.

238. *Arizona v. United States*, 132 S. Ct. 2492, 2529 (2012) (Alito, J., concurring in part and dissenting in part); cf. *Hines*, 312 U.S. at 71 n.32 (“The requirement that cards be carried and exhibited has always been regarded as one of the most objectionable features of proposed registration systems, for it is thought to be a feature that best lends itself to tyranny and intimidation.”).

239. 797 F. Supp. 2d 905 (S.D. Ind. 2011).

diana granted a preliminary injunction that enjoined enforcement of a state law provision authorizing state and local officials to conduct warrantless arrests of individuals with outstanding federal removal orders. In addition to the usual preemption problems the provision presented,<sup>240</sup> the court found that the provision violated the Fourth Amendment because it authorized arrest for non-criminal offenses and left a “deafening silence as to what happens to the arrestee post his arrest.”<sup>241</sup>

### 3. *Beyond Immigration—Lessons for Other Claims*

The immigration cases demonstrate that even where the racial animus is all but explicit, reformers still gain the most traction from racially neutral claims. This observation holds true within the more limited family of equal protection claims as well: even when the race-neutral claim is based on a factor linked to race (like citizenship), race-neutral equal protection claims are more likely to succeed than race-based claims. These cases may indicate that the more racially inflammatory the underlying facts, the more important it is to rely upon racially neutral legal claims. They also show, however, that there is life yet in the Equal Protection Clause and that reformers need not shy away from equal protection claims where they do exist, as in facial classifications on the basis of alienage.<sup>242</sup> And finally, these cases serve as a powerful reminder that disparate racial impact may sometimes productively be challenged on multiple fronts.

Reformers have made use of federal preemption in other contexts as well. In a case related to the anti-immigration legislation, the Supreme Court recently struck down an Arizona proposition that required prospective voters to present documentary proof of citizenship in order to register to vote.<sup>243</sup> So-called “voter ID” laws like this one have a disproportionate impact on people of color,<sup>244</sup> who are less like-

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240. *Id.* at 920.

241. *Id.* at 918; *see also id.* at 918-19 (“There is no mention of any requirement that the arrested person be brought forthwith before a judge for consideration of detention or release. There is in fact a complete void within the new statute regarding all other due process protections.”).

242. *Cf.* Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 1012-17 (1995) (arguing that the Court’s equal protection alienage cases are actually driven by preemption concerns).

243. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013) (finding proposition preempted under the National Voting Rights Act via the Elections Clause).

244. A number of laws seeking to restrict access to voting were passed or proposed in the months leading up to the 2012 presidential election. *See, e.g.*, ADVANCEMENT PROJECT, VOTER PROTECTION PROGRAM, *Segregating American Citizenship: Latino Voter Disenfranchisement in 2012* 3-4 (2012), available at [www.advancementproject.org/page/-/resources/Latino%20Report%202012.pdf](http://www.advancementproject.org/page/-/resources/Latino%20Report%202012.pdf) (summarizing laws).

ly than whites to have government issued identification.<sup>245</sup> In a twist on the use of federal preemption principles, the Court relied not upon preemption under the Supremacy Clause, but rather under the Elections Clause, which gives Congress the power to make or alter state regulations governing the time, place, and manner of holding federal elections.<sup>246</sup>

The Court's decision is all the more interesting in light of the claim that the Ninth Circuit denied, under Section 2 of the Voting Rights Act, which provides explicitly race-based relief.<sup>247</sup> The Ninth Circuit noted the need for plaintiffs seeking such relief to demonstrate that the voting practice being challenged actually results in race discrimination, with a causal connection between the practice and the discriminatory result.<sup>248</sup> It found that plaintiffs failed to provide evidence demonstrating even the disparate impact alleged.<sup>249</sup> Here, racial justice was again better served by the race-neutral structural protections of federalism and federal preemption than by the explicitly race-based protections conferred by federal statute.

Finally, courts across the country have dealt with a variety of cases involving disparate racial impact, immigration, and/or allegations of racial animus in the post-9/11 cases. As in the other areas of law examined by this Article, the disparate racial impact implicated by these cases is relatively clear; the U.S. Government has focused almost exclusively on Muslims and predominantly Muslim countries in an effort to prevent future terrorist attacks, and largely on Middle

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245. See, e.g., NAT'L CONG. OF AM. INDIANS, VOTER ID LAWS & THE NATIVE VOTE: STATES OF CONCERN 4, available at [http://www.ncai.org/attachments/PolicyPaper\\_LaOnRbluKyazjpizLTzOsFxrRiBpmwxxbGVFOeCNGMFwEuLZXwz\\_VoterIDs\\_NativeVote\\_States\\_of\\_Concern.pdf](http://www.ncai.org/attachments/PolicyPaper_LaOnRbluKyazjpizLTzOsFxrRiBpmwxxbGVFOeCNGMFwEuLZXwz_VoterIDs_NativeVote_States_of_Concern.pdf) (discussing the disparate impact voter ID laws have on Native Americans, noting, for example, that many tribal communities do not have street addresses); JON C. ROGOWSKI & CATHY J. COHEN, BLACK YOUTH PROJECT, TURNING BACK THE CLOCK ON VOTING RIGHTS: THE IMPACT OF NEW PHOTO IDENTIFICATION REQUIREMENTS ON YOUNG PEOPLE OF COLOR 1 (2012), available at <http://research.blackyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf> (focusing on effect of voter ID laws on young voters who are of color); WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUST., VOTING LAW CHANGES IN 2012 24 (2011), available at [https://www.brennancenter.org/page/Democracy/VRE/Brennan\\_Voting\\_Law\\_V10.pdf](https://www.brennancenter.org/page/Democracy/VRE/Brennan_Voting_Law_V10.pdf) (noting that "as many as 25% of African-American voters do not possess a current and valid form of government issued photo ID, compared to 11% of voters of all races").

246. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2257.

247. 42 U.S.C. § 1973(a) (2006) (prohibiting states from imposing voting qualifications that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color").

248. *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012).

249. *Id.* at 407.

Eastern citizens and countries.<sup>250</sup> Those seeking to challenge directly the racial justice implications of racial profiling or special registration requirements, however, have met with little success when relying on claims driven purely by equal protection.<sup>251</sup> Race-neutral claims, brought under the writ of habeas corpus, due process, and/or federal statutes or treaties, have proven more fruitful.<sup>252</sup>

#### IV. CONCLUSION

The scenarios of racial inequality discussed above were neither intentionally created by a racist government cabal nor the result of bad state actors engaged in intentional discrimination. They arose, instead, out of what some scholars have identified as structural racism: the development of social institutions over time, through myriad government choices and actions.<sup>253</sup> The resulting structural inequality is impossible to eradicate via the elimination of a single government policy or targeted firings of racist employees.

This new racial injustice is difficult, if not impossible, to combat under the Court's reading of the Equal Protection Clause, which requires the ill intent of a bad government actor, that is, the racist government employee. It requires, moreover, a structural solution. While much of contemporary equal protection scholarship has focused on how to extend the protections of the Equal Protection Clause to new groups like lesbian women and gay men, this Article returns to the paradigmatic application of the clause to prohibit classifications based upon race.<sup>254</sup> It offers an exploration of the many ways reform-

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250. See, e.g., U.S. DEPT OF ST., NATIONAL STRATEGY FOR COMBATING TERRORISM 2 (Sept. 2006), <http://2001-2009.state.gov/s/ct/rls/wh/71803.htm> (describing counter-terrorism strategy and focusing on threat from radical Islamists in the Middle East).

251. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 682-83 (2009) (dismissing complaint for failing to allege facts showing petitioners "purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin"); *Rajah v. Mukasey*, 544 F.3d 427, 438-39 (2d Cir. 2008) (denying equal protection challenge to special registration requirements that applied only to adult male citizens of Muslim majority states and North Korea because there was a rational national-security basis for the program).

252. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (holding that aliens held as enemy combatants were entitled to habeas corpus hearings to challenge their detentions); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (finding proposed military commissions violated Uniform Code of Military Justice and did not satisfy Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 537-38 (2004) (requiring that citizen held as enemy combatant be given meaningful opportunity to contest his detention pursuant to the Due Process Clause).

253. See *supra* note 42.

254. This includes, of course, Yoshino's article. Yoshino, *supra* note 9; see also Ball, *supra* note 58, at 9-12 (discussing liberty and equality based claims in context of gay rights); Tribe, *supra* note 48.

ers have found to fill the gaps wrought in the Equal Protection Clause by *Davis* and its progeny, and it demonstrates that reformers largely (and long ago) abandoned explicitly race-based claims, relying instead on other guarantees contained in the Bill of Rights, statutory claims, and federal structural arguments.

This Article is largely a descriptive project. It takes as a given existing Court doctrine and recognizes—as reformers working on the ground already have—that different paths can be taken to achieve equality. But this description of today’s fight for racial equality helps to illuminate what equality more generally might resemble in the coming years, and whether and to what extent the Equal Protection Clause will even be relevant.

Facially neutral policies with a disparate racial impact will likely be a fact of life for some time. The continued vitality of the Equal Protection Clause has perhaps never been in greater question, not just for race, but for other groups seeking equality as well. The hard-fought lessons racial justice reformers have learned over the years may soon be relevant for others seeking to challenge disparate impact claims. This Article seeks to demonstrate that government policies creating such impact are not beyond the reach of the law. The workarounds identified herein do not present a solution to every racial inequality—sometimes a political solution may be more appropriate. But where a judicial fix is feasible, these workarounds point the way towards a new racial justice.