

## ARTICLES

# THE CONSTITUTIONAL COSTS OF SCHOOL POLICING

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*Responding to fears of violence and liability on K-12 campuses, local school boards and superintendents have made on-site or embedded school police omnipresent in American public schools. Yet, very little attention is paid to the many costs associated with their presence. When situating law enforcement's presence squarely in the racist history of policing and school policing, the juxtaposition with the civic purpose of public education reveals significant constitutional costs. This Article builds on existing scholarship by bringing attention to the conflict between the First, Fourth, Fifth, Eighth, and Fourteenth Amendments and the dimensions of embedded school police. Ultimately, schools must balance their responsibility to protect students entrusted to them by parents and guardians with those students' individual rights, such as the right to privacy. While current policing practices in schools do not per se violate precedent, the Court could and should overturn precedent in light of the*

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*changing face of school security in American schools. Adequate action by the Court would protect schoolchildren’s constitutional rights. Finally, the Article elevates evidence-based alternatives to embedded school police that promote safe and positive school climates.*

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#### INTRODUCTION

On Wednesday, August 11, 2021, students at Washington Middle School in Albuquerque, New Mexico, had their first day of in-person school after a year of distance learning due to the COVID-19 global

pandemic.<sup>1</sup> Only two days later, the first fatal school shooting in the district's history occurred.<sup>2</sup> Thirteen-year-old Juan Saucedo Jr., took his father's gun to school and fatally shot his classmate, Bennie Hargrove.<sup>3</sup> Hargrove was a thirteen-year-old Black student who had attempted to de-escalate a fight between Saucedo and another student whom Hargrove believed Saucedo had been bullying.<sup>4</sup> After the shooting, a campus police officer ("CPO") took Saucedo into custody.<sup>5</sup> According to a complaint filed in Children's Court, he was charged with murder and unlawful carrying of a deadly weapon on school premises.<sup>6</sup> Local news outlets reported the community's reactions to the shooting, which shifted blame between fellow students for failing to report Saucedo to school officials for having a gun, and Saucedo's father, whose history involves shooting a parent at a local high school in 2018 and negligent storage of the weapon.<sup>7</sup>

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1. Susan Montoya Bryan & Paul Davenport, *Police: School Shooting Victim Went to Aid Boy Being Bullied*, WASH. POST (Aug. 13, 2021, 11:59 PM), [https://www.washingtonpost.com/new-mexico-school-year-off-to-deadly-start-amid-gun-violence/2021/08/13/f830d02c-fcb3-11eb-911c-524bc8b68f17\\_story.html](https://www.washingtonpost.com/new-mexico-school-year-off-to-deadly-start-amid-gun-violence/2021/08/13/f830d02c-fcb3-11eb-911c-524bc8b68f17_story.html) [https://perma.cc/M6RS-F879].

2. Matthew Reisen, *School Shootings in New Mexico*, ALBUQUERQUE J. (Aug. 17, 2021, 8:46 PM), <https://www.abqjournal.com/2420337/school-shootings-in-new-mexico.html> [https://perma.cc/LGF8-YMK2].

3. Matthew Reisen, *'He just wanted to make peace,' friends, family mourn teen slain at ABQ school*, ALBUQUERQUE J. (Aug. 14, 2021, 10:23 PM), <https://www.abqjournal.com/2419662/police-id-shooter-victim-in-school-shooting.html> [https://perma.cc/5A5H-TL85].

4. Brady Wakayama, *Victim, Suspect Named in Fatal Washington Middle School Shooting*, KRQE (Aug. 16, 2021, 05:47 AM), <https://www.krqe.com/news/crime/victim-suspect-named-in-fatal-washington-middle-school-shooting> [https://perma.cc/J6UD-XJTA]; John Woodrow Cox & Steven Rich, *Please Help Me: Kids with Guns Fueled a Record Number of School Shootings in 2021*, WASH. POST (Dec. 31, 2021, 6:30 AM), <https://www.washingtonpost.com/dc-md-va/2021/12/31/2021-school-shootings-record> [https://perma.cc/L248-FDJX].

5. *Id.*; Reisen, *supra* note 3.

6. See Bob D'Angelo, *Victim in Fatal N.M. Middle School Shooting Tried to De-Escalate Situation*, WFTV (Aug. 14, 2021, 11:52 PM), <https://www.wftv.com/news/trending/victim-fatal-nm-middle-school-shooting-tried-de-escalate-situation/A5AB3RA3RRB4XJYH3ELF5QGH0I> [https://perma.cc/K3C5-2HXD].

7. See Jami Seymore, *Charges Possible for Parents of Washington Middle School Shooting Suspect*, KRQE (Aug. 17, 2021, 8:54 AM), <https://www.krqe.com/news/politics-government/charges-possible-for-parents-of-washington-middle-school-shooting-suspect> [https://perma.cc/73WK-4RZT]; Brady Wakayama, *No Student Told Washington Middle School Staff that Suspect had a Gun, Police Say*, KRQE (Aug. 19, 2021, 6:26 AM), <https://www.krqe.com/news/albuquerque-metro/no-student-told->

Despite the presence of at least one embedded CPO, a Black child took it upon himself to defend another student from bullying and ultimately lost his life. Unfortunately, Bennie Hargrove's tragic death is just one of countless instances across the country—the 2018 shooting spree at Marjory Stoneman Douglas High School in Parkland, FL, and 2022 shooting at Robb Elementary School in Uvalde being two recent examples, in which embedded school police and other prisonization tactics failed to keep students safe.<sup>8</sup> The literature is replete with critiques of the school-to-prison pipeline that has developed with the increase in prisonization practices.<sup>9</sup>

This Article amplifies questions about the constitutionality of prisonization practices, particularly embedded school police. To lay the framework for constitutional challenges, we first juxtapose the history of policing and the history of school policing with the purposes of education in America. Next, the Article turns to the constitutional analysis by focusing on the ways in which school resource officers (“SROs”) and other policing measures potentially violate students’ First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights.<sup>10</sup> Finally, the Article elevates evidence-based alternatives to promote student safety and positive school climates.

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washington-middle-school-staff-that-suspect-had-a-gun-police-say  
[<https://perma.cc/5W7T-U3ZL>].

8. Elizabeth Chuck, Alex Johnson & Corky Siemaszko, *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC (Feb. 15, 2018, 10:20 AM), <https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101> [<https://perma.cc/6PGR-B24N>]; Vanessa Romo, *Texas Community Struggles with Second-Deadliest School Shooting in U.S. History*, NPR (May 25, 2022, 4:50 AM), <https://www.npr.org/2022/05/24/1101037902/texas-elementary-school-shooting-ualde> [<https://perma.cc/4NJC-JQLV>] (reporting that 21 people—19 children and two adults—were killed at an elementary school in Uvalde, TX).

9. See, e.g., ABA, ABA TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE: REPORT, RECOMMENDATIONS AND PRELIMINARY REPORT (2018); *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/racial-justice/race-and-inequality-education/race-and-inequality-education-school-prison-pipeline> [<https://perma.cc/TV9Z-BY67>]; Racial Disparities in the School-to-Prison Pipeline, PBS (Feb. 17, 2022) <https://www.pbs.org/video/racial-disparities-in-the-school-to-prison-pipeline-r7kczd> [<https://perma.cc/GQE8-V7D7>]; Deborah N. Archer, *Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 867-72 (2009/10).

10. See generally Maryam Ahranjani, *School “Safety” Measures Jump Constitutional Guardrails*, 44 SEATTLE U. L. REV. 273 (2021).

I. HISTORY OF POLICING AND SCHOOL POLICING IN THE  
UNITED STATES

The past informs the present. To understand the problematic nature of school policing, one must step back and consider the history of policing in America at large. First, we discuss the slave patrols of early colonial America as a precursor to modern American policing. This history is integral to contextualizing the current presence of police in predominantly non-white public schools. Next, we consider how both the slave patrols of the South and the police in the North evolved into military-like organizations in response to the Civil Rights movement. Ultimately, this history gives life to the strong racial undercurrent of school policing today.

A. *Slave Patrols and the Roots of Policing in America*

In early colonial British-America, slavery began as a system of indentured servitude, which could bind anyone, regardless of race.<sup>11</sup> The first enslaved Africans brought to Point Comfort in the British colony of Virginia in 1619 were legally known as “servants.”<sup>12</sup> Once the colonies grew to depend on the economic wealth generated by these slaves, white slaveholders relied on a racialized social structure to justify this new, brutal system called chattel slavery.<sup>13</sup> Economic dependence on this system gave rise to concomitant fears of efforts to overthrow it.<sup>14</sup>

One method of preventing a potential multiracial overthrow was to tightly regulate the behavior and conduct of slaves with “slave codes,” which sought to regulate where and when slaves could gather, defined prohibited activities, and outlined punishments for various violations.<sup>15</sup> Apart from criminalizing slave conduct, slave codes served another, less apparent purpose. They served as “racial bribes” to white indentured servants.<sup>16</sup> By allowing white indentured servants the special privilege to, for example, police slaves through their work in

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11. Bryan Stevenson, *A Presumption of Guilt: The Legacy of America’s History of Racial Injustice*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 3, 6 (Angela J. Davis ed., 2017).

12. *Id.*

13. *Id.* at 6.

14. *Id.* at 6-8.

15. Katheryn Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT*, *supra* note 11, at 136, 140.

16. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 25 (rev. ed. 2012).

slave patrols and militias, the slave codes effectively drove a wedge between them and Black slaves.<sup>17</sup> As a result, poor whites now had a “direct, personal stake” in maintaining the racialized social order.<sup>18</sup>

Slave codes also authorized “slave patrols,” which were established to enforce the codes.<sup>19</sup> Initially, slave patrols were more often found in those colonies where slaves outnumbered (or almost outnumbered) whites.<sup>20</sup> Slave codes and patrols were endemic in southern slave states—the most elaborate and oldest documented slave codes are from South Carolina.<sup>21</sup> In 1704, South Carolina implemented its first official slave patrol in response to ongoing fears of a slave uprising.<sup>22</sup> It provided that every militia captain select ten men under his command to serve in a slave patrol, thereby exempting them from regular militia duties.<sup>23</sup> Their duties were to ride to and from plantations, collecting slaves without documentation from their slaveholders, and punishing them for violating the slave codes.<sup>24</sup> Patrollers often rode in “beats” of five men and had the authority to enter slave quarters without search warrants, an irony given that early American colonists sought to escape the same tyrannical overreach by the British monarchy.<sup>25</sup> Other slave states and colonies followed suit.<sup>26</sup>

The racialized social structure that upheld chattel slavery outlived the end of *de jure* slavery. Specifically, postbellum slave patrols transformed as the need for patrols was somewhat obviated after the Civil War.<sup>27</sup> Those who otherwise would have joined slave patrols filtered into state and federal militias, as well as the Ku Klux Klan.<sup>28</sup> These organizations, tasked with policing the movements of newly

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17. *Id.*

18. *Id.*

19. Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 58 (1988).

20. *Id.* at 57.

21. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 14 (2001).

22. *Id.* at 19.

23. *Id.* at 20.

24. *Id.*

25. *Id.* at 22; Reichel, *supra* note 17, at 63. (explaining that “[p]atrols were allowed search powers that the colonists later found so objectionable in the hands of British authorities”).

26. Russell-Brown, *supra* note 15, at 140 (discussing slave patrols in North and South Carolina).

27. Russell-Brown, *supra* note 15, at 141.

28. *Id.*

freed slaves, effectively supplanted slave patrols.<sup>29</sup> In addition, where former patrols had to minimize the amount of violence used to capture and return escaped slaves or face consequences by demanding slaveowners, the new patrols had no such incentive.<sup>30</sup> As a result, these groups were even more brutal and violent than the former iteration of patrols.

Just as new forms of state-sanctioned policing groups replaced slave patrols—black codes replaced slave codes.<sup>31</sup> Black codes sought to regulate the conduct of freed Black slaves, ostensibly because white legislators believed that freed Black citizens “lacked the proper motivation to work.”<sup>32</sup> These codes were meant to establish systems resembling slavery or otherwise mandated segregation.<sup>33</sup> Convict laws which included vagrancy laws that criminalized unemployment were one aspect of these codes selectively applied to Black citizens.<sup>34</sup> In this way, Jim Crow-era segregation also served as a racial bribe for whites.<sup>35</sup>

Policing developed on a more formal path in Northern states and cities. In 1838 the Massachusetts legislature authorized the hiring of police officers in Boston.<sup>36</sup> New York City created its police department in 1844, followed by New Orleans, Cincinnati, Philadelphia, Chicago, and Baltimore in the 1850s.<sup>37</sup> The industrial revolution, immigration, petty crime, and population growth fueled the formation of police departments in these urban centers.<sup>38</sup> Others ascribe the advent of modern policing to the appointment of August Vollmer as the Berkeley police chief in 1909, who effectively “refashioned American police into an American military.”<sup>39</sup>

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29. *Id.*

30. *See id.* (reasoning when slaves were no longer considered property, there was no incentive to practice restraint).

31. *See* ALEXANDER, *supra* note 24, at 28.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 34.

36. Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [<https://perma.cc/F85Q-CLRZ>].

37. *Id.*

38. *Id.*

39. *Id.*

B. *The Rise of “Modern” Policing in America*

In the early 1900s, the policing institution underwent significant reforms<sup>40</sup> to legitimize the force after a failed “political era,” where police officers were inextricably linked with the dominant political leadership.<sup>41</sup> Reforms included new standards for hiring officers, training, and a more centralized system focused primarily on crime control.<sup>42</sup> Despite these reforms, there was a growing rift between what the community sought from policing (for issues noncriminal in nature) and how police officers responded (emphasis on controlling crime).<sup>43</sup> This rift would be further tested during the Civil Rights movement.

In fact, community policing became further militarized in response to protests during the Civil Rights Movement. In 1965, President Johnson signed the Law Enforcement Assistance Bills,<sup>44</sup> which authorized federal funding and training assistance for state and local police departments to address crime and regulate their prison systems more effectively.<sup>45</sup> These laws would ultimately lay the groundwork for equipping police departments across the country with military-grade weapons.<sup>46</sup> Then in 1968, President Johnson signed the Omnibus Crime Control and Safe Street Act,<sup>47</sup> legislation that eventually diverted money away from social safety net programs (including funding for public schools) and towards policing.<sup>48</sup> For example, since 1979, while total spending on education has increased, it is still outpaced by the rate of spending on prisons.<sup>49</sup>

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40. *Id.*; CAROL A. ARCHBOLD, *POLICING: A TEXT/READER* 8 (2012).

41. ARCHBOLD, *supra* note 40, at 7-8.

42. *Id.* at 9.

43. *Id.* at 10.

44. President’s Crime Commissions Funds Authorization Act, Pub. L. No. 89-196, 79 Stat. 827, [S.J. Res. 102]; Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197, 79 Stat. 828 [H.R. 8027].

45. President’s Crime Commissions Funds Authorization Act, Pub. L. No. 89-196 [S.J. Res. 102]; Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197 [H.R. 8027].

46. Lepore, *supra* note 36; Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015, 7:00 AM), <https://time.com/3746059/war-on-crime-history> [<https://perma.cc/CRS6-PU3L>].

47. Pub. L. No. 90-351, 82 Stat. 197 (1968) [H.R. 5037].

48. *See also* Lepore, *supra* note 36.

49. Christopher Ingraham, *The States that Spend More Money on Prisoners Than College Students*, WASH. POST (July 7, 2016, 9:40 AM), <https://www.washingtonpost.com>



The impact of the Johnson Administration's focus on "law and order" continues to reverberate today through the intertwined roots of policing and institutionalized anti-Black racism in over-policed communities and schools.<sup>50</sup> A recent analysis of federal civil rights data shows that prisonization practices are more endemic in majority non-white schools than in predominantly white schools.<sup>51</sup> Much like slave patrols and Jim Crow segregation, these practices serve as a means of social control, indoctrinating all students (including white students) with the problematic notion of the inherent criminality of Black and Brown children and young adults. To further underscore the significance of the racial disparities in school prisonization, the next two Sections explore the history of public schooling and policing in schools.

### C. *The History of Public Schools in America*

Common school systems were created in the nineteenth century through land grants from Congress to further the federal interest in raising citizens with a shared commitment to national ideals and institutions.<sup>52</sup> Consequently, in its enabling acts for new states, Congress donated 77,630,000 acres of land for common schools, but not without strings attached.<sup>53</sup> After the Civil War ended in 1865, the expansion westward brought more elaborate systems of organizing

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/news/wonk/wp/2016/07/07/the-states-that-spend-more-money-on-prisoners-than-college-students [https://perma.cc/PT88-D8K6]; see U.S. DEP'T OF EDUC., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION 1 (2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf> [https://perma.cc/85EA-TSRT] (explaining that state and local government expenditures in prisons and jails have increased three times as fast as education spending).

50. Russell-Brown, *supra* note 15, at 141 (explaining that, "at its inception, American policing was designed to police black bodies, particularly black male bodies").

51. See Evie Blad, *On-Site Police, Security More Common at Majority-Black Secondary Schools*, EDUC. WEEK (Apr. 26, 2018), <https://www.edweek.org/leadership/on-site-police-security-more-common-at-majority-black-secondary-schools/2018/04> [https://perma.cc/T93R-NFPW] (explaining that there were sworn law enforcement officers at more than half of the schools surveyed with an enrollment of at least 75% black students, whereas at those schools with an enrollment of at least 75% white students, law enforcement officers were present in only 42.1% of the schools surveyed).

52. DAVID TYACK, THOMAS JAMES & AARON BENAVIDE, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, at 14-15 (1987).

53. *Id.* at 22.

public education.<sup>54</sup> Ultimately, in 1867 Congress established the federal Department of Education (ED).<sup>55</sup> While the ED created regulations and Congress offered subsidies, public schools remained largely decentralized, funded, and managed at the state and local levels.<sup>56</sup> Each State used compulsory school attendance laws to ensure that children within its jurisdiction had access to instruction and opportunities for social and economic mobility and civic participation beyond what their caregivers alone might be willing or able to provide.<sup>57</sup> Compulsory school attendance also freed parents to manage the competing demands of domestic life and paid employment.<sup>58</sup>

Historians and political scientists have observed some common purposes for education. Amy Gutmann, former President of the University of Pennsylvania, points out that civic education was necessary to reproduce society and sustain a liberal democratic political order.<sup>59</sup> Public schools promoted the development of morals or character—as defined by the majority.<sup>60</sup> John Dewey famously observed that education is training for the responsibilities and privileges of adult life.<sup>61</sup> Indeed, common schooling provided a mechanism to help immigrants adapt and assimilate to the majority culture.<sup>62</sup>

Two important realities shaped and continue to shape the evolution of public education: population growth and increasing diversity (including mandatory integration) in terms of national origin, race, religion, sexual orientation, and gender identity, inter alia. The mix of these ingredients—the racist history of policing, indoctrination purpose of public schools, the need for parents to work and thus cede control to public schools, growing numbers of students, and more

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54. *Id.* at 21.

55. *Id.* at 22; The main purpose of the ED was to collect information and statistics about schools in the country. *An Overview of the U.S. Department of Education*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/overview/focus/what.html> [<https://perma.cc/34H2-V755>].

56. *Id.*

57. Randall Curren & J. C. Blokhuis, *The Prima Facie Case Against Homeschooling*, 25 PUB. AFFS. Q. 1, 1 (2011).

58. *Id.*

59. AMY GUTMANN, *DEMOCRATIC EDUCATION* 287 (1999).

60. *Id.* at 41; TYACK ET AL., *supra* note 52, at 169.

61. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 63 (1916).

62. Bruce Fuller & Arun Rasiyah, *Schooling Citizens for Evolving Democracies*, in *THE PUBLIC SCHOOLS* 81 (Susan Fuhrman & Marvin Lazerson eds., 2005); TYACK ET AL., *supra* note 52, at 16.

diversity in the country—contributed to the majority’s increasing reliance on police in public schools and the public’s general tolerance for the school-to-prison pipeline.

*D. The Evolution of Police in Public Schools*

The timing of police appearing in schools roughly aligns with the rise of formalized community policing described in Section I.B. Accordingly, Kristin Henning traces the roots of school policing back to the aftermath of the 1954 Supreme Court case *Brown v. Board of Education*.<sup>63</sup> Henning explains that while the presence of school police has increased exponentially in the past twenty years following highly-publicized but rare instances of mass violence in schools, their origins and funding mechanisms were created in the wake of *Brown* and resistance to racial desegregation.<sup>64</sup> Under the guise of protecting Black students during the tumultuous efforts to integrate public schools, fearful municipal leaders claimed that Black children lacked discipline and worried they “would bring disorder to their schools.”<sup>65</sup> Many white middle-class Americans conflated the struggle for civil rights with crime and delinquency.<sup>66</sup>

Initial school policing efforts sprouted at the local level, but the federal government became involved in the 1960s when President Lyndon B. Johnson established the Commission on Law Enforcement and Administration of Justice.<sup>67</sup> The Commission published a report in 1967 that connected race, crime, and poverty and warned about the role of Black youth in crime in coming years.<sup>68</sup> Local and state law enforcement agencies began to apply for new federal grants for school-based policing through the U.S. Department of Justice Office of Law Enforcement Assistance.<sup>69</sup>

Even though there were immediate and persistent concerns raised by Black teachers and parents who were targeted by these so-called safety measures, public support for police in schools swelled in the

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63. Kristin Henning, *Cops at the Schoolyard Gate*, Vox (July 28, 2021, 8:00 AM), <https://www.vox.com/the-highlight/22580659/police-in-school-resource-officers-sro> [<https://perma.cc/WE49-ZRYW>]; *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

64. Henning, *supra* note 63.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

1980s and 1990s during a period of increased crime and drugs.<sup>70</sup> Two federal laws, the Violent Crime Control and Law Enforcement Act<sup>71</sup> and Gun-Free Schools Act,<sup>72</sup> were passed in 1994, further increasing federal funding for policing in communities and schools.<sup>73</sup> Notably, the Office of Community Oriented Policing Services (“COPS”) was created pursuant to the Violent Crime Control Act.<sup>74</sup> In 1999, the public’s appetite for more police in schools increased significantly after Eric Harris and Dylan Klebold murdered twelve students and one teacher at Columbine High School.<sup>75</sup> Subsequently, President Bill Clinton authorized COPS to provide tens of millions of additional dollars to school systems to address crime in and around schools.<sup>76</sup>

During the late 1990s, with federal laws and funding in place, prisonization practices became commonplace despite concerns about the disproportionate impact on children of color and children with disabilities.<sup>77</sup> Prisonization refers to the transformation of public schools into prison-like institutions where student mobility is surveilled and restricted.<sup>78</sup> Prisonization includes metal detectors, surveillance cameras, security personnel, armed faculty and staff on school campuses, and harsh discipline methods such as zero tolerance policies, restraint and seclusion, and threat assessments.<sup>79</sup>

These policies and practices are fear-based responses to relatively infrequent but sensationalized school violence cases like Columbine, Sandy Hook, and Marjory Stoneman Douglas.<sup>80</sup> Whereas in 1975, only 1% of schools had embedded police officers, by 2019-2021, 51.4% of

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70. *Id.*

71. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 [H.R. 3355].

72. Gun-Free Schools Act of 1994, Pub. L. No. 103-227, 108 Stat. 270 [H.R. 1804].

73. Henning, *supra* note 63.

74. *Id.*

75. *Id.*

76. *Id.*

77. Maryam Ahranjani, *The Prisonization of America’s Public Schools*, 45 HOFSTRA L. REV. 1097, 1101–02 (2017).

78. *Id.* at 1098.

79. *Id.*

80. See, e.g., John Woodrow Cox, Steven Rich, Allyson Chiu, Hannah Thacker, Linda Chong, John Muyskens & Monica Ulmanu, *More Than 311,000 Students Have Experienced Gun Violence at School Since Columbine*, WASH. POST (May 27, 2022, 3:10 PM), <https://www.washingtonpost.com/graphics/2018/local/school-shootings-database> [<https://perma.cc/2XJP-8M3T>] (noting that “[h]undreds of outlets cover the deadliest attacks, such as the . . . rampage at Marjory Stoneman Douglas High” but conceding that “school shootings remain rare”).

schools (and a staggering 70.9% of high schools) reported having at least one sworn officer routinely carrying a firearm on campus.<sup>81</sup> Between 2001 and 2017, the percentage of students ages twelve to eighteen who reported observing the use of one or more security cameras increased from 39% to 84%.<sup>82</sup> In a post-Columbine and 9/11 America, some have defended as necessary the swift speed with which prisonization has ingrained itself in our society and schools.

As explored further in Section III.A., the problem with fear-based responses to tragic events is that they may not be effective. In a recent report on the effectiveness of such practices, the Center for American Progress concluded that “these stringent security measures do not make schools safer.”<sup>83</sup> In fact, there are several unintended and harmful consequences: students may feel *less safe* with higher levels of security; students are more likely to be referred to law enforcement for smaller infractions, like theft and vandalism, than they would be without law enforcement; and students of color and students with disabilities are disproportionately harmed.<sup>84</sup>

Scholars and other researchers generally agree that the presence of one or more of these practices results in more law enforcement contact and more arrests of vulnerable children.<sup>85</sup> In Jason Nance’s study, schools with more than 50% students of color were two to eighteen times more likely to be subjected to metal detectors, school police and security guards, locked gates, and random sweeps than at schools

81. Chelsea Connery, *The Prevalence and the Price of Police in Schools*, U. CONN. CTR. FOR EDUC. POL’Y ANALYSIS 1 (Oct. 2020), [https://cepa.uconn.edu/wp-content/uploads/sites/399/2020/10/Issue-Brief-CEPA\\_C-Connery.pdf](https://cepa.uconn.edu/wp-content/uploads/sites/399/2020/10/Issue-Brief-CEPA_C-Connery.pdf) [https://perma.cc/AX8Y-XAM5]; NAT’L CTR. FOR EDUC. STATS., U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2020, Table 233.70 (2022), [https://nces.ed.gov/programs/digest/d21/tables/dt21\\_233.70.asp](https://nces.ed.gov/programs/digest/d21/tables/dt21_233.70.asp) [https://perma.cc/AB7U-TBYS].

82. KE WANG, YONGQIU CHEN, JIZHI ZHANG & BARBARA A. OUDEKERK, NAT’L CTR. FOR EDUC. STAT., NCES 2020-063, INDICATORS OF SCHOOL CRIME AND SAFETY: 2019, at 107 (2020).

83. BAYLISS FIDDIMAN, ASHLEY JEFFREY & SCOTT SARGRAD, CTR. FOR AM. PROGRESS, SMART INVESTMENTS FOR SAFER SCHOOLS 5 (Dec. 2018).

84. *Id.* at 6.

85. *E.g.* Emily E. Tanner-Smith, Benjamin W. Fisher, Lynn A. Addington & Joseph H. Gardella, *Adding Security, But Subtracting Safety? Exploring Schools’ Use of Multiple Visible Security Measures*, 43 AM. J. CRIM. JUST. 102, 102 (2018) (finding that “utilization of multiple [visible] security measures reduced the likelihood of exposure to property crime in high schools, but most other security utilization patterns were associated with poorer school safety outcomes”). *See generally* Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 770-71 (2017) (presenting data on school surveillance techniques and their relationship to implicit racial bias).

where the nonwhite population was less than 20%.<sup>86</sup> And according to the U.S. Department of Education, students of color and students with disabilities are far more likely to be subject to restraint and arrest than white students and students without disabilities.<sup>87</sup>

For the past two decades, scholars, educators, and activists have been concerned with the rapidly increasing presence of embedded police officers in public schools around the country.<sup>88</sup> Leading organizations like the American Psychological Association, American Civil Liberties Union (ACLU), Advancement Project, and the Justice Policy Institute have long argued that police should not be embedded in schools and that there are evidence-based alternatives that promote safe and positive schools.<sup>89</sup> As American cities reexamine the role of police in mass incarceration and racial injustice, attention to policing in public schools has similarly undergone heightened scrutiny.<sup>90</sup> Some cities are conducting better training for the school police, repurposing the police, or removing them altogether.<sup>91</sup> When teachers and

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86. Nance, *supra* note 85, at 811; *see also* Melinda D. Anderson, *When School Feels Like Prison*, THE ATLANTIC (Sept. 12, 2016), <https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556> [<https://perma.cc/PWL4-PBQG>] (explaining that Nance's study suggests that as the number of students of color in a school increased, so did the odds that the school would employ more intense surveillance methods).

87. FIDDIMAN ET AL., *supra* note 83, at 6–7.

88. *See, e.g.*, ABA, *supra* note 9, at 72–74 (analyzing the data reflecting this trend and outlining several of its repercussions).

89. *Am. Psych. Ass'n Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 857–59 (2008) (recommending reforms to zero tolerance policies and examining alternatives); Harold Jordan, *It Is Time to Get Real About School Policing*, ACLU (Oct. 5, 2016), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/it-time-get-real-about-school-policing> [<https://perma.cc/Z48U-GZCJ>] (examining the “real consequences for students and for [school] culture” of embedding officers in schools); ADVANCEMENT PROJECT, ALL. FOR EDUC. JUST., DIGNITY IN SCHS. CAMPAIGN & NAACP LEGAL DEF. & EDUC. FUND, INC., POLICE IN SCHOOLS ARE NOT THE ANSWER TO SCHOOL SHOOTINGS 12-16 (2018) (detailing the significant harms associated with armed officer embedment in schools); AMANDA PETTERUTI, JUST. POL'Y INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS (2011) (same).

90. *See, e.g.*, Eder Campuzano, *Portland Superintendent Says He's "Discontinuing" Presence of Armed Police Officers in Schools*, OREGONIAN (June 5, 2020, 12:12 PM), <https://www.oregonlive.com/education/2020/06/portland-superintendent-says-hes-discontinuing-school-resource-officer-program.html> [<https://perma.cc/CR2Y-LUCA>].

91. *See, e.g.*, Rebecca Tan, *For First Time in 19 Years, Montgomery County Schools Set to Reopen Without Police*, WASH. POST (Aug. 25, 2021, 2:30 PM),

administrators can call an officer already on site to resolve an issue they previously managed on their own, the temptation is too great to seek law enforcement's assistance.<sup>92</sup> Additionally, officers are trained to manage human behavior in ways that are antithetical to the aims of schooling described in the previous section.<sup>93</sup> There is no shortage of news reports of officers physically or sexually abusing students, misplacing their guns, and even shooting students.<sup>94</sup>

*E. The Constitution as a Basis for Reform of School Policing*

There is no explicit language in the U.S. Constitution regarding education. Further, the U.S. Supreme Court has declined to find an implied right to education.<sup>95</sup> This means there are no *federal* constitutional rights to education for any of the approximately 62 million school-age children today in the United States.<sup>96</sup> However, the Supreme Court *has* addressed education in the course of affirming other constitutional rights, and each of the fifty states has an education

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[https://www.washingtonpost.com/local/md-politics/montgomery-schools-police-officer-program/2021/08/25/99fe70d2-058b-11ec-a654-900a78538242\\_story.html](https://www.washingtonpost.com/local/md-politics/montgomery-schools-police-officer-program/2021/08/25/99fe70d2-058b-11ec-a654-900a78538242_story.html) [<https://perma.cc/DXH9-YUQL>] (noting that Montgomery County, Maryland, Arlington County, Virginia, and the city of Alexandria, Virginia all pulled police from public schools following nationwide antiracist protests).

92. Jason P. Nance, *Students, Police, and the School-To-Prison Pipeline*, 93 WASH. U. L. REV. 919, 977 (2016) ("SRO programs appear to facilitate a criminal justice orientation to how school officials respond to offenses that they once handled internally.").

93. See *supra* notes 57-60 and accompanying text.

94. E.g. Claudia Dominguez, Natasha Chen & Stephanie Becker, *Woman Shot by School Safety Officer to be Disconnected From Life Support, Family Says*, CNN (Oct. 3, 2021, 8:12 PM), <https://www.cnn.com/2021/10/02/us/california-school-safety-officer-shooting> [<https://perma.cc/2PB8-ZEG5>]; Lauren del Valle, *Michigan School Resource Officer Sentenced to 1 Year in Jail for Sexually Assaulting 3 High School Students*, CNN (Oct. 3, 2019, 10:24 PM), <https://www.cnn.com/2019/10/03/us/michigan-officer-sentenced-sexual-assault/index.html> [<https://perma.cc/DNL7-PXBY>].

95. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.") (emphasis added).

96. See U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: ACS DEMOGRAPHIC AND HOUSING ESTIMATES (2020), <https://data.census.gov/table?q=DP05&tid=ACSDPIY2021.DP05> [<https://perma.cc/4WPQ-M96T>] (estimating that, as of 2021, there were approximately 63 million children in the U.S. between the ages of five and nineteen).

clause in its constitution.<sup>97</sup> The language varies, but every state guarantees some right to education to its residents.<sup>98</sup>

Since 1899, the Supreme Court has heard no fewer than ninety-three cases—an average of about one case per year—on civil rights claims in public schools.<sup>99</sup> The issues considered by the Court include, *inter alia*, student free speech and free exercise rights; freedom from unreasonable searches and seizures; rights to equal treatment regardless of race, gender, or national origin; and due process rights in the context of school discipline.<sup>100</sup> While the Court has maintained there is no federal constitutional right to education; it has consistently acknowledged aims and purposes of public schooling consistent with those identified by liberal philosophers of education.<sup>101</sup> Prisonization practices in schools undermine the spirit of the Court's stance on the importance of public education and contradict the Court's holdings that specific civil rights attach to the school context.

The next Part of this Article provides constitutional support for systemic reform of school policing. Systemic reform is more than offering training in adolescent brain development or teaching officers to use more peaceful interventions. Systemic reform involves the removal of embedded police and the removal or reduction of other prisonization practices. Given the injurious history of policing in America and the discordant presence of school police relative to the aims of education, the constitutional protections of the First, Fourth, Fifth, Eighth, and Fourteenth Amendments support systemic reform.

## II. CONSTITUTIONAL CONCERNS

Any constitutional analysis must acknowledge a balance of interests. Individual rights are almost always asserted in the context of competing interests. Public schools, which exist to train young people to be participants in our constitutional democracy, occupy a unique space in American society.<sup>102</sup> The stakeholders, including parents, other community members (such as school boards), students, school administrators, staff, and faculty, often have competing values and

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97. DEREK W. BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 2 (3d ed. 2021).

98. *Id.* at 2-3.

99. Maryam Ahranjani & J.C. Blokhuis, *Purposes of Education*, in *LEGAL FOUNDATIONS OF EDUCATION* (J.C. Blokhuis ed., forthcoming Mar. 2023).

100. *Id.*

101. *Id.*

102. *See supra* notes 57-59 and accompanying text.



interests, which sometimes align but often do not. And within the groups, there are, of course, multiple viewpoints. School administrators often are concerned about liability; parents are concerned about the learning environment and safety; and students often test boundaries in an effort to individuate in a quest to become autonomous.

This Part considers only federal constitutional protections. However, other legal protections may exist under state constitutions,<sup>103</sup> federal laws such as the Individuals with Disabilities in Education Act<sup>104</sup> and Equal Educational Opportunities Act,<sup>105</sup> and state tort laws.<sup>106</sup> The focus on federal constitutional protections has wide-reaching implications since federal constitutional protections apply to every single public-school student in America.

A. *Policing Policies Often Infringe on Students' First Amendment Rights*

Our notion of what constitutes prisonization practices is broad. In addition to the methods described earlier,<sup>107</sup> we consider prisonization practices to include policies that infringe upon the speech rights of students such as disciplinary measures, dress codes and censorship. While these speech policies are not as concrete as other prisonization practices,<sup>108</sup> school officials are granted wide latitude to regulate speech in a manner that is “reasonable” and “viewpoint neutral.”<sup>109</sup> This broad

103. *Supra* notes 97–98 and accompanying text.

104. 20 U.S.C. §§ 1400–82.

105. 20 U.S.C. §§ 1701–58.

106. *See generally* Ralph D. Mawdsley, *Standard of Care for Students with Disabilities: The Intersection of Liability Under the IDEA and Tort Theories*, 2010 BYU EDUC. & L.J. 359, 368–73 (2010) (examining tort claims under a state common law standard of care); Phillip Buckley, *Barriers to Justice, Limits to Deterrence: Tort Law Theory and Four Approaches to Shielding Districts and Teachers from Liability for Negligent Supervision*, 48 LOY. U. CHI. L.J. 1015, 1021 (2017) (examining school district and employee liability for negligent supervision of students).

107. *Supra* notes 83–84 and accompanying text (explaining that prisonization mechanisms can include the use of metal detectors, surveillance cameras, and armed security personnel, while prisonization methods can include harsh discipline methods, physical restraint, seclusion, and threat assessments).

108. *See infra* Section II.B (discussing searches on school grounds); Section II.C (examining interrogations by school officials); Section II.D (analyzing corporal punishment, restraint, and seclusion practices in schools).

109. *See* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as

discretion works in tandem with other prisonization practices to reify the Court's treatment of schools as authoritarian, prison-like environments.<sup>110</sup>

Historically, the Court has approached free speech in authoritarian contexts (commonly understood as schools, prisons, and the military) with quite a bit of deference to administrative officials.<sup>111</sup> The rationale is that judicial second-guessing of administrative procedures inhibit officials from attending to the proper functioning of these settings.<sup>112</sup> The consistent treatment of free speech rights in schools as coterminous with that which occurs in prisons and the military has drastic implications for the ability of students to engage in forms of non-violent protest that strike at the very core of their developing identities. The Court's current approach to free speech in schools disparately impacts those students whose identities have been historically excluded both inside and outside of educational institutions, especially where mostly white teachers,<sup>113</sup> principals,<sup>114</sup>

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their actions are reasonably related to legitimate pedagogical concerns"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (explaining that children in a public school need not be permitted "the same latitude" with respect to political speech protections as adults).

110. See generally Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71 (2010).

111. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (explaining that children in a public school need not be permitted "the same latitude" with respect to political speech protections as adults); see also Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 442 (1999) ("Across the entire spectrum of constitutional rights, the Supreme Court adopts a posture of deference to the authority of institutions such as military, prisons, [and] schools . . .").

112. *Id.* at 460 ("The Supreme Court offers two primary justifications for its almost complete deference to authoritarian institutions: the need to preserve authority within these places and the expertise of those managing them.").

113. See INST. OF EDUC. SCIENCES, U.S. DEPT. OF EDUC., NCES 2020-103, RACE AND ETHNICITY OF PUBLIC SCHOOL TEACHERS AND THEIR STUDENTS (2020) ("In the 2017-18 school year, 79 percent of public school teachers were White and non-Hispanic.").

114. See BILL HUSSAR, JJUN ZHANG, SARAH HEIN, KE WANG, ASHLEY ROBERTS, JIASHAN CUI ET AL., U.S. DEP'T OF EDUC., NCES 2020-144, THE CONDITION OF EDUCATION 2020, at 65 (2020) (showing that, during the 2017-18 school year, 78% of public school principals were white).

superintendents,<sup>115</sup> and school boards<sup>116</sup> have the ultimate leverage to determine what speech constitutes a “material disruption” to the learning environment.<sup>117</sup>

Moreover, some advocates note that the Court has granted only limited rights to students in schools in recognition of the special needs circumstances of the school environment.<sup>118</sup> The Court developed the special needs doctrine to permit warrantless searches in “those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”<sup>119</sup> The special needs doctrine has been applied to allow searches without a warrant or probable cause in the context of drug testing high school athletes, searches of motorists at sobriety check-points, and drug testing railroad employees involved in an accident.<sup>120</sup> The treatment of schools as authoritarian environments that give rise to the government’s “special needs” has clear implications for student speech rights.

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115. See Naaz Modan, *Survey: Superintendents Still Overwhelmingly White, Male*, K-12 DIVE (Feb. 11, 2020), <https://www.k12dive.com/news/survey-superintendents-still-overwhelmingly-white-male/572008> [<https://perma.cc/2VVM-MVN6>] (citing a recent report from The School Superintendents Association, which found that in 2020, nearly three quarters of superintendents were men and that more than 90% identified as white).

116. See, e.g., Brendan Bartanen, Jason A. Grissom, Ela Joshi & Marc Meredith, *Mapping Inequalities in Local Political Representation: Evidence from Ohio School Boards*, 4 AERA OPEN 1, 3, 14–15 (2018) (explaining that, at least with respect to two school board election cycles across Ohio from 2009–2011, “[l]ocal board members [were] elected systematically from more advantaged neighborhoods,” i.e., areas that were whiter, more affluent, and more educated).

117. See, e.g., Jesus Jiménez, *2 Oklahoma Boys Pulled From Class for ‘Black Lives Matter’ T-Shirts*, N.Y. TIMES (May 9, 2021), <https://www.nytimes.com/2021/05/09/us/black-lives-matter-shirt-oklahoma-school.html> [<https://perma.cc/US7L-JK7T>] (explaining that the Ardmore City Schools’ Elementary Student Handbook states that the principal makes the final decision concerning “the appropriateness of dress”); Elizabeth Miller, *Newberg School District Faces Union Tort Claim, Legislators’ Criticism Over Board Actions*, OR. PUB. BROAD. (Aug. 27, 2021, 9:00 AM), <https://www.opb.org/article/2021/08/27/newberg-school-district-faces-union-tort-claim-legislators-criticism-over-board-actions> [<https://perma.cc/XAS3-4GZ7>] (explaining that school board members would determine what speech constitutes “political” speech as it relates to a recently approved district-wide ban on flags and clothing displaying “Black Lives Matter,” the rainbow symbol, or other “broadly ‘political’” messaging).

118. E.g., Chemerinsky, *supra* note 111, at 457.

119. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

120. JOSHUA DRESSLER, GEORGE C. THOMAS III & DANIEL S. MEDWED, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* 465, 467-68, 482 (7th ed. 2020).

Our treatment of speech restrictions in schools as a prisonization practice is not controversial. In fact, in its attempt to define the contours of First Amendment protections for individuals in authoritarian environments, the Court has treated student speech rights similarly to speech rights in the prison and military contexts.<sup>121</sup> In its cases involving free speech in schools, the Court has endeavored to balance the competing interests between students' free speech rights and the need for school administrators to attend to the proper function of schools as environments conducive to learning without distractions or disturbances.<sup>122</sup> Students retain some protections under the First Amendment for speech within schools as long as the speech does not materially disrupt the schooling environment.<sup>123</sup> However, the Court has granted a considerable measure of deference to school administrators to implement "reasonable" restrictions to combat materially distracting speech—a responsibility that flows from the rather nebulous asserted interest in preserving the peace and order within the school.<sup>124</sup> Nonetheless, the Court's conception of the schooling environment as authoritarian in First Amendment jurisprudence is problematic when considered alongside other prisonization practices, which are more likely to be found at predominantly non-white public schools than predominantly white schools.<sup>125</sup>

The case *Tinker v. Des Moines Independent Community School District*<sup>126</sup> is often considered the watershed case for expanding the political

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121. Chemerinsky, *supra* note 111, at 455. *But cf.* *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) (finding, in the context of an Eighth Amendment claim, "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration").

122. *See Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2050 (2021) (explaining that "special rules" apply to in-school student speech because schools "could [not] function if administrators and teachers could not regulate on-premises student speech" to avoid distractions and interruptions in the classroom).

123. *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that a student retains their free speech rights in school unless their conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others") (quoting *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966)) (citing *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)).

124. *See B.L.*, 141 S. Ct. at 2050.

125. *See supra* note 86 and accompanying text.

126. 393 U.S. 503 (1969).

speech rights of students in schools.<sup>127</sup> But as some scholars point out,<sup>128</sup> its impact overshadows the important groundwork laid in two earlier Fifth Circuit cases: *Burnside v. Byars*<sup>129</sup> and *Blackwell v. Issaquena County Board of Education*.<sup>130</sup> That the Court's rationale in *Tinker* borrowed from the language in these two cases<sup>131</sup> is unsurprising and reveals how the gains in free speech rights for *all* students are indebted to and inextricable from the struggles of Black students in the Jim Crow South seeking to secure and exercise their basic civil rights.

The *Burnside* and *Blackwell* cases were decided on the same day and authored by the same Fifth Circuit judge.<sup>132</sup> They also involved substantially similar facts: Black students protesting for civil rights in Mississippi in the mid-1960s. In *Burnside*, Black students at Booker T. Washington High School in Philadelphia, Mississippi, donned pins with the words "One Man, One Vote" to school.<sup>133</sup> Likewise, in *Blackwell*, Black students at Henry Weathers High School wore similar "freedom buttons," depicting a black hand and a white hand joined together.<sup>134</sup> School officials disciplined both groups of students for violating their respective school policies on distracting or disorderly conduct.<sup>135</sup> And both groups of students were given an ultimatum that they must either remove the buttons and remain in school or keep the buttons and be suspended.<sup>136</sup> Notwithstanding the factual similarities, the court reached opposite conclusions in each case due to one key distinction: the extent to which the challenged speech materially disrupted the learning environment. While the court failed to find a

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127. Charles J. Russo, *The Supreme Court and Student Free Speech: A Retrospective Look at Tinker v. Des Moines Independent Community School District and its Progeny*, 45 U. DAYTON L. REV. 189, 190, (2020).

128. See, e.g., KATHRYN SCHUMAKER, TROUBLEMAKERS: STUDENTS' RIGHTS AND RACIAL JUSTICE IN THE LONG 1960S, at 50 (2019) ("[*Burnside* and *Blackwell*] laid the groundwork for future cases involving public school students and the Constitution even as they created a precedent that would limit the scope of students' free speech rights. Although the Fifth Circuit's ruling limited students' rights at school, it also affirmed that students had rights, however circumscribed they might be. In this way, it smoothed the path to *Tinker*.").

129. 363 F.2d 744 (5th Cir. 1966).

130. *Id.* at 749.

131. See *Tinker*, 393 U.S. at 512–13 (quoting *Burnside*, 363 F.2d at 749) (citing *Blackwell*, 363 F.2d 749).

132. *Burnside*, 363 F.2d at 744, 746; *Blackwell*, 363 F.2d at 749–50.

133. 363 F.2d at 746.

134. 363 F.2d at 750.

135. *Burnside*, 363 F.2d at 747; *Blackwell*, 363 F.2d at 751.

136. *Burnside*, 363 F.2d at 747; *Blackwell*, 363 F.2d at 751.

material disruption in *Burnside*,<sup>137</sup> it did find such disruption to the learning environment in *Blackwell*.<sup>138</sup>

In *Burnside*, the court held that the district court erred in denying the students a preliminary injunction against the school district.<sup>139</sup> That injunction would have stopped school officials from enforcing the school's disciplinary regulations against the suspended students for wearing "freedom buttons" to school.<sup>140</sup> Instead, the court reasoned that the buttons constituted core political speech that could not be infringed by state officials.<sup>141</sup> The court cited from the transcript of the trial proceedings, which indicated that the purpose of wearing the buttons was to raise awareness about civil rights and, in particular, voting rights.<sup>142</sup> Indeed, one witness stated that the purpose behind the buttons was to emphasize being able "to register and vote without being beat up and killed."<sup>143</sup> No evidence was presented that the buttons in this case caused any disturbance or disruption to the schooling environment.<sup>144</sup> In fact, the school official who reprimanded the students was not even present in the building that day but had been at home, which tended to weaken his speculative argument that the buttons could have created such a disruption.<sup>145</sup>

However, the court also noted that "school officials have a wide latitude of discretion" to make rules and regulations that are "necessary for the maintenance of an orderly program of classroom learning," so long as those policies are "reasonable."<sup>146</sup> The court defined "reasonable" in this context to encompass the asserted interest in maintaining order and decorum in schools.<sup>147</sup> But that was not the case with the regulation at issue, which allowed school administrators to discipline students for "distracting or disorderly conduct."<sup>148</sup> No evidence was presented to show that the buttons caused a material and substantial interference to any educational activity and the mere

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137. 363 F.2d at 748–49.

138. 363 F.2d at 754.

139. 363 F.2d at 749.

140. *Id.*

141. *Id.* at 747.

142. *Id.* at 747 & n.5.

143. *Id.* at 747 n.5.

144. *Id.* at 748.

145. SCHUMAKER, *supra* note 128, at 42.

146. *Burnside*, 363 F.2d at 748.

147. *Id.*

148. *Id.* at 746 n.2.

presence of the buttons (absent some student misconduct) was insufficient to warrant their wholesale exclusion from the school.<sup>149</sup>

By contrast, in *Blackwell*, the court held that the district court properly denied a request for a preliminary injunction against school officials.<sup>150</sup> The court acknowledged the similarities in *Burnside* but distinguished the *Blackwell* case by pointing to the evidence showing a “complete breakdown in school discipline.”<sup>151</sup> Specifically, the evidence demonstrated that students were “noisily talking in the hall” about the buttons, that students accosted other students and pinned them with buttons without their consent, and that some students threw pins into the school through an open window.<sup>152</sup> This conduct, the court concluded, resulted in “much disturbance” to the order of the schooling environment.<sup>153</sup> Reiterating its rule from *Burnside*, the court found that the discipline policy was a reasonable infringement of the students’ speech rights because it was necessary to preserve the order and decorum within the school.<sup>154</sup>

Ultimately, the Fifth Circuit button cases would lay the groundwork for the later watershed cases of *Tinker* and, more recently, *Mahanoy Area School District v. B.L.*<sup>155</sup> These cases involved white students’ political and non-political speech rights, respectively. *Tinker* involved a group of high school students who wore black armbands to school as a form of protest.<sup>156</sup> The Supreme Court held that the district court erred when it dismissed the students’ complaint, relying on the two button cases for its rationale.<sup>157</sup> Specifically, the Court reasoned that where there was no evidence of a material and substantial disruption resulting from the targeted speech, school officials were prohibited from implementing viewpoint-based speech restrictions—even if the targeted speech was “unpopular” or uncomfortable.<sup>158</sup>

Despite the enduring legacy of *Burnside* and *Blackwell* via *Tinker*, Black students continue to be disciplined for exercising their core

149. *Id.* at 748.

150. *Blackwell v. Issaquena Cnty Bd. of Educ.*, 363 F.2d 749, 754 (1966).

151. *Id.* at 753.

152. *Id.* at 750–52.

153. *Id.* at 753.

154. *Id.* at 753–54.

155. 141 S. Ct. 2038 (2021) (involving the non-political speech rights of a student who posted an online comment outside of school hours and off-campus). We do not consider *Mahanoy* at length because it involved non-political, off-campus speech.

156. 393 U.S. 503, 504 (1969).

157. *Id.* at 514.

158. *Id.* at 509, 511.

political speech rights in schools.<sup>159</sup> In August 2016, for her school's picture day, Mariah Havard wore a shirt bearing the words "Black Lives Matter."<sup>160</sup> Once at school, Havard was escorted by an SRO to the vice principal's office, where she was told that the shirt was disruptive to the schooling environment, citing an earlier incident involving Havard and a white student who purportedly told her that "black lives don't matter."<sup>161</sup> The next day, Havard's friend wore a similar shirt and was similarly reprimanded by school officials.<sup>162</sup> Both students are Black.<sup>163</sup> More recently, in May 2021, two Black children (five and eight years old) were disciplined for wearing shirts displaying the words "Black Lives Matter."<sup>164</sup> When one child was unable to change into a different shirt, he was made to sit in the front office for the entire school day.<sup>165</sup> The school district's superintendent argued that the shirts were disruptive because they created an "emotionally charged environment."<sup>166</sup>

What are the implications for treating students' political speech like prison inmates, especially when those students are Black and Brown? Put differently, what message do marginalized students receive when they are punished for their non-disruptive core political speech? It also stands to reason that censoring the speech of marginalized students not only violates individual students' rights but also leads to a dangerous chilling effect on protected speech. The irony is that these students are being sent home for "materially disrupting"<sup>167</sup> the

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159. Although the focus of this section is on prisonization practices as they impact students of color, it is noted that school speech restrictions also curtail the political speech rights of teachers, as public employees of the school district who "speak for the government, not themselves." Sydney Boles, *Can A Teacher Fly A Black Lives Matter Flag At School? A Florida Court Will Consider*, NPR (Apr. 30, 2021, 8:14 AM), <https://www.npr.org/2021/04/30/992038052/blm-and-teacher-s-free-speech> [<https://perma.cc/V3VL-983Q>].

160. Katie Mettler, *An Ariz. School Banned Her Black Lives Matter T-shirt. So She Boycotted Her School.*, WASH. POST (Aug. 30, 2016, 6:41 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/08/30/an-ariz-school-banned-her-black-lives-matter-t-shirt-so-she-boycotted-her-school> [<https://perma.cc/FJ28-2NLJ>].

161. *Id.*

162. *Id.*

163. *Id.*

164. Jiménez, *supra* note 117.

165. *Id.*

166. *Id.*

167. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).



schooling environment while their own learning is being disrupted when they are sent home by school officials.

Messages such as “Black Lives Matter” on a t-shirt worn by a Black student are less about a per se challenge to pure First Amendment rights. Instead, these messages evoke the ongoing racial oppression that these students experience beyond the schoolhouse gate. Subsequently, they serve to indict the larger community for the persistent oppressive conditions in which these students are routinely racialized. In other words, “Black Lives Matter” is set quite apart from the non-political speech in *Bethel School District No. 403 v. Fraser*,<sup>168</sup> *Hazelwood School District v. Kuhlmeier*,<sup>169</sup> *Morse v. Frederick*,<sup>170</sup> and *Mahanoy*<sup>171</sup> because it is a message that seeks to challenge racial oppression which occurs both inside and outside of schools. Restrictions on such messages—as one type of prisonization practice—fail to take these complexities into account and are constitutionally suspect.

In addition to First Amendment concerns raised by embedded school police and other prisonization practices, there are other potential constitutional challenges. Three key considerations are relevant to the argument that current “security” measures jump constitutional guardrails. First, with regard to students’ Fourth, Fifth, Eighth, and Fourteenth Amendment rights, several decades have passed since the Court decided seminal cases involving students’ rights and prisonization practices.<sup>172</sup> The seminal cases were decided in 1954,<sup>173</sup> 1975,<sup>174</sup> 1977,<sup>175</sup> and 1985<sup>176</sup> when public schools looked very different with regard to prisonization practices. Embedded school

168. 478 U.S. 675, 677-78 (1986) (involving sexual innuendo speech in the school setting).

169. 484 U.S. 260, 263-63 (1988) (involving censorship of a student newspaper featuring two articles on divorce and teen pregnancy).

170. 551 U.S. 393, 396 (2007) (involving drug-related speech in the school setting).

171. 141 S. Ct. 2038, 2042-43 (2021) (involving off-campus profane speech).

172. *Ingraham v. Wright*, 430 U.S. 651, 653 (1977) (addressing whether paddling of students constitutes cruel and unusual punishment); *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985) (search of student’s purse after the student was caught smoking cigarettes did not violate Fourth Amendment); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (holding that students temporarily suspended from public school have a liberty and property interest that qualifies for Due Process protection).

173. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (segregation in schools violates equal protection granted by the Fourteenth Amendment).

174. *See Goss*, 419 U.S. at 576.

175. *See Ingraham*, 430 U.S. at 653.

176. *See T.L.O.*, 469 U.S. at 328.

police, metal detectors, cameras, threat assessments, and zero-tolerance policies were not prevalent when those cases were decided.<sup>177</sup> Prisonization tactics have increased the importance of recognizing students' rights. Considering that the Court decided the seminal cases in the context of relatively infrequent contact with school police, no surveillance cameras, and before zero-tolerance policies became popular, it follows that a critical part of its calculus in weighing whether and how to apply constitutional guarantees to students has significantly changed because of the implications on privacy rights of students. Second, nearly all the decisions and their progeny were quite close in votes.<sup>178</sup>

Finally, recent scientific evidence about juvenile brain development demands reconsidering earlier cases.<sup>179</sup> Research shows that brain development continues throughout the early twenties and that this development profoundly impacts a juvenile's "decision-making, self-control, and emotional processing" abilities.<sup>180</sup> In the more recent cases before the Court, the Justices' opinions have been informed by this scientific evidence, which signals a shifting intolerance of complete deference to school officials and harsh punishment.<sup>181</sup>

B. *The Mere Presence of Embedded School Police Violates Fourth Amendment Ban on Unreasonable Searches and Seizures*

The Court has decided four cases about the application of the Fourth Amendment in public schools: *New Jersey v. T.L.O.*,<sup>182</sup> *Vernonia*

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177. See Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. ON PUB. POL'Y, 2009, at 1, 8.

178. *Ingraham*, 430 U.S. at 651 (a 5-4 decision); *T.L.O.*, 469 U.S. at 326-27; *Goss*, 419 U.S. at 565; *Brown*, 347 U.S. at 483.

179. See, e.g., CATHERINE INSEL, STEPHANIE TABASHNECK, FRANCIS X. SHEN, JUDITH G. EDERSHEIM & ROBERT T. KINSCHERFF, CENTER FOR LAW, BRAIN & BEHAVIOR, WHITE PAPER ON THE SCIENCE OF LATE ADOLESCENCE: A GUIDE FOR JUDGES, ATTORNEYS, AND POLICY MAKERS (2022) (reporting on juvenile developmental brain science and noting the Court's growing reliance on juvenile neuroscience in its Eighth Amendment jurisprudence).

180. *Id.* at 2.

181. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 834-35 (2002) (drug testing for extracurricular activities was reasonable under the Fourth Amendment); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 372 (2009) (concluding that search of student's underwear was especially intrusive given the student's adolescent vulnerability); *J.D.B. v. North Carolina*, 564 U.S. 261, 273 & n. 5, 275-76 (2011) (holding that a child's age informs whether custody was permissible).

182. 469 U.S. 325 (1985).

*School District 47J v. Acton*,<sup>183</sup> *Board of Education of Independent School District No. 92 v. Earls*,<sup>184</sup> and *Safford Unified School District No. 1 v. Redding*.<sup>185</sup> Because the balance of interests has changed in the current prisonization era, the Court should (1) impose stricter limits on intrusions into student privacy and (2) require that police in schools have probable cause to conduct searches and seizures.

The Fourth Amendment's protection against unreasonable searches and seizures always involves balancing individual privacy and community safety. In *T.L.O.*, the Court first held that the Fourth Amendment applies in the public school context, but because of the special needs of the school environment, only reasonable suspicion rather than probable cause is needed to conduct a school search.<sup>186</sup> The Court created the two-pronged test of reasonable suspicion (i.e., reasonable at inception and in scope)<sup>187</sup> and applied the test in three subsequent cases.<sup>188</sup>

Several important features of *T.L.O.* relate to the idea of the de-prisonization of schools. First, although the Court originally granted certiorari in *T.L.O.* to address the issue of whether the exclusionary rule applies to juvenile court proceedings for unlawful school searches, it explicitly expanded its consideration to "what limits, if any, the Fourth Amendment places on the activities of school authorities."<sup>189</sup> The Court's decision to extend its reach reflects an interest in recognizing students' rights. By condoning reasonable suspicion rather than requiring probable cause, the Court attempted to strike a balance between recognizing students' rights and its traditional deference to school officials.

Between 1985, when *T.L.O.* was decided, and 2009, when *Safford* was decided, the Court expanded school administrators' ability to conduct searches and seizures. In *Vernonia*, the Court allowed suspicion-less searches of student-athletes in a school facing a serious drug problem.<sup>190</sup> In 2002, the Court narrowed its scope on suspicion-less searches: Justice Ginsburg, who had previously voted with the majority in *Vernonia*, changed her stance in *Earls* when she felt the Court went

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183. 515 U.S. 646 (1995).

184. 536 U.S. 822 (2002).

185. *Safford*, 557 U.S. at 379.

186. *T.L.O.*, 469 U.S. at 341.

187. *Id.*

188. See *Vernonia*, 515 U.S. at 655; *Earls*, 536 U.S. at 826; *Safford*, 557 U.S. at 370.

189. *T.L.O.*, 469 U.S. at 332.

190. *Vernonia*, 515 U.S. at 653, 663-65.

too far in permitting suspicion-less searches of students involved in all competitive extracurricular activities, especially when there did not appear to be a clear and present danger of drug use and abuse in the school.<sup>191</sup> In her dissent, Justice Ginsburg specifically articulated an unwillingness to allow suspicion-less searches of all students, which seemed to be a concern of the dissenting Justices about where the *Vernonia* majority was headed.<sup>192</sup>

In its 8-1 decision, with Justice Thomas (who had written the majority in *Earls*) dissenting, the Court held in *Safford* that a strip search of a thirteen-year-old girl at school went too far.<sup>193</sup> In drawing that line, the Court indicated a recognition of the privacy interests at stake and signaled a shift in its tolerance of overly aggressive actions by school officials.<sup>194</sup> Justice Souter, writing for the majority, wrote:

Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.<sup>195</sup>

The first three Fourth Amendment cases—*T.L.O.*, *Vernonia*, and *Earls*—were all decided before the explosion in school prisonization efforts. By 2009, when the Court decided *Safford*, prisonization practices were becoming more popular, and simultaneously, there were concerns raised about the implications for minority students and students with disabilities.<sup>196</sup>

Some critics assert that the lower standard has watered down Fourth Amendment rights of students to such an extent as to nearly extinguish them.<sup>197</sup> With the increased police presence in schools today despite evidence that they do more harm than good, the Court would have to consider the much higher stakes involved in school-based infractions and the greater likelihood of children's referral to the criminal justice

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191. *Earls*, 536 U.S. at 843; see also *id.* at 855 (Ginsburg, J., dissenting) (pointing out that “[t]he government is nowhere more a teacher than when it runs a public school”).

192. *Id.* at 844, 846 (majority decision).

193. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009).

194. See *id.* at 374-75.

195. *Id.* at 377.

196. See *infra* notes 220-25 and accompanying text.

197. E.g., Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 953-54 (2011); Matthew Lynch, Note, *Mere Platitudes: The “Domino Effect” of School-Search Cases on the Fourth Amendment Rights of Every American*, 91 IOWA L. REV. 781, 783-84 (2006).

system.<sup>198</sup> In 1985, when the Court decided *T.L.O.*, embedded school police were relatively rare, and their presence was largely tied to grossly inflated reports of drug-related crime and violence in and around schools.<sup>199</sup> Today, 65% of all public schools have at least one security guard (including, but not limited to, a police officer), and 70% of all public high schools have one or more embedded sworn officers who carry a firearm.<sup>200</sup>

### C. *The Fifth Amendment and School Police*

Two Fifth Amendment provisions are implicated by prisonization practices: the privilege against self-incrimination and procedural due process. In 2011, the Court considered whether the Fifth Amendment's privilege against self-incrimination applies in the school context. In *J.D.B. v. North Carolina*,<sup>201</sup> a thirteen-year-old special education student suspected of committing two robberies was questioned by a uniformed police officer in a closed conference room at school.<sup>202</sup> Not surprisingly, the child confessed.<sup>203</sup> No parent or guardian was notified prior to the questioning, and the child was not read his *Miranda* rights, which is required in all custodial interrogations.<sup>204</sup> The child's attorney argued that the confession should have been suppressed—an argument that made it up to the Supreme Court.<sup>205</sup> In a 5–4 decision, the Court narrowly decided that a student's age should be a factor in the *Miranda* custody analysis but only to the extent that the officer knew or could reasonably have been expected to know the child's age.<sup>206</sup> The Court declined to go into any detail as to whether a child could be questioned at all, or details as to the kind of notice to a parent or guardian might be required.<sup>207</sup>

Experts have concluded that young people do *not* comprehend *Miranda* rights, making it critical for an attorney and a parent or

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198. See *supra* Section I.C.

199. See MEGAN FRENCH-MARCELIN & SARAH HINGER, ACLU, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 6 (2017).

200. NAT'L CTR. FOR EDUC. STATS., *supra* note 81, at Table 233.70.

201. 564 U.S. 261 (2011).

202. *Id.* at 265.

203. *Id.* at 267; see also *id.* at 269 (explaining studies that indicate that children are more likely to confess, and to falsely confess, than adults).

204. *Id.* at 266; see *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

205. *J.D.B.*, 564 U.S. at 261.

206. *Id.* at 277.

207. See *id.*

guardian to be present during questioning.<sup>208</sup> Of course, in *Miranda*, the Court held that in order to waive one's *Miranda* rights to silence and counsel, a person must do so knowingly, intelligently, and voluntarily.<sup>209</sup> In fact, the single most important factor that predicts comprehension of one's *Miranda* rights is age.<sup>210</sup> Further, researchers have found—regardless of the child's experience with the criminal justice system—children under the age of fifteen are unlikely to produce valid *Miranda* waivers.<sup>211</sup>

The *J.D.B.* holding could have been even more disappointing; however, it certainly set a precedent that legitimized (1) police presence in schools and (2) juveniles' comprehension of *Miranda* rights. The case, decided in 2011, is much more recent than the prior cases examined in this section, but still, the frequency and presence of school police have expanded significantly since then.<sup>212</sup> Therefore, the same argument regarding the possibility of the Court's calculus changing in terms of the proper balance between a child's individual right and the need for community safety still applies.

Under the Fifth Amendment's Due Process Clause, the federal government shall not deprive anyone of "life, liberty, or property without due process of law."<sup>213</sup> Procedural due process is about basic fairness with regard to the *process* of the government depriving someone of their life, liberty, or property. Procedural due process thus seeks to advance two basic goals: to produce more accurate results through the use of fair procedures and to give people an opportunity to be heard. Courts have further distilled three essential components of procedural due process: a notice, a hearing, and a neutral arbiter.<sup>214</sup>

The Supreme Court extended procedural due process guarantees to apply when state government action deprives school children of minimal process requirements.<sup>215</sup> In the school context, the idea is that

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208. See, e.g., Heather Zelle, Christina L. Riggs Romaine & Naomi E.S. Goldstein, *Juveniles' Miranda Comprehension: Understanding, Appreciation, and Totality of Circumstances Factors*, 39 L. & HUM. BEHAV. 281, 288 (2015); Naomi E. Sevin Goldstein, Lois Oberlander Condie, Rachel Kalbeitzer, Douglas Osman & Jessica L. Geier, *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 361 (2003).

209. *Miranda*, 384 U.S. at 444.

210. Goldstein et al., *supra* note 208, at 361, 368.

211. *Id.* at 361.

212. See FRENCH-MARCELIN & HINGER, *supra* note 199, at 10-11.

213. U.S. CONST. amend. V.

214. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1185-86 (5th ed. 2017).

215. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

if a child is deprived of life, liberty, or property, then they should receive a fair process.<sup>216</sup> One particular prisonization practice—threat assessments—are shrouded in secrecy and arguably deprives students of fair process. The U.S. Secret Service first developed the threat assessment tool to prevent violent acts against elected officials.<sup>217</sup> More recently, its use has been extended in order to avoid school shootings and is now a widespread tool that traps children with disabilities and other vulnerable individuals.<sup>218</sup> The idea is that serious incidents of school violence can best be prevented if the assailants are on law enforcement’s radar.<sup>219</sup>

Surveilling students in the same way that we surveil threats to the President is offensive, overly inclusive relative to the potential threat, and impractical to implement given limited resources. Besides being objectionable at the outset, the adoption of threat assessments has become widespread, and serious concerns exist with its current implementation. For example, in Virginia, a well-resourced state that has been using threat assessment for two decades, researchers recently found that the threat assessment tool needed improvement regarding training, consistency, and dissemination of procedures to parents, students, and school staff.<sup>220</sup> For states like New Mexico with limited financial resources relative to other states, implementing the threat assessment tool in a fair and impartial manner and respecting students’ procedural due process rights seems challenging.<sup>221</sup>

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216. *Id.* at 576.

217. U.S. SECRET SER. NAT’L THREAT ASSESSMENT CTR., PROTECTING AMERICA’S SCHOOLS: A U.S. SECRET SERVICE ANALYSIS OF TARGETED SCHOOL VIOLENCE I (2019) [hereinafter SECRET SERVICE ANALYSIS].

218. See Ike Swetlitz, *Who’s the Threat?*, SEARCHLIGHT N.M. (Oct. 15, 2019), <https://searchlightnm.org/whos-the-threat> [https://perma.cc/YB8C-8T49]; Ed Williams, *Restraint, Seclusion, Deception*, SEARCHLIGHT N.M. (Oct. 8, 2019), <https://searchlightnm.org/restraint-seclusion-deception> [https://perma.cc/UDR2-277N].

219. See SECRET SERVICE ANALYSIS, *supra* note 217, at 25, 49.

220. DEWEY CORNELL & JENNIFER MAENG, NAT’L CRIM. JUST. REFERENCE SERV., STUDENT THREAT ASSESSMENT AS A SAFE AND SUPPORTIVE PREVENTION STRATEGY: FINAL TECHNICAL REPORT 4 (2020).

221. ALBUQUERQUE PUBLIC SCHOOLS, STUDENT THREAT ASSESSMENT PROCESS, <https://www.aps.edu/student-family-and-community-supports/threat-assessment/student-threat-assessment-process> [https://perma.cc/Q8RM-Z2KH] (failing to account for whether threat assessment records are maintained in students’ permanent files).

The Court has considered only two cases challenging whether a student received a fair process: *Goss v. Lopez*<sup>222</sup> and *Ingraham v. Wright*.<sup>223</sup> In *Goss*, nine students, including Dwight Lopez, were suspended for destroying school property and disrupting the learning environment.<sup>224</sup> In a 5-4 decision, the Court held that the school violated the students' due process rights by suspending them without a hearing.<sup>225</sup> In the holding, Justice White reiterated that "students do not 'shed their constitutional rights' at the schoolhouse door."<sup>226</sup> The Court also held that the state had no authority to deprive students of their property interest in educational benefits, or their liberty interest in reputation, without due process of law.<sup>227</sup> *Goss* ultimately held that a ten-day suspension was more than a de minimis deprivation of property because suspending students could seriously harm their reputation and affect their future employment and education.<sup>228</sup>

In his dissent, Justice Powell wrote that the state statute in question did not implicate due process rights because the statute guaranteed a right to education, not a right to education without discipline.<sup>229</sup> He disagreed that the punishment implicated a deprivation to the degree protected by the Due Process Clause.<sup>230</sup> The dissenters felt the safeguards in place—written notice to parents within twenty-four hours of the suspension decision—were sufficient.<sup>231</sup>

It is important to consider Powell's rationale because today the punishments are very different. Whereas punishment in the past involved suspension or, at worst, expulsion within the context of prisonized schools, misbehavior in school today regularly leads to criminal punishment. Punishments affect not just a student's access to education but indeed their liberty and, when their cases are referred to the criminal system, their long-term liberty. Surely that would be part of the Court's calculus today.

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222. 419 U.S. 565 (1975).

223. 430 U.S. 651 (1977).

224. 419 U.S. at 569-570.

225. *Id.* at 584.

226. *Id.* at 574 (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969)).

227. *Id.* at 574-75.

228. *Id.*

229. *Id.* at 586 (Powell, J., dissenting).

230. *See id.* at 573-574 (majority).

231. *Id.* at 596 (Powell, J., dissenting).



New Mexico's efforts to implement its threat assessment tool seemingly lacks adequate due process protections.<sup>232</sup> Albuquerque Public Schools ("APS"), the state's largest district,<sup>233</sup> fails to meet all three basic hallmarks of procedural due process when the state deprives children of their liberty and property interests in education.<sup>234</sup> In *Goss*, the Court indicated that oral or written notice plus an informal sharing of the charges with the child would meet procedural due process in school discipline situations where ten days or less of suspension was involved.<sup>235</sup> The Court indicated that suspensions of more than ten days would likely trigger greater procedural protections but did not specify what those would be.<sup>236</sup> Since the potential punishment for a child identified as a threat may exceed a ten-day suspension, more than likely, greater protections would attach.

The current APS procedure fails to give adequate notice to students and parents when a student has been identified as a potential threat, does not provide adequate opportunities to be heard, and is decided by non-neutral parties.<sup>237</sup> In a recent exposé, Searchlight New Mexico reporter Ike Swetlitz was unable to find out what happens to student records after an individual is initially flagged as a threat.<sup>238</sup> Swetlitz also found that a child's parents are notified *after* the threat assessment team meets to assess the threat posed by their child; parents are only brought in once the intervention is recommended, and they do not receive all of the records and information collected against their child but rather a summary.<sup>239</sup>

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232. See Swetlitz, *supra* note 218.

233. *About Us*, ALBUQUERQUE PUB. SCHS., <https://www.aps.edu/about-us> [<https://perma.cc/57RF-WAEP>].

234. See Swetlitz, *supra* note 218 (explaining that students experience a lack of notice and opportunity to be heard in threat assessments). The three hallmarks include: notice, a hearing, and an impartial decision-maker. See *supra* notes 214–15 and accompanying text.

235. *Goss*, 419 U.S. at 581.

236. See *id.* at 576, 581.

237. See Swetlitz, *supra* note 218; Williams, *supra* note 218. APS has announced that its procedures will change for the 2022–2023 school year. See *Student Threat Assessment Process*, ALBUQUERQUE PUB. SCHS., <https://www.aps.edu/student-family-and-community-supports/threat-assessment/student-threat-assessment-process> [<https://perma.cc/5WUQ-UF3Q>].

238. Swetlitz, *supra* note 218.

239. *Id.*

D. *Since Many Public Schools are Prison-Like Environments, the Eighth Amendment's Ban on Cruel and Unusual Punishment Applies*

The next constitutional provision we consider is the Eighth Amendment's ban on cruel and unusual punishment. The Supreme Court declined to extend Eighth Amendment protections to students in public schools in *Ingraham* on the theory that "cruel and unusual punishments" may only be banned in prisons and prison-like settings.<sup>240</sup> In *Ingraham*, the Court issued a 5–4 ruling that the forcible paddling of a fourteen-year-old boy, who refused to promptly leave the stage of a school auditorium when asked to do so by a teacher, did not merit constitutional protection.<sup>241</sup> The majority reasoned that school attendance was voluntary and that children's freedom of movement was not restrained to the degree that it is in prison.<sup>242</sup> The Court failed to find that schools are "prison-like" and therefore declined to extend the Eighth Amendment's protection from cruel and unusual punishment to school children.<sup>243</sup> In response to the disappointing outcome, many states banned corporal punishment in schools.<sup>244</sup>

*Ingraham* was decided in 1977, and the Court has not since revisited the question of whether the Eighth Amendment applies in the school setting. But, since 1977, public schools have become prison-like settings,<sup>245</sup> and the Eighth Amendment's protections against corporal punishment should apply to school children.<sup>246</sup> While thirty-one states have banned corporal punishment in schools, in 2022 nineteen still allow it, despite research that shows that Black children and children with disabilities are more likely to be the victims of corporal punishment.<sup>247</sup>

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240. 430 U.S. 651, 669-71 (1977).

241. *Id.* at 683.

242. *Id.* at 670. Compulsory school attendance laws generally require children of certain ages to attend school or suffer consequences. See *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/statereform/tab5\\_1.asp](https://nces.ed.gov/programs/statereform/tab5_1.asp) [<https://perma.cc/UT2A-Q2HD>].

243. *Ingraham*, 430 U.S. at 669–71.

244. Maryam Ahranjani, *Can They Do That to Me?! Does the Eighth Amendment Protect Children's Best Interests?*, 63 S.C. L. REV. 403, 407-08 (2011).

245. See *supra* Section I.C.

246. See Ahranjani, *supra* note 244, at 407-08 (explaining how many states still allow corporal punishment in schools).

247. Michael Levenson, *Paddling Makes a Comeback in a Missouri School District*, N.Y. TIMES (Aug. 27, 2022), <https://www.nytimes.com/2022/08/27/us/corporal->

Corporal punishment was more socially and legally acceptable in 1977 in the United States and across the globe than it is now.<sup>248</sup> In recent years, a number of leading organizations have issued policy statements about the harm spanking can cause.<sup>249</sup> Child development experts argue that parents should never spank children,<sup>250</sup> and if parents should never spank children, then school officials *certainly* should never spank children.<sup>251</sup>

A specific type of corporal punishment that has come under scrutiny in recent years is restraint and seclusion. Restraint refers to the practice of “restricting a student’s ability to freely move his or her torso, arms, legs, or head” and may include the use of a device or equipment.<sup>252</sup> Seclusion is “involuntarily confining a student alone in a room or area from which he or she cannot physically leave.”<sup>253</sup> In 2018, the Kentucky ACLU, Children’s Law Center, and a private law firm partnered to win a \$337,000 settlement for two children of color with disabilities who were cruelly handcuffed by a deputy sheriff.<sup>254</sup> The two plaintiffs were so small that the deputy sheriff had to lock the handcuffs around the children’s biceps and force their hands behind their backs.<sup>255</sup> The deputy sheriff was accused of previously handcuffing children as young as five years old.<sup>256</sup> After the traumatizing event that led to the suit, the two plaintiffs experienced frequent bed-wetting and nightmares, and

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punishment-schools.html [https://perma.cc/B9L2-X6H6]; see also *Corporal Punishment in Schools is Used Disproportionately on African-American Children and Children with Disabilities*, UT NEWS (Oct. 5, 2016), https://news.utexas.edu/2016/10/05/disproportionate-use-of-corporal-punishment-in-schools [https://perma.cc/Z37B-CFAK].

248. See *Research*, HANDS ARE FOR HOLDING, https://stopspanking.org/research [https://perma.cc/ZXW7-8E45].

249. See *id.*

250. *Id.*

251. It is important to note that culture is an important factor in determining whether spanking will be psychologically harmful. In cultures where spanking is acceptable, children do not seem to experience long-term psychological harm, presumably because it is happening to other children. Ahranjani, *supra* note 244, at 410 n.65.

252. JACQUELINE M. NOWICKI, U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-418T, K-12 EDUCATION: FEDERAL DATA AND RESOURCES ON RESTRAINT AND SECLUSION 2-3 (2019).

253. *Id.* at 3.

254. Susan Mizner, *Children Cruelly Handcuffed Win Big Settlement Against the Police in Kentucky*, ACLU (Nov. 2, 2018, 12:00 PM), https://www.aclu.org/blog/disability-rights/disability-rights-and-education/children-cruelly-handcuffed-win-big [https://perma.cc/GJ2F-PYVH].

255. *Id.*

256. *Id.*

they would not let their mothers out of sight.<sup>257</sup> The federal district court ruled that the deputy sheriff's behavior constituted excessive force.<sup>258</sup>

Restraint and seclusion is far too prevalent a response to a range of student behavior.<sup>259</sup> The full extent of the use of restraint and seclusion is unknown due to underreporting.<sup>260</sup> The behaviors triggering a school administration to authorize the use of restraint and seclusion are often directly related to a child's diagnosed disability or disabilities, which is illegal.<sup>261</sup> According to a recent Government Accountability Office (GAO) report, boys and children with disabilities are more likely to be subjected to restraint and seclusion.<sup>262</sup>

Reports from districts across the country have detailed the extreme use of the restraint and seclusion technique. For example, Albuquerque fourth grader Urijah Salazar was placed in a "team control position," a supposedly rare technique where two adults pull a child's arms backward and force their head to the ground.<sup>263</sup> Urijah is a Native American student receiving special education services through the district.<sup>264</sup> According to school records, he was subjected to the "team control position" 150 times in a four-year period.<sup>265</sup>

In many states, restraint is only allowed when a child poses an immediate physical threat to themselves or others.<sup>266</sup> Though this may seem to be a high standard, hundreds of children die or are severely injured each year from restraint in schools.<sup>267</sup> While death is the most

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257. *Id.*

258. *Id.*

259. See, e.g., Jennifer Smith Richards & Jodi S. Cohen, *Illinois Lawmakers Push for National Ban on Seclusion in Schools, Citing a Tribune-ProPublica Investigation*, CHI. TRIB. (Jan. 15, 2020, 5:40 PM), <http://www.chicagotribune.com/investigations/ct-seclusion-room-ban-durbin-duckworth-illinois-20200115-wgeqs6rprcxdmxujv6gymu4ly-story.html> [<https://perma.cc/6RFB-4CVW>]; see also ROSS W. GREENE, *LOST AT SCHOOL: WHY OUR KIDS WITH BEHAVIORAL CHALLENGES ARE FALLING THROUGH THE CRACKS AND HOW WE CAN HELP THEM* (2014).

260. Jenny Abamu, *How Some Schools Restrain or Seclude Students: A Look at a Controversial Practice*, NPR (June 15, 2019, 6:01 AM), <https://www.npr.org/2019/06/15/729955321/how-some-schools-restrain-or-seclude-students-a-look-at-a-controversial-practice> [<https://perma.cc/X65Q-R8LE>].

261. See Williams, *supra* note 218.

262. NOWICKI, *supra* note 252, at 4.

263. Williams, *supra* note 218.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

extreme outcome, children who survive suffer long-term psychological harm.<sup>268</sup> Some states—including Georgia, Hawaii, Nevada, and Pennsylvania—ban seclusion, while sixteen others, including Illinois, only “ban seclusion in certain circumstances or for certain types of students.”<sup>269</sup> With regard to efficacy, Professor Miranda Johnson explains that practices that prevent students’ behavior from escalating are effective and keep students safe, but there is scant evidence to show that seclusion and restraint help keep children or adults safe in schools.<sup>270</sup>

Various federal efforts have been made to ban or limit restraint and seclusion practices in schools. In May 2021, Congressional Democrats introduced the Keeping All Students Safe Act.<sup>271</sup> The Act bans most uses of restraint and seclusion but does allow restraint in cases where a student poses a danger to themselves or others.<sup>272</sup> Whether the bill will become law remains to be seen. Under President Biden’s leadership, ED has issued guidance cautioning against the use of restraint and seclusion.<sup>273</sup> The average American public high school—with its fences, security cameras, embedded police officers, and metal detectors—would be unrecognizable to the members of the Supreme Court who decided *Ingraham*.

Today, compared to forty-three years ago when *Ingraham* was decided, there is greater awareness of the harm related to harsh discipline practices such as corporal punishment, restraint, and seclusion, which is reflected in federal efforts to limit these practices. There is also strong data to show the disproportionate impact of these practices on Black children and children with disabilities. Even more troubling is the fact that these harsh practices are occurring in the context of schools that resemble prisons. Therefore, it stands to reason that, given the chance, the Supreme Court has every reason to reverse

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268. *Id.*

269. Richards & Cohen, *supra* note 259.

270. *Id.*

271. S. 1858, 117th Cong. (2021); Char Adams, *Bill Heading to Congress to Ban Seclusion, Restraint in Schools*, NBC NEWS (May 26, 2021, 1:47 PM), <https://www.nbcnews.com/news/nbcblk/congress-introduces-bill-ban-seclusion-restraints-schools-n1268638> [<https://perma.cc/NS4W-FZCK>].

272. Adams, *supra* note 271.

273. Donna St. George, *Biden Warns Schools Not to Overpunish Students with Disabilities*, Wash. Post (July 19, 2022, 6:08 PM), <https://www.washingtonpost.com/education/2022/07/19/school-discipline-special-ed-biden> [<https://perma.cc/8HB8-YL4H>].

its holding in *Ingraham* and find that the Eighth Amendment's ban on cruel and unusual punishment should in fact, extend to public schools.

*E. Embedded Law Enforcement's Role in the School-to-Prison Pipeline Violates the Equal Protection Clause of the Fourteenth Amendment*

The final potential constitutional challenge to prisonization practices such as embedded school police is the Fourteenth Amendment's guarantee of equal protection under the law. Scholars in the fields of education, law, and sociology have extensively documented the school-to-prison pipeline.<sup>274</sup> There is no question that current prisonization practices in schools funnel children, especially Black and Brown and children with disabilities, into the criminal legal system.<sup>275</sup> Because of over-reliance on police by schoolteachers and administrators, children are punished for what used to be considered minor infractions such as tardiness, dress code violations, failure to respond to adults' requests, and the like.<sup>276</sup> The disproportionate impact of prisonization on children of color, especially those who also have disabilities, has increased the number of lawsuits against districts based on violations of the Fourteenth Amendment's Equal Protection Clause ("EPC").<sup>277</sup>

Discrimination along the lines of a physical or mental disability receives the lowest level of constitutional scrutiny—rational basis review.<sup>278</sup> However, racial discrimination is subjected to the most exacting standard known as strict scrutiny, which requires the government to show a compelling government purpose to the policy, and that the policy is narrowly tailored to accomplish the compelling government purpose.<sup>279</sup> Therefore, it is more difficult to bring a successful claim based on disability than a claim based on race or ethnicity.<sup>280</sup>

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274. *E.g.*, Nance, *supra* note 85; Jordan, *supra* note 89; ABA, *supra* note 9.

275. Nance, *supra* note 85, at 771-72.

276. *See School-to-Prison Pipeline*, *supra* note 9; *supra* Section I.C.

277. *See* U.S. COMM'N ON CIVIL RIGHTS, BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 55-57 (2019).

278. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (holding that such discriminating legislation "must be rationally related to a legitimate governmental purpose").

279. CHEMERINSKY, *supra* note 214, at 760.

280. Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1022-23 (2009).

To bring a successful race-based discrimination claim under the EPC, challengers must show discrimination either on the face of the law or in its impact. Here, assuming there is no discriminatory language in the text of school prisonization policies, such policies could be shown to discriminate based on their disparate impact—that is, in the way they disproportionately affect Black, Brown, and Indigenous students.<sup>281</sup> Alternatively, when challenging a facially neutral law with a disparate impact on a particular racial group, a challenger generally must prove a discriminatory intent behind the policy.<sup>282</sup> Historically, this is difficult, but not impossible, to achieve.<sup>283</sup>

In this case, because the harmful effects of prisonization practices are widely known, creative lawyers and advocates challenging school practices could argue that discriminatory intent could be met by implication, especially considering the racist history of policing and school policing described earlier.<sup>284</sup>

In this context, a school may argue that it must implement prisonization practices to meet its compelling interest in student safety. However, suppose the school’s discipline regime disproportionately punishes children of certain racial backgrounds. In that case, the state or school district likely must show not only that there is a compelling state interest in safety but also that the particular punishment is narrowly tailored to serve the interest.<sup>285</sup> The school would likely fail the second prong since there are many less restrictive ways to handle even serious misbehavior.<sup>286</sup>

After *Brown v. Board of Education*, the Court decided a number of cases where students raised equal protection claims, including *San*

281. See *Washington v. Davis*, 426 U.S. 229, 243 (1976) (noting that in “proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor”) (citation omitted).

282. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484-85 (1982).

283. *League of United Latin Am. Citizens v. Abbott*, No. 21-CV-00991, 2022 WL 174525, at \*3 (W.D. Tex. Jan. 18, 2022).

284. See *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488–489 (1997); *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 372 (2014) (Sotomayor, J., dissenting); *supra* Part I.

285. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 555 U.S. 701, 720 (2007) (“[S]chool district must demonstrate that the use of individual racial classifications in the assignment plans here under review is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.”) (citation omitted).

286. Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and The School To Prison Pipeline*, F. ON PUB. POL’Y, 2009, at 17; see *supra* Section III.B.

*Antonio v. Rodriguez*<sup>287</sup> in 1973 and *Plyler v. Doe*<sup>288</sup> in 1982. *Rodriguez* involved a challenge by Mexican American parents to their school district's reliance on local property taxes as a violation of their equal protection rights.<sup>289</sup> The Court indicated that there was no federal right to education,<sup>290</sup> giving birth to decades of scholarly work arguing in favor of the opposite conclusion.<sup>291</sup> When applying the rational basis standard, the Court held that the school district's funding scheme was rationally related to a legitimate interest and therefore did not violate the parents' equal protection rights.<sup>292</sup>

In *Plyler*, the Court considered whether the EPC permitted the state of Texas to deny undocumented school-age children the free public education it provided to U.S. citizens or students with recognized legal status in the United States.<sup>293</sup> The Court affirmed the application of the EPC to people who are undocumented but, again, declined recognizing a federal right to education.<sup>294</sup> Justice Brennan noted, however, that education is not simply a governmental benefit: "Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."<sup>295</sup> In *Plyler*, even by applying rational basis scrutiny, the Court found the denial of education to undocumented children unconstitutional because illiteracy "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."<sup>296</sup>

*Brown* certainly represents the high-water mark in terms of the Court's willingness to make sweeping holdings regarding students' equal protection rights. The Court clearly stated that race-based discrimination against schoolchildren is difficult for the government

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287. 411 U.S. 1 (1973).

288. 457 U.S. 202 (1982).

289. 411 U.S. at 4-5.

290. *Id.* at 35.

291. See, e.g., A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY (Kimberly Jenkins Robinson ed., 2019).

292. *Rodriguez*, 411 U.S. at 55.

293. 457 U.S. at 205.

294. *Id.* at 221.

295. *Id.* ("[E]ducation provides the basic tools by which individuals might lead economically productive lives . . . . [It] has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

296. *Id.* at 202.



to justify.<sup>297</sup> Therefore, it stands to reason that the Court would not look favorably upon prisonization practices that disproportionately punish children of color and children with disabilities.

### III. BEYOND THE CONSTITUTIONAL COSTS: AN HONEST AND EVIDENCE-BASED LOOK AT HOW TO CREATE SAFER SCHOOLS

The constitutional costs of embedded school police may or not be convincing to the current Supreme Court. In addition to the significant constitutional concerns, an important practical concern remains: embedded school police have quickly become commonplace despite the lack of actual evidence that their presence is an effective way to maintain safety in schools.<sup>298</sup> This Section argues that embedded school police is not an evidence-based way to address school safety. In many ways, they contribute to the disproportionately harsh treatment of children with disabilities and children of color and should be replaced with “evidence-based” practices that focus on positive and safe school climates. Then, this Section explores better alternatives, such as engaging and educating communities, strengthening mental health support in schools and communities, expanding the Family and Medical Leave Act (FMLA), promoting policies and programs recommended by the Centers for Disease Control (CDC), and passing stricter gun control laws.

Calling attention to the lack of public dialogue around the wisdom of embedded school police is critical but also quite challenging. New Mexico, the authors’ home state, provides a powerful example of how challenging it can be to draw the public’s attention because even well-connected and well-organized efforts in a small state face an uphill battle. In June 2020, after the murder of George Floyd, Maryam read about Professor Tiffany Sizemore and her Marshall-Brennan Constitutional Literacy Project colleague Professor Jeff Shook, advocating in Pennsylvania for the removal of school police in favor of investment in additional resources for students and schools.<sup>299</sup> Inspired by their advocacy and advocacy around the country, Maryam teamed up with Albuquerque attorney Hope Pendleton to call for the removal

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297. *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954).

298. *See supra* Section I.C.

299. *See* TyLisa C. Johnson, *Should Police be in Pittsburgh Schools? Advocates’ Call for Removal Reignited in Wake of Floyd’s Death*, PUBLICSOURCE (June 10, 2020), <https://www.publicsource.org/should-police-be-in-pittsburgh-schools-advocates-call-for-removal-reignited-in-wake-of-floyds-death> [<https://perma.cc/KN2F-LRX8>].

of school police in New Mexico.<sup>300</sup> Maryam is one of only several constitutional/criminal law professors at the only law school in the state and is well-known for her work in the community. Hope was then President of the Black Law Student Association at the law school and the mother of four Black children.

Building on Sizemore and Shook's call to action in Pennsylvania, Maryam and Hope wrote and sent a similar call to action to decision-makers around New Mexico, receiving significant interest.<sup>301</sup> In an effort to build support and awareness of the intense need for greater social-emotional support for New Mexican children, Hope and Maryam built a grassroots coalition that meets monthly to share updates on legislation, cases, and other information related to school policing from around the state. The coalition includes parents of children of color and children with disabilities, civil rights advocates, community leaders, teachers, and others interested in building safe and healthy school environments. Hope and Maryam felt that because New Mexico has a small population and they occupy a place of respect in the community, the Coalition as a whole might be able to reverse the reliance on school police, especially in Albuquerque, the largest school district in the state.<sup>302</sup>

#### A. *The Role of Social-Emotional Supports Instead of Police*

Despite the fact that New Mexico school districts do not seem to employ as many prisonization efforts as some other states—statewide, there certainly are reports of criminalization of schoolchildren. One such case involves a seventh-grader at an Albuquerque Middle School arrested for burping in school.<sup>303</sup> The school's police officer patted the boy down, cuffed him, and took him to the juvenile detention center because he had been disrupting other students in his physical education class by burping loudly and repeatedly.<sup>304</sup>

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300. Shelby Perea, *Many Want Police Out of Schools Across NM*, ALBUQUERQUE J. (June 21, 2020, 12:05 AM), <https://www.abqjournal.com/1468386/many-want-police-out-of-schools-across-nm.html> [<https://perma.cc/AU56-HGGV>].

301. *See id.*

302. *About Us*, ALBUQUERQUE PUB. SCHS., <https://www.aps.edu/about-us> [<https://perma.cc/3YUS-WD3U>].

303. *Albuquerque Boy Arrested for Burping Must Digest Suspension, Court Rules*, GUARDIAN (July 30, 2016, 5:12 PM), <https://www.theguardian.com/us-news/2016/jul/30/albuquerque-boy-arrested-burping> [<https://perma.cc/AV4K-YD8L>].

304. *Id.*

Another case occurred on May 10, 2019, at Española Valley High School, an officer tased a 15-year-old student with special needs because the officer claimed he was resisting arrest.<sup>305</sup> And in Farmington on August 27, 2019, an eleven-year-old girl was shoved against a school building and slammed to the ground by a police officer at Mesa View Middle School because she took too many milk cartons from the cafeteria, was standing on the school bus, and was picking at a sign taped to a door.<sup>306</sup>

In addition to the over-presence of law enforcement, schools have a dearth of counselors, social workers, and psychologists. The New Mexico ACLU's recent report, "Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students," explains the following staggering statistics that lead to over-reliance on law enforcement in schools:

- Student to Counselor Ratio in NM – 391:1 (not meeting recommended 250:1).<sup>307</sup>
- Student to Social Worker Ratio in NM – 945:1 (not meeting recommended 250:1).<sup>308</sup>
- Student to School Psychologist Ratio in NM – 3,673:1 (not meeting recommended 700:1).<sup>309</sup>

Since 2013, APS has had its own department of school policing and an annual contract (Memorandum of Understanding or "MOU") with the Bernalillo County Sheriff's Office to issue deputy commissions to applicants for APS police officer positions.<sup>310</sup> Through the Coalition's work, we raised awareness about evidence-based school safety approaches and requested the department and MOU be terminated in

305. Tabitha Clay, *Sheriff's Deputy Tases High School Student*, RIO GRANDE SUN (Jan. 30, 2020), [http://www.riograndesun.com/news/sheriffs-deputy-tases-high-school-student/article\\_d8768598-824d-11e9-b3f9-2b6caa5afc70.html](http://www.riograndesun.com/news/sheriffs-deputy-tases-high-school-student/article_d8768598-824d-11e9-b3f9-2b6caa5afc70.html) [https://perma.cc/AB35-CWG2].

306. Reis Thebault, *Video Shows Police Officer Tackling an 11-Year-Old Girl He Accused of Being 'Disruptive' at School*, WASH. POST (Oct. 23, 2019, 6:54 AM), <https://www.washingtonpost.com/education/2019/10/23/video-shows-police-officer-tackling-an-year-old-girl-he-accused-being-disruptive-school> [https://perma.cc/8FRP-EABF].

307. AMIR WHITAKER, SYLVIA TORRES-GUILLEN, MICHELLE MORTON, HAROLD JORDAN, STEFANIE COYLE, ANGELA MANN & WEI-LING SUN, ACLU, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 12 (2019).

308. *Id.* at 13.

309. *Id.* at 14.

310. *School Services*, ALBUQUERQUE PUB. SCHS., <https://www.aps.edu/police/about-us/divisions> [https://perma.cc/8KRE-HFEN].

light of the current awareness of the over-policing of Black and Brown people. We also demanded greater transparency surrounding school discipline and supported the publication of an op-ed about the poor training of embedded school officers.<sup>311</sup> While the Coalition no longer meets on a regular basis, members still collaborate whenever possible.

The Coalition proposes that instead of embedding police in the school system and individual schools, districts should focus on expanding expertise in culturally appropriate conflict resolution and provide more effective support for students, administrators, and teachers. Building on APS's recent focus on and successes with regard to social-emotional learning practices and implementation of restorative justice models, the Coalition requests a continuation and expansion of those efforts. Most preventive and responsive efforts should occur through early intervention by counselors, other mental health professionals, and educators trained in child development, pedagogy, and trauma-informed interventions.<sup>312</sup>

This effort perfectly aligns with *Martinez v. State*,<sup>313</sup> in which First Judicial District Court Judge Singleton ordered the state to provide a constitutionally sufficient education for at-risk students by increasing the number of social workers, school counselors, and health services.<sup>314</sup> In her opinion, Judge Singleton found that school counselors and social workers help “low-income children be successful,” improve educational outcomes, and “help struggling students attain academic success.”<sup>315</sup> Notably, “[w]hen school counselors are working at the recommended student-to-counselor ratio, students have fewer disciplinary problems and higher graduation rates.”<sup>316</sup> However, public schools in New Mexico are so severely underfunded—and fall extremely short of achieving the student-to-counselor ratio—that most students simply lack sufficient access to a school counselor or social worker.<sup>317</sup>

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311. Susan Medina, *Police in School Put my Autistic Son at Risk*, ALBUQUERQUE J. (Nov. 14, 2021, 12:02 AM), <https://www.abqjournal.com/2445680/police-in-school-put-my-autistic-son-at-risk.html> [<https://perma.cc/7FZT-B8SK>].

312. See Counseling Not Criminalization in Schools Act, S. 2125, 117th Cong. § 2 (2021).

313. No. D-101-CV-2014, 2018 WL 9489382 (N.M. Dist. Dec. 20, 2018).

314. *Id.* at \*24, \*26.

315. *Id.* at \*25, \*26.

316. *Id.* at \*25.

317. See *id.* at \*24–27; *supra* notes 309–12 and accompanying text.

The over-policing of students in large urban settings has been well-documented, and rural America is following suit. The authors describe New Mexico as a case study of how prisonization practices have infiltrated even smaller cities and rural communities and how difficult it can be to reverse these practices once in place. A 2018 report funded by the DOJ's Office of Community Oriented Policing Services – and conducted by the International Association of Chiefs of Police – explained the importance of and proposed methodologies for policing in smaller, rural, and tribal communities.<sup>318</sup> Without consistent and persistent grassroots organizing over a long period of time, it is an uphill climb to convince communities to focus on social-emotional support rather than police.

*B. Since School Police Do Not Make Schools Safer—What Works Better?*

At best, *maybe* embedded school police *might* make schools safer, but on the whole, there are more effective ways to keep students and school personnel safe and safeguard constitutional rights. At worst, they cause more harm than good. In a February 2022 report commissioned by the National Institute of Justice at the request of Congress, authors McKenna and Petrosino summarized:

The decision to adopt, expand, limit, or remove school policing belongs to local communities. Our report provides no mandate, nor should it. However, based on our report, our guidance is for local communities to tread carefully. Without careful thought to officer selection, initial and ongoing training, carefully designed roles for officers and educators, regular communication of those roles to the school community, and periodic monitoring of program implementation, school policing programs may be inadequate at best and harmful at worst.<sup>319</sup>

In addition to more focused efforts on eliminating school policing, there are broader, community-led efforts to address the root causes of racial disparities in schools. For example, Families United for Education (FUE) is an Albuquerque-based organization that advocates

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318. INT'L ASS'N OF CHIEFS OF POLICE, PRACTICES IN MODERN POLICING IN SMALL, RURAL, AND TRIBAL COMMUNITIES 11–12 (2018), [https://www.theiacp.org/sites/default/files/2018-11/IACP\\_PMP\\_SmallTribal.pdf](https://www.theiacp.org/sites/default/files/2018-11/IACP_PMP_SmallTribal.pdf) [<https://perma.cc/2PB6-NY64>].

319. JOSEPH M. MCKENNA & ANTHONY PETROSINO, NATIONAL INSTITUTE OF JUSTICE, SCHOOL POLICING PROGRAMS: WHERE WE HAVE BEEN AND WHERE WE NEED TO GO NEXT iii (2022).

for students and families.<sup>320</sup> Since at least 2012, the group has worked to engage and amplify the voices of those most impacted by school policing, including students, youth organizers, and parents.<sup>321</sup> It is a decentralized “community collective” that developed APS’s Family and Community Engagement Policy, which was adopted and implemented by the APS school board.<sup>322</sup> The policy acknowledges that “[e]ngaged communities and families is a critical component to reach our goal of dramatically increased student achievement” and towards this end, embraces four core principles: (1) “[f]ostering safe and welcoming environments”; (2) “[s]trengthening relationships and capacity with families, teachers, school and district administrators and community partners”; (3) “[e]xpanding communication between families, community partners and schools”; and (4) “[c]ultivating equitable and effective systems.”<sup>323</sup>

While the policy was initially met with reactionary concerns, FUE sought to bolster the policy by leveraging existing support and educating dissenters.<sup>324</sup> Following the successful adoption of the policy, FUE has focused on school board elections by engaging the broader, multigenerational community on equity issues and hosting candidate forums to directly hold candidates accountable for their views on the engagement policy and anti-racism training.<sup>325</sup> These efforts are predominantly youth-led, which provides a concrete pathway for young people to take ownership of issues that impact them the most.<sup>326</sup> In addition, the group has developed and promoted an ethnic studies curricula framework for the District.<sup>327</sup> While FUE’s multi-pronged approach has seen some success, obstacles still persist, including resistant school board members and stagnation from largely symbolic equity rhetoric without concrete action.<sup>328</sup> Ultimately, FUE serves as a

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320. *Civic Change Champion Announced – Families United for Education*, EVERYDAY DEMOCRACY, <https://www.slideshare.net/everydaydemocracy/families-united-for-education-civic-change-champion-100418> [<https://perma.cc/97ZQ-CB9C>].

321. *Id.*

322. *Id.*

323. *Family and Community Engagement*, ALBUQUERQUE PUB. SCHS., <https://www.aps.edu/about-us/policies-and-procedural-directives/procedural-directives/k-school-community-home-relations/family-and-community-engagement> [<https://perma.cc/39J8-8K79>].

324. EVERYDAY DEMOCRACY, *supra* note 322.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

persistent action-oriented force in the community and a reminder to gatekeepers that family and community engagement can lead to lasting change for students.

In addition to local community organizing to address student safety, communities across the country have implemented culturally relevant conflict resolution approaches such as restorative justice programs.<sup>329</sup> Tailored restorative justice (“RJ”) offers an alternative to punitive, exclusionary discipline that arises from prisonization practices.<sup>330</sup> At its broadest definition, practices rooted in RJ acknowledge the harm to the broader community and seek to restore and repair the relationship between the parties involved—without assigning blame or casting away the party who caused harm.<sup>331</sup> These practices originate in the restorative practices of Native American, Indigenous, and First Nation people of North America.<sup>332</sup>

In the context of schools, RJ has been used as both a widespread policy measure and as a response to isolated instances of conflict.<sup>333</sup> Some concrete RJ approaches include training on informal and formal restorative dialogue techniques as well as RJ circles, which is a facilitated meeting that allows students to resolve conflict and problem-solve a “reasonable restorative sanction for the offender.”<sup>334</sup> For example, Portland Public Schools engages in restorative practices to:

Build relationships with and empower community members to take responsibility for the well-being of others; Prevent or deal with conflict before it escalates; Address underlying factors that lead youth to engage in inappropriate behavior; Increase the pro-social skills of those who have harmed others; Build resiliency both in students who have committed harm and in those who have been harmed; [and] Provide students with the opportunity to be

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329. See TREVOR FRONIUS, HANNAH PERSSON, SARAH GUCKENBERG, NANCY HURLEY & ANTHONY PETROSINO, WESTED, RESTORATIVE JUSTICE IN U.S. SCHOOLS: A RESEARCH REVIEW 10 (2016).

330. *Id.*

331. *Id.* at 1, 10.

332. LAURA MIRSKY, INT’L INST. FOR RESTORATIVE PRACS., RESTORATIVE JUSTICE PRACTICES OF NATIVE AMERICAN, FIRST NATION AND OTHER INDIGENOUS PEOPLE OF NORTH AMERICA: PART TWO (2004).

333. See, e.g., *Restorative Justice Framework*, PORTLAND PUB. SCHS., <https://www.pps.net/Page/13482> [<https://perma.cc/E9AL-UXS6>] (describing the restorative philosophy that guides relationships with students and community members, as well as intervention when students misbehave).

334. FRONIUS ET AL., *supra* note 331, at 11.

accountable to those they have harmed and enable them to repair the harm to the extent possible.<sup>335</sup>

A recent literature review by the WestEd Justice & Prevention Research Center of RJ practices in schools revealed some promising results, especially for marginalized students.<sup>336</sup> RJ practices have resulted in fewer teacher-issued student misconduct referrals and better relationships (measured by student-perceived teacher respect).<sup>337</sup> In addition, teachers who were perceived as using RJ practices by their students had less racial disparities in disciplinary referrals than teachers who were perceived as using a lower threshold of RJ elements in their pedagogy.<sup>338</sup>

Despite the appeal of restorative practices, serious obstacles to their successful implementation exist. Regular funding sources, quality control, the buy-in of all stakeholders, adequate training, and sustainability make it extremely difficult to implement RJ in meaningful ways.<sup>339</sup> However, the growth in RJ practices in schools signals the acknowledgment that prisonization practices like SROs and zero-tolerance policies are unacceptable.

In addition to banning harmful practices and providing funding for evidence-based interventions at the federal level, additional federal action is needed. The United States offers the least protection to families out of all peer and many developing nations.<sup>340</sup> In terms of (1)

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335. PORTLAND PUB. SCHS., *supra* note 335.

336. See FRONIUS ET AL., *supra* note 331; see also Andy Kopsa, *The City That Kicked Cops Out of Schools and Tried Restorative Practices Instead*, IN THESE TIMES (Dec. 12, 2022), <https://inthesetimes.com/article/the-city-that-kicked-cops-out-of-schools-and-tried-restorative-practices-instead> (examining one school district's efforts to replace SROs with restorative practices).

337. Anne Gregory, Kathleen Clawson, Alycia Davis & Jennifer Gerewitz, *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 26 J. EDUC. & PSYCH. CONSULTATION 325, 340–42 (2016).

338. *Id.* at 341–42.

339. FRONIUS ET AL., *supra* note 331, at 12–13 (addressing implementation issues and making recommendations for schools and educators); see also Emily Richmond, *When Restorative Justice in Schools Works*, ATLANTIC (Dec. 29, 2015), <https://www.theatlantic.com/education/archive/2015/12/when-restorative-justice-works/422088> [<https://perma.cc/2A4L-U2BU>] (noting the training and buy-in that changed the campus climate at a school in Pittsfield).

340. See Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RES. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave> [<https://perma.cc/Q8P5-9XDS>]; Margaret Talbot, *America's Family-Leave Disgrace*, NEW YORKER (Jan. 22, 2015), <http://www.newyorker.com/news/daily-comment/paid-family-leave-obama-work> [<https://perma.cc/JPA7-42MU>].



paid leave, (2) paternity leave, (3) the scope of who is protected, (4) the length of leave, and other measures, the United States falls behind other countries.<sup>341</sup> The United States has only offered comprehensive job protection to its employees who have or adopt babies for just over thirty years.<sup>342</sup> The federal protection under the FMLA only mandates twelve weeks of unpaid leave for eligible workers who meet certain requirements.<sup>343</sup> An eligible employee is someone who has worked for the employer for at least twelve months, has worked a minimum of 1,250 hours in the preceding twelve months (approximately twenty-three hours per week for fifty-two weeks), and “is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.”<sup>344</sup> The FMLA covers four situations: care for oneself, one’s children, one’s spouse or parents for a serious medical illness, and the birth or adoption of a child.<sup>345</sup>

State and local governments, as well as individual employers, may offer more protection than what is required by federal law, but often there are budget issues and no immediately apparent financial incentive to do so.<sup>346</sup> Only a handful of states currently offer paid family, sick, and/or paid school/parental leave, although the number of states is increasing.<sup>347</sup> According to one study, large and medium size businesses (those of at least one-hundred employees) with unpaid leave for mothers went from 33% to 61%, and even to 84% by 1995 following FMLA, but paid leave remained constant between 2% to 3% before and after the FMLA’s passage.<sup>348</sup> Under current law, only 23%

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341. Livingston & Thomas, *supra* note 342.

342. Family and Medical Leave Act, 29 U.S.C. § 2601(b)(2).

343. *Id.* § 2612 (a)(1), (c). *But see id.* § 2653 (encouraging more generous leave polices beyond the minimums established in § 2612).

344. GERALD MAYER, CONG. RSCH. SERV., R42758, THE FAMILY AND MEDICAL LEAVE ACT (FMLA): AN OVERVIEW 3 (2012).

345. *Id.* at 4-5.

346. *Cf.* NAT’L P’SHIP FOR WOMEN & FAMS., PAID FAMILY AND MEDICAL LEAVE: SECURING FINANCIAL STABILITY AND GOOD HEALTH FOR WORKING FAMILIES 3, 9, 12 (2012) (explaining that paid leave policies support worker retention and productivity, which are longer-term financial gains to employers).

347. *State Family and Medical Leave Laws*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [<https://perma.cc/D9SQ-BK3J>] (outlining the eleven states that currently offer paid family leave, sixteen that require paid sick leave, and eleven that provide a limited number of hours to parents for attending their children’s school-related events).

348. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL’Y ANALYSIS & MGMT. 281, 285-86 (1999).

of U.S. private sector workers have access to paid family leave.<sup>349</sup> For the remaining 77% of workers who must weigh costs and benefits of taking unpaid leave, many cite affordability as their reason for foregoing taking leave because they simply cannot pay bills without the missed income.<sup>350</sup>

The limitations of the FMLA and state laws have tremendous implications for child welfare. Researchers have found a link between paid parental leave, the length of leave, and child health.<sup>351</sup> In general, “states and countries that have instituted paid family leave [report better] bonding between newborns and parents, lower infant mortality, improved health in children, [and] mothers who breastfeed longer.”<sup>352</sup> One study found more generous paid leave is correlated with fewer deaths of infants and children.<sup>353</sup> That study compared sixteen European countries and concluded that “parental leave may be a cost-effective method of bettering child health.”<sup>354</sup>

Research indicates parents and guardians who have the opportunity to watch and monitor children’s behavior, seek resources when necessary, and offer consistent love and care will have better adjusted and educationally successful children.<sup>355</sup> Considerable research documents the contributions of parent involvement to positive outcomes, such as: (1) higher academic achievement; (2) student sense of well-being; (3) student school attendance; (4) student and parent perceptions of classroom and school climate; (5) positive student attitudes and behavior; (6) student readiness to do homework; (7) increased student time spent with parents; (8) better student grades; (9) higher educational aspirations among students and

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349. *Paid Leave in the U.S.*, KFF (Dec. 17, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s> [<https://perma.cc/84VZ-C6H4>].

350. *See id.*

351. Christopher J. Ruhm, *Parental Leave and Child Health*, 19 J. HEALTH ECON. 931, 946–48, 950–52 (2000).

352. Hana Schank & Elizabeth Wallace, *Beyond Maternity Leave*, ATLANTIC (Dec. 19, 2016), <https://www.theatlantic.com/business/archive/2016/12/beyond-maternity-leave/500063> [<https://perma.cc/DV86-JC9X>]. Breastfeeding is an intensely individual decision and as such, the author expressly declines to promote it, but there are mothers who would like to continue breastfeeding who simply cannot because they have to work and there is research to support their desire to continue breastfeeding.

353. *See* Ruhm, *supra* note 353, at 946–48, 950–52.

354. *Id.* at 931.

355. *E.g.*, MICH. DEP’T OF EDUC., WHAT RESEARCH SAYS ABOUT PARENT INVOLVEMENT IN CHILDREN’S EDUCATION IN RELATION TO ACADEMIC ACHIEVEMENT (2002) (discussing the benefits that result when parents involve themselves in their children’s education).

parents; and (10) parent satisfaction with teachers.<sup>356</sup> For parents to have those opportunities, they need time with their children, especially in the early years.<sup>357</sup> However, under the protections offered by current laws, only a small fraction of parents, mostly well-off parents, can afford to effectively engage in their children's upbringing.<sup>358</sup>

Research clearly supports the need for better support for parents and guardians, but support should also extend to the needs of caretakers of physically and mentally ill children. Caring for individuals with mental health issues may take a significant toll on the caretaker and often leads to exhaustion and quitting.<sup>359</sup> The Supreme Court has held that states cannot be sued if they do not let their workers take time off for their own serious medical problems.<sup>360</sup> Therefore, Congress must step in and expand the FMLA in many ways.

In the 2020 presidential election cycle, Senator Elizabeth Warren made paid family leave a front-and-center issue by advocating for twelve weeks of paid leave in which workers would be paid two-thirds of their salary.<sup>361</sup> She shared that her own ability to succeed as a young professional would not have been possible if her aunt had not moved in with her to help care for her young children.<sup>362</sup> Then-candidate Joe Biden also stated that he supports a more extensive policy - twelve weeks of paid family leave.<sup>363</sup> With the birth rate declining and the

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356. *Id.*

357. *See id.*

358. *See* Esteban Ortiz-Ospina, *Are Parents Spending Less Time With Their Kids?*, OUR WORLD IN DATA (Dec. 14, 2020), <https://ourworldindata.org/parents-time-with-kids> [<https://perma.cc/DW65-XU88>].

359. *See* Wendy Brennan, *The Family Role in Recovery: Understanding the Illness and Embracing the Process*, BEHAV. HEALTH NEWS (Apr. 1, 2013), <https://behavioralhealthnews.org/the-family-role-in-recovery-understanding-the-illness-and-embracing-the-process> [<https://perma.cc/KUD9-26SR>] (describing the stress on families with someone who is being treated for mental illness).

360. *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 33 (2012).

361. Annabelle Timsit, *Which Democratic Frontrunner Has the Best Policies for Families?*, QUARTZ (July 20, 2020), <https://qz.com/1809767/where-democratic-candidates-stand-on-childcare-and-family-leave> [<https://perma.cc/S96J-j3X2>].

362. Elizabeth Warren, *My Plan for Universal Child Care*, MEDIUM (Feb. 19, 2019), <https://medium.com/@teamwarren/my-plan-for-universal-child-care-762535e6c20a> [<https://perma.cc/96XC-E8VV>].

363. Timsit, *supra* note 363.

COVID-19 pandemic forcing nearly two-million American women out of the workforce, there is no doubt that reform is needed.<sup>364</sup>

First, the length of federally-protected leave should be expanded to at least six months. Six months is the length of time recommended for nursing (for those who nurse) in developed countries.<sup>365</sup> This length of time is not as long as most peer nations, limiting the impact on the American economy.<sup>366</sup>

Second, all employees should be covered. A review of the legislative history indicates that the limits were decided arbitrarily and inappropriately.<sup>367</sup> “Clearly, the Government’s dictating an arbitrary 12-week unpaid leave benefit destroys this important flexibility for both employee and employer [and] attracts costly lawsuits.”<sup>368</sup> Women giving birth by Cesarean section have barely recovered by 12 weeks.<sup>369</sup> As addressed earlier, the FMLA has a number of limitations, resulting in only 60% of workers being eligible for its protections.<sup>370</sup> Whether due to the number of employees being less than fifty, they have not been working for at least one year, or they have worked less than 1250 hours, approximately 40% of American workers do not qualify.<sup>371</sup>

Third, the FMLA leave should be paid. Although some in the business community resist the idea of paid leave, as demonstrated by the 2020 election cycle, both major political parties would be warmly

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364. Kelly Anne Smith, *The U.S. Birth Rate is Down Again – Could This Be the Final Push for Paid Parental Leave?*, FORBES (May 6, 2011, 11:38 AM), <https://www.forbes.com/advisor/personal-finance/us-paid-parental-leave-reform> [<https://perma.cc/7GZR-UBLM>]; Megan Cassella, *The Pandemic Drove Women Out of the Workforce. Will They Come Back?*, POLITICO (July 22, 2021, 4:30 AM), <https://www.politico.com/news/2021/07/22/coronavirus-pandemic-women-workforce-500329> [<https://perma.cc/B26N-LSXD>].

365. See MICHAEL S. KRAMER & RITSUKO KAKUMA, WHO, *THE OPTIMAL DURATION OF EXCLUSIVE BREASTFEEDING: A SYSTEMATIC REVIEW* 20 (2002).

366. See Livingston & Thomas, *supra* note 342.

367. See 139 CONG. REC. 2,048 (1993) (statement of Rep. Jay Kim) (criticizing FMLA as creating an “arbitrary 12-week unpaid leave benefit” that discriminates against lower- and middle-income employees and excludes employees that work for small businesses).

368. 139 CONG. REC. 2048 (1993) (statement of Rep. Kim).

369. See Jenn Morson, *1 or 10 Weeks? 7 Women Share How Mothers Need More Recovery Time*, HEALTHLINE (Sep. 20, 2018), <https://www.healthline.com/health/pregnancy/maternity-leave-recovery-time> [<https://perma.cc/27DH-VRDM>] (noting that a full physical recovery “could take anywhere from six months to a year”).

370. Maria Masters, *What Every Mom Needs to Know About Maternity Leave*, WHAT TO EXPECT (Mar. 10, 2022), <https://www.whattoexpect.com/pregnancy/maternity-leave> [<https://perma.cc/4F43-TRXJ>]; see *supra* notes 342–52 and accompanying text.

371. See Masters, *supra* note 372.

received if they presented a pro-family, pro-business reform that included paid leave.<sup>372</sup> According to polls and the fact that an increasing number of states offer some type of paid leave, a significant majority of Americans support strengthening family leave.<sup>373</sup> When paid parental leave is available, mothers are 93% more likely to remain in their jobs nine to twelve months later, 40% less likely to need food stamp assistance, and 39% less likely to need public assistance.<sup>374</sup> Benefits should extend to fathers and children as well.<sup>375</sup> If other nations have figured it out, the United States should as well.<sup>376</sup>

Finally, the FMLA should specifically protect care for dependent children and adults with mental health problems so that parents can support their children instead of worrying about keeping their jobs. In addition to providing greater support to parents caring for children with mental health problems through the FMLA, schools can do a better job of caring for children's mental health needs. Even though it does impose limitations, the 2020 Families First Coronavirus Response Act<sup>377</sup> (FFCRA) provides up to twelve weeks of partial paid leave to parents to care for their children due to illness or school closure.<sup>378</sup> Hopefully, the FFCRA is the first step in more robust and permanent reform.

The CDC has played a critical role in understanding the causes of school violence. In solving public health problems, the CDC

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372. *Cf., e.g.*, MARSHALL PLAN FOR MOMS, MAKING WORKPLACES WORK FOR MOMS (2021) (suggesting actions businesses can take to create mom-friendly workplaces), <https://marshallplanformoms.com/work> [<https://perma.cc/3ALG-PYAC>]; NAT'L P'SHIP FOR WOMEN & FAMS., PAID FAMILY AND MEDICAL LEAVE: GOOD FOR BUSINESS (Sept. 2018) (listing business advantages for providing paid leave), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-leave-good-for-business.pdf> [<https://perma.cc/K79W-3J3B>].

373. *See* Kathleen Weldon, *Public Opinion on the Family and Medical Leave Act*, HUFFINGTON POST (Sept. 6, 2016), [http://www.huffingtonpost.com/entry/fmla-and-public-opinion\\_us\\_57aa1807e4b091a07ef7e9c4](http://www.huffingtonpost.com/entry/fmla-and-public-opinion_us_57aa1807e4b091a07ef7e9c4) [<https://perma.cc/Y2YV-8U8W>].

374. LINDA HOUSER & THOMAS P. VARTANIAN, RUTGERS CTR. FOR WOMEN & WORK, PAY MATTERS: THE POSITIVE ECONOMIC IMPACTS OF PAID FAMILY LEAVE FOR FAMILIES, BUSINESSES AND THE PUBLIC 6, 8–9 (2012).

375. *Id.*

376. *See* HEATHER BOUSHEY & SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THE EFFECTS OF PAID FAMILY AND MEDICAL LEAVE ON EMPLOYMENT STABILITY AND ECONOMIC SECURITY 17-19 (2012) (summarizing research on more favorable paid family and medical leave policies in Canada, Australia, and Europe).

377. Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified as amended at 29 U.S.C. § 2620).

378. *Id.* § 3102, 134 Stat. 189–90.

recommends first defining the problem, then identifying risk and protective factors, next developing and testing prevention strategies, and finally ensuring widespread adoption.<sup>379</sup> The goal in the case of school violence is to stop it from happening in the first place. In examining data on perpetrators of school violence, the CDC has identified risk factors that may increase the likelihood of a youth engaging in violence at school and prevention strategies for those risk factors.<sup>380</sup>

RISK FACTORS	PREVENTION STRATEGIES
<ul style="list-style-type: none"> <li>• Prior history of violence</li> <li>• Drug, alcohol, or tobacco use</li> <li>• Association with delinquent peers</li> <li>• Poor family functioning</li> <li>• Poor grades in school</li> <li>• Poverty in the community</li> </ul>	<ul style="list-style-type: none"> <li>• Universal, school-based prevention programs</li> <li>• Early intervention parent- and family-based programs</li> <li>• Street outreach programs</li> </ul>

In aligning practices with identified prevention strategies, the CDC engages in many activities “that help us to understand and effectively prevent school violence.”<sup>381</sup> Such activities include the Youth Risk Behavior Surveillance System (“YRBSS”),<sup>382</sup> the School-Associated Violent Death Study,<sup>383</sup> the School Health Policies and Practices Study

379. *The Public Health Approach to Violence Prevention*, CDC, <https://www.cdc.gov/violenceprevention/about/publichealthapproach.html> [https://perma.cc/K9WV-EV9Q].

380. CDC, UNDERSTANDING SCHOOL VIOLENCE: FACT SHEET 2 (2016), [http://www.cdc.gov/violenceprevention/pdf/school\\_violence\\_fact\\_sheet-a.pdf](http://www.cdc.gov/violenceprevention/pdf/school_violence_fact_sheet-a.pdf) [https://perma.cc/Y2YV-8U8W] (recognizing that the mere presence of these risk factors does not always mean that a young person will become an offender, but merely that based on analyses of known cases, the presence of many of these factors may increase the likelihood of engagement in violence at school).

381. *Id.*

382. *Id.* “The YRBSS monitors health-risk behaviors among youth, including physical fighting, bullying, weapon carrying, and suicide. Data is collected every two years and provide nationally representative information about youth in grades 9-12.” *Id.* For further information on the YRBSS, see *Youth Risk Behavior Surveillance System (YRBSS)*, CDC, <https://www.cdc.gov/healthyyouth/data/yrbs/index.htm> [https://perma.cc/KHL2-ATCE].

383. CDC, *supra* note 382, at 3; see CDC, *School-Associated Student Homicides—United States, 1992-2006*, 57 *MMWR* 33–36 (Jan. 18, 2008), <https://www.cdc.gov/mmwr/>

(“SHPPS”),<sup>384</sup> the Health Curriculum Analysis Tool (“HECAT”),<sup>385</sup> the School Health Index,<sup>386</sup> the National Centers for Youth Violence Prevention (“YVPCs”),<sup>387</sup> the Guide to Community Preventative Services,<sup>388</sup> and Striving to Reduce Youth Violence Everywhere (“STRYVE”).<sup>389</sup>

Parents and other concerned stakeholders may identify these resources and ask how their local schools use them and, if not, how they may begin to utilize them. In addition to strengthening FMLA provisions to allow for coverage of caring for mentally ill children and young adults<sup>390</sup> and supporting the CDC’s programs and tools

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preview/mmwrhtml/mm5702a1.htm [https://perma.cc/J7V5-8H29] (explaining a collaboration with the Departments of Education and Justice to “monitor school-associated violent deaths at the national level”).

384. CDC, *supra* note 382, at 3; see *School Health Policies and Practices Study (SHPPS)*, CDC, <https://www.cdc.gov/healthyyouth/data/shpps/index.htm> [https://perma.cc/38LD-5KA4] (assessing health and safety “policies and practices at the state, district, school, and classroom levels”).

385. CDC, *supra* note 382, at 3; see *Health Education Curriculum Analysis Tool (HECAT)*, CDC, <https://www.cdc.gov/healthyyouth/hecat> [https://perma.cc/H8LC-JS6J] (containing guidance, appraisal tools, and resources to help schools conduct an analysis of health education curricula based on the National Health Education Standards and CDC’s Characteristics of an Effective Health Education Curriculum, which can help schools select or develop curricula to address topics such as violence prevention).

386. CDC, *supra* note 382, at 3; see *School Health Index*, CDC, <https://www.cdc.gov/healthyschools/shi/index.htm> [https://perma.cc/5DMM-FMZH] (providing resources for schools to use to improve their health and safety policies).

387. CDC, *supra* note 382, at 3; see *National Centers of Excellence in Youth Violence Prevention (YVPCs)*, CDC, <https://www.cdc.gov/violenceprevention/youthviolence/yypc/index.html> [https://perma.cc/BXW6-5YEN] (showing collaboration between researchers and local organizations, and the YVPCs work with high-risk communities to carry out and evaluate a multifaceted, science-based approach for reducing youth violence).

388. CDC, *supra* note 382, at 3; see *GUIDE TO COMMUNITY PREVENTIVE SERVICES*, <https://www.thecommunityguide.org> [https://perma.cc/RJT7-3PDF] (recommending ways to improve public health and examining youth violence prevention strategies such as firearm laws, therapeutic foster care, universal school-based violence prevention programs, and transfer of juveniles to adult courts).

389. CDC, *supra* note 382, at 3; see also *STRYVE: Striving to Reduce Youth Violence Everywhere*, CDC, <https://www.cdc.gov/violenceprevention/youthviolence/stryve/index.html> [https://perma.cc/7F39-68RZ] (explaining the national initiative to provide information, training, and tools to increase public health leadership to prevent youth violence, promote the widespread adoption of youth violence prevention strategies, and reduce the rates of youth violence on a national scale).

390. Ahranjani, *supra* note 77, at 1107-10.

designed to address the risk factors associated with school violence directly, there are several other more effective responses to the risk factors, including strengthening mental health supports in schools and communities,<sup>391</sup> and tightening access to guns and weapons.<sup>392</sup>

While those of us who experience mental illness are no more likely to be involved in violent crime than others,<sup>393</sup> mass shooters are usually male, mentally ill, and socially marginalized.<sup>394</sup> Unfortunately, far too many children and young adults in America live with mental health issues that could be addressed more effectively.<sup>395</sup> As a society, we are becoming more aware and willing to explore our mental health, but it is still a huge challenge, and millions of children fly under the radar screen every year with undiagnosed and untreated conditions.<sup>396</sup> Every school should have a licensed mental health worker who monitors students. If the attendant cost is prohibitive, existing staff should be trained to direct students to appropriate, existing community resources. These efforts should be required by federal law and paid for by Congress. School is the one place all students have in common, so it is the logical place to begin to address mental health issues.

The first national survey of school mental health services was conducted by the federal Substance Abuse Mental Health Services Administration (“SAMHSA”) and released in 2005.<sup>397</sup> It surveyed public elementary, middle, and high schools.<sup>398</sup> According to the survey, current school-based mental health resources are

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391. *Id.* at 1111-12.

392. *Id.* at 1112-13.

393. *Mental Health Myths and Facts*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.mentalhealth.gov/basics/mental-health-myths-facts> [<https://perma.cc/F4EM-BDDU>].

394. Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 240 (2015).

395. *Children’s Mental Health: Why is Children’s Mental Health Important?*, AM. PSYCHOL. ASS’N, <http://www.apa.org/pi/families/children-mental-health.aspx> [<https://perma.cc/PBZ6-9Z38>].

396. See generally Pierre André Michaud & Eric Fombonne, *ABC of Adolescence: Common Mental Health Problems*, 330 BRIT. MED. J. 835, 835 (2005) (indicating that it is difficult to diagnose adolescents).

397. SUSAN FOSTER, MARY ROLLEFSON, TERESA DOKSUM, DENISE NOONAN, GAIL ROBINSON & JUDITH TEICH, U.S. DEP’T. OF HEALTH & HUM. SERVS., *SCHOOL MENTAL HEALTH SERVICES IN THE UNITED STATES: 2002-2003* (2005), <http://files.eric.ed.gov/fulltext/ED499056.pdf> [<https://perma.cc/2KK6-CBJS>].

398. *Id.* at 10, 47-55.



insufficient.<sup>399</sup> In fact, 20% of those children and adolescents receive the mental health support they need.<sup>400</sup>

According to another SAMHSA study, approximately 4.1 million adolescents between the ages of twelve and seventeen reported a major depressive episode in 2020, and nearly 60% did not receive any treatment.<sup>401</sup> A 2002 study confirmed that students are significantly more likely to seek help for mental health issues when school-based mental health services are available.<sup>402</sup> The pandemic has greatly exacerbated the need for greater mental health support for children, and the CDC has issued specific recommendations for different age groups.<sup>403</sup>

While it is difficult to ascertain exactly how many schools offer an appropriate continuum of resources, the current offerings are insufficient.<sup>404</sup> Parents, even educated, well-connected, wealthy ones with access to resources, struggle to navigate the complicated labyrinth of mental health, including figuring out insurance coverage; completing paperwork; identifying strong, accessible providers; and at the end of all that, convincing their child or children to take advantage of the therapy and medication.<sup>405</sup> Therefore, school-based mental health assessments provide a good model to ensure mental health is better addressed.

There are quite a few measures that Congress and state legislatures can implement to strengthen mental health resources for youth. U.S.

399. *Id.* at 59-61.

400. CDC, BEHAVIORAL HEALTH INTEGRATION FACTSHEET (2022), <https://www.cdc.gov/childrensmentalhealth/documents/mental-health-care-infographic-H.pdf> [<https://perma.cc/8DSH-ZRR9>].

401. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T HEALTH & HUMAN SERVS., THE NATIONAL SURVEY ON DRUG USE AND HEALTH: 2020, at 54 (2022), <https://www.samhsa.gov/data/sites/default/files/reports/slides-2020-nsduh/2020NSDUHNationalSlides072522.pdf> [<https://perma.cc/U7WS-GT9Y>].

402. *Id.* at 97.

403. *Parental Resources Kit*, CDC <https://www.cdc.gov/mentalhealth/stress-coping/parental-resources/index.html> [<https://perma.cc/9HKW-A4FJ>].

404. See PETE EARLEY, CRAZY: A FATHER'S SEARCH THROUGH AMERICA'S MENTAL HEALTH MADNESS 117-20 (2006) (detailing the insufficiency of mental health services to save a young man's life); see also Liza Long, 'I Am Adam Lanza's Mother': A Mom's Perspective On The Mental Illness Conversation in America, HUFFPOST (May 13, 2014), [https://www.huffpost.com/entry/i-am-adam-lanzas-mother-mental-illness-conversation\\_n\\_2311009](https://www.huffpost.com/entry/i-am-adam-lanzas-mother-mental-illness-conversation_n_2311009) [<https://perma.cc/AK56-9J56>] (describing a mother's fears for her mentally ill son).

405. See Long, *supra* note 406 (detailing a mother's struggle to manage her son's mental illness and violent episodes).

Senator Chris Murphy and U.S. Representative Ayana Pressley introduced the Counseling Not Criminalization in Schools Act, which would establish a \$2.5 billion grant program for schools to invest in counselors, nurses, mental health professionals, and trauma-informed staff.<sup>406</sup> There is growing awareness of the need to make it easier for a family to obtain mandated treatment for a potentially dangerous person, and we should require protocols for health insurance companies with a minimum level of services and coverage for more inpatient and intensive outpatient services. There are many other proposals to explore, but the bottom line is that society can and should do a much better job of addressing children's mental health needs through public schools, the one place universally accessible to all children.

Finally, limiting access to guns and weapons is the most direct but perhaps most difficult solution to eliminating or minimizing incidents of school violence. In the same way that September 11, 2001, led to the creation of the now nearly \$67 billion Department of Homeland Security,<sup>407</sup> some predicted that the second-deadliest school shooting in American history on December 14, 2012, at Sandy Hook Elementary School would spark similar federal action focused on gun control.<sup>408</sup> In the weeks after Sandy Hook, then-President Barack Obama met with experts and worked on proposals with Congress.<sup>409</sup>

Despite President Obama's efforts, gun control legislation had not been passed in the United States for thirty years until, on June 25, 2022, President Biden finally signed into law the first major gun safety legislation in thirty years.<sup>410</sup> Biden signed the bill just one month after

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406. See Adams, *supra* note 275.

407. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2017, at 9 (2017), [https://www.dhs.gov/sites/default/files/publications/FY2017\\_BIB-MASTER.pdf](https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf) [<https://perma.cc/H6AF-9H82>].

408. Ayana Archie, *In the 10 Years Since Sandy Hook, Gun Laws in the U.S. Haven't Changed Much*, NPR (May 25, 2022, 6:09 AM), <https://www.npr.org/2022/05/25/1101139624/texas-elementary-school-shooting-sandy-hook-gun-legislation-gun-control> [<https://perma.cc/RH9P-2XGQ>].

409. See Michael D. Shear, *Obama Vows Fast Action Pressing for Gun Control*, N.Y. TIMES, Dec. 20, 2012, at A1 (listing President Obama's efforts to convince Congress to pass gun control legislation).

410. See Meghan Keneally, *4 Years After Sandy Hook, Obama Leaves a Legacy of Little Progress on Gun Laws*, ABC NEWS (Dec. 14, 2016, 5:01 AM), <http://abcnews.go.com/Politics/years-sandy-hook-obama-leaves-legacy-progress-gun/story?id=44163755> [<https://perma.cc/4JBD-S25A>] (describing the lack of gun control post-Sandy Hook

a gunman killed nineteen children and two adults in Uvalde, Texas.<sup>411</sup> The law went further than some wanted to restrict gun ownership and not nearly far enough for others<sup>412</sup>. The law was passed days after the current conservative majority of the Supreme Court found a constitutional right to carry handguns in public for self-defense.<sup>413</sup> The Court previously limited the Second Amendment right to carry a handgun for self-defense to the home.<sup>414</sup>

In contrast, in 1996, a gunman killed thirty-five and wounded twenty-three at a seaside resort in Australia.<sup>415</sup> It was the deadliest shooting in Australian history.<sup>416</sup> Public outcry and a newly elected Prime Minister led to the enactment of much stricter gun control laws.<sup>417</sup> It only took the Australian government twelve days to announce their bipartisan deal with both state and local governments to enact unparalleled gun-control measures.<sup>418</sup>

Specifically, the Australian government launched a buyback program and collected over 600,000 semi-automatic shotguns and rifles, which represented approximately one-fifth of the guns in circulation in Australia at the time.<sup>419</sup> It also “prohibited private sales, required that all weapons be individually registered to their owners, and required that gun buyers present a ‘genuine reason’—other than self-defense—for the purchase at the time of sale.”<sup>420</sup> According to studies done since 1996, the policies led to a tremendous drop in

massacre); Don Clyde & Shauneen Miranda, *Biden Signs Gun Safety Bill Into Law*, NPR (June 25, 2022, 9:19 AM), <https://www.npr.org/2022/06/25/1107626030/biden-signs-gun-safety-law> [<https://perma.cc/WQ89-ASWA>].

411. Don Clyde and Shauneen Miranda, *Biden Signs Gun Safety Bill Into Law*, NPR (June 25, 2022, 9:15 AM), <https://www.npr.org/2022/06/25/1107626030/biden-signs-gun-safety-law> [<https://perma.cc/JE6Z-JDGJ>].

412. *Id.*

413. Nina Totenberg, *Supreme Court Strikes Down N.Y. Law that Restricts Carrying Concealed Weapons in Public*, NPR (June 23, 2022, 4:54 PM) <https://www.npr.org/2022/06/23/1102995474/supreme-court-opinion-guns> [<https://perma.cc/4B29-6C39>].

414. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 749-50 (2010).

415. Will Oremus, *How Many Shootings Will It Take for America to Control Its Guns?*, SLATE (Dec. 16, 2012, 10:00 PM), [http://www.slate.com/blogs/crime/2012/12/16/gun\\_control\\_after\\_connecticut\\_shooting\\_could\\_australia\\_s\\_laws\\_provide\\_a.html](http://www.slate.com/blogs/crime/2012/12/16/gun_control_after_connecticut_shooting_could_australia_s_laws_provide_a.html) [<https://perma.cc/94JR-N2AY>].

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

firearm-related suicide and homicide rates and had little effect on non-firearm-related deaths.<sup>421</sup>

There is a debate in the United States over whether gun control would be an effective solution to school violence and gun violence in general. There is no guarantee such efforts would succeed in the United States. However, there is no disputing that the United States has greater gun ownership, more relaxed gun control measures, and much greater rates of gun-related crimes than its peer nations.<sup>422</sup> Whatever Second Amendment right-to-bear-arms arguments may exist, many agree that it is too easy to get a semi-automatic gun in the United States.<sup>423</sup> One potential hurdle is that there are far more semi-automatic shotguns and rifles in the United States, and Americans have the highest gun ownership rate—by far—of any population in the world.<sup>424</sup> The potential benefits of automatic gun control reform—not just to curb mass violence in suburban schools—are enormous and worth pursuing.

#### CONCLUSION

In her dissenting opinion in *Acton*, Justice O'Connor wrote that "the greatest threats to our constitutional freedoms come in times of crisis."<sup>425</sup> The confluence of the worldwide pandemic caused by COVID-19 and the sharp focus on racist policing practices during the

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421. See Andrew Leigh & Christine Neill, *Do Gun Buybacks Save Lives? Evidence from Panel Data*, 12 AM. L. & ECON. REV. 509, 512-17 (2010) (detailing the relationship between buyback programs and deaths).

422. Harmeet Kaur, *What Studies Reveal About Gun Ownership in the US*, CNN (June 2, 2022), <https://www.cnn.com/2022/06/02/us/gun-ownership-numbers-us-ccc/index.html> [<https://perma.cc/WBN5-YD4K>].

423. See, e.g., Andy Campbell & Roque Planas, *It Took Us Just 38 Minutes to Buy an AR-15 in Orlando*, HUFFINGTON POST (June 24, 2016, 7:18 PM), [https://www.huffpost.com/entry/ar-15-orlando\\_n\\_576059f3e4b0e4fe5143fd4d](https://www.huffpost.com/entry/ar-15-orlando_n_576059f3e4b0e4fe5143fd4d) [<https://perma.cc/K8AX-8S6J>] (demonstrating how easy it was to purchase a similar semiautomatic weapon as the one used in the Orlando shooting even during a state of emergency); Helen Ubiñas, *I Bought an AR-15 Semi-Automatic Rifle in Philly in 7 Minutes*, PHILLY.COM (June 13, 2016, 10:04 PM), [https://www.inquirer.com/philly/columnists/helen\\_ubinas/20160614\\_Ubinas\\_I\\_bought\\_an\\_AR-15\\_semi-automatic\\_rifle\\_in\\_Philly\\_in\\_7\\_minutes.html](https://www.inquirer.com/philly/columnists/helen_ubinas/20160614_Ubinas_I_bought_an_AR-15_semi-automatic_rifle_in_Philly_in_7_minutes.html) [<https://perma.cc/HU6K-Y9U9>].

424. See Max Fisher, *What Makes America's Gun Culture Totally Unique in the World, in Four Charts*, WASH. POST (Dec. 15, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/15/what-makes-americas-gun-culture-totally-unique-in-the-world-as-demonstrated-in-four-charts> [<https://perma.cc/NM4N-5SRZ>].

425. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting).

summer of 2020 certainly combine to make this a time of crisis. While some fear that the interest in racial justice will fade, others are convinced that because of the tremendous groundswell of support all around the country, even in homogeneous white, middle-class communities, the injustices are simply too abhorrent to ignore.<sup>426</sup>

Thanks to widespread outrage and organizing across the country after the police killed Breonna Taylor and George Floyd in 2020, some legal and policy changes have occurred with regard to both policing in general<sup>427</sup> and policing in public schools.<sup>428</sup> However, most reforms have not been systemic. For example, instead of removing embedded school police, New York City is training all 5,000 of its school police officers in restorative justice practices.<sup>429</sup>

Simultaneously, despite the importance of stare decisis, the Court has been willing to overturn or amend its previous holdings. Some scholars have noted that the Court conveniently leans on stare decisis when it seeks a particular outcome rather than strictly applying the doctrine.<sup>430</sup> However, on a number of occasions, the Court has reversed itself. The Court recently and famously was willing to reverse the 50-year precedent for a right to abortion in *Dobbs v. Jackson Women's Health*.<sup>431</sup> Also, in the Fourth Amendment case *Arizona v. Gant*, Justice Stevens wrote:

Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result . . . . The doctrine of stare decisis does not require us to approve routine constitutional violations.<sup>432</sup>

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426. Erin McCarthy, *In Philadelphia's White Suburbs, Black Lives Matter Protests Both Denounced and Exposed Racism. Will it Make a Difference?*, PHILA. INQUIRER (Sept. 12, 2020), <https://www.inquirer.com/news/black-lives-matter-white-philadelphia-suburbs-activism-20200912.html> [<https://perma.cc/6GZN-5MRJ>].

427. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/42K3-GDMV>].

428. Erum Salam, *New York Will Reassign 5,000 School Officers*, GUARDIAN (Sept. 17, 2021, 6:00 PM), <https://www.theguardian.com/us-news/2021/sep/17/new-york-city-reassign-5000-school-safety-officers> [<https://perma.cc/D8LS-X3LF>].

429. *Id.*

430. See, e.g., Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1545 (2000) (describing how the Supreme Court picks and chooses when to apply the stare decisis doctrine).

431. 142 S. Ct. 2228, 2284 (2022).

432. *Arizona v. Gant*, 556 U.S. 332, 349, 51 (2009).

Also, in the school context, in *West Virginia State Board of Education v. Barnette*,<sup>433</sup> the Court famously reversed itself just three years after deciding that schoolchildren may be required to salute the flag.<sup>434</sup> World War II brought the realization that totalitarian regimes demanding patriotism could yield terrible results. In *Barnette*, Justice Jackson stated, “that [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>435</sup>

While skeptics may point to the current conservative makeup of the Court as a barrier, most of the justices have children or grandchildren who are school-age, so presumably, they relate on a personal level to the over-policing of children. For example, Justice Amy Coney Barrett has two young Black children. Further, several sitting justices have criminal law and law enforcement-side experience, and Justice Gorsuch also may be open to these arguments. In the Albuquerque burping case, then-10th Circuit Judge Neil Gorsuch expressed a common-sense concern about the embedded police officer’s actions.<sup>436</sup> Justice Ketanji Brown Jackson, only the third Black person on the Court and the first Black woman who is a mother of two Black children, may also provide leadership on these issues, especially with her experience as a public defender and commissioner on the U.S. Sentencing Commission.<sup>437</sup>

Similarly, our current awareness of racial injustice calls for serious scrutiny and condemnation of the prisonization practices currently employed in so many schools. The movement to defund the police is not about completely abolishing police departments but rather right-sizing them to fit what they are uniquely trained and suited to do:

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433. 319 U.S. 624 (1943).

434. *Id.* at 642.

435. *Id.* at 637.

436. *Albuquerque Boy Arrested for Burping Must Digest Suspension, Court Rules*, *supra* note 305; see also *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1169-70 (10th Cir. 2016) (Gorsuch, J., dissenting) (writing that that the majority was ignoring a crucial distinction between “childish pranks and more seriously disruptive behaviors”).

437. Adrian Blanco & Shelly Tan, *How Ketanji Brown-Jackson’s Path to the Supreme Court Differs From the Current Justices*, WASH. POST (Mar. 20, 2022), <https://www.washingtonpost.com/politics/interactive/2022/ketanji-brown-jackson-school-career> [<https://perma.cc/NQ2R-DK7A>].

resolve violent crime.<sup>438</sup> Only one percent of police time in large cities is spent on serious violent crime.<sup>439</sup> In fact, contrary to what the public or police officers may believe, most officers spend most of their time responding to noise complaints, issuing traffic and parking tickets, and dealing with other noncriminal issues.<sup>440</sup>

On the other hand, the #AbolishthePolice movement<sup>441</sup> recognizes that systemic racism is inherent in police departments.<sup>442</sup> The movement argues that unless we deconstruct and rebuild, the “solutions” we currently work with will continue to be Band-Aids attempting to cover the insidious roots of policing in America as an extension of slavery.<sup>443</sup> It is clear there is a range of options to address the constitutional concerns with prisonization. One extreme is to wait for the Supreme Court (and other courts) to reconsider, on a case-by-case basis, the challenges to, inter alia, *T.L.O.*, *Goss*, *J.D.B.*, and *Ingraham*. On the other end of the spectrum, jurisdictions could completely defund embedded school police, remove zero-tolerance policies, eliminate threat assessment regimes, abolish restraint and seclusion, and stop or curb other prisonization practices.

As a practical matter, neither extreme option is likely to occur, at least not in the near future. The ABA resolution includes some high-impact, immediate actions, including (1) more genuine efforts of transparency and information-sharing by school districts about what exactly embedded law enforcement officers do, (2) re-negotiating the terms of Memoranda of Understanding between local police and

438. Rashawn Ray, *What Does ‘Defund the Police’ Mean and Does It Have Merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit> [https://perma.cc/H4VV-KXUD].

439. Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [https://perma.cc/NL5E-MC5H].

440. Alex S. Vitale, *Five Myths About Policing*, WASH. POST (June 26, 2020), [https://www.washingtonpost.com/outlook/five-myths/five-myths-about-policing/2020/06/25/65a92bde-b004-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/outlook/five-myths/five-myths-about-policing/2020/06/25/65a92bde-b004-11ea-8758-bfd1d045525a_story.html) [https://perma.cc/HTL7-VLCR].

441. Sean Illing, *The “Abolish the Police” Movement, Explained by 7 Scholars and Activists*, VOX (June 12, 2020), <https://www.vox.com/policy-and-politics/2020/6/12/21283813/george-floyd-blm-abolish-the-police-8cantwait-minneapolis> [https://perma.cc/GGN6-BFLZ].

442. *Id.*

443. Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/F2R4-SJKQ].

school districts, and (3) expanding expertise in culturally appropriate conflict resolution. If every teacher in America read *Lost at School*,<sup>444</sup> millions of children would be positively affected.

Preventive and responsive efforts should occur through early intervention by counselors, other mental health professionals, and educators trained in child development, pedagogy, and trauma-informed interventions, rather than on-site officers. Resources should be allocated to counselors rather than law enforcement. Sadly, New Mexico consistently ranks lowest in the nation for child well-being, evidencing that our children need mental health resources in school, not so-called “resource officers” who do not and cannot provide our children what they need.

Funds currently allocated to embedded law enforcement and other prisonization practices should be reallocated in a number of ways. First, schools must look at their own data to identify which children are most likely to interact with law enforcement and for what infractions. They also ought to identify the common needs of police-involved children. For example, there is a growing movement calling for increasing extracurricular opportunities at schools and improving job training and opportunities to help young people find their way.<sup>445</sup> Finally, schools must provide implicit bias training and dismantle racist and ableist systems and structures. Investing in more teacher training and additional support, such as social workers, counselors, and school psychologists, is an evidence-based, cost-effective strategy for schools. These highly trained experts protect children and school personnel in a way that preserves democratic values *and* students’ constitutional rights.<sup>446</sup>

Leading child psychologist Dr. Ross W. Greene argues that many children with social, emotional, and behavioral challenges are misunderstood and treated in a way that contradicts the causes of their behavior.<sup>447</sup> We inflict harsh punishments on children who actually need extra love and care. In the heat of the moment, when a child fails

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444. GREENE, *supra* note 259, at xiii-xiv (citing to the groundbreaking book identifying that adults often punish acting out behavior rather than simply asking questions to figure out the root causes of the behavior).

445. See Aaron Stagoff-Belfort, *To Cut Police Budgets, Start in Public Schools*, APPEAL (Aug. 3, 2020), <https://theappeal.org/to-cut-police-budgets-start-in-public-schools> [https://perma.cc/4KZL-6L37] (describing the growth of this movement in Los Angeles).

446. JUST. POL’Y INST., *supra* note 89, 25.

447. GREENE, *supra* note 259.



to listen to an adult authority, far too often, educators default to tactics like restraint and seclusion, threat assessments, and referrals to school police. As described in Part III, the ACLU, American Psychological Association, and others have documented the harmful effects of these harsh practices on student safety and school climate. In addition to increasing social-emotional support and curricular guidance, education advocates like Tara Ford at Stanford Law School's Youth and Education Law Project suggest that diverted funds should be used to bolster young people's opportunities. In her experience, the children most likely to have contact with school police would also benefit from having more meaningful access to extracurricular activities, meaningful restorative justice programs, and employment opportunities.<sup>448</sup>

Removing embedded police officers and prisonization practices from public schools will be no small feat. In fact, even during the pandemic, when schools were mostly online, police overreach and the targeting of children with disabilities and students of color continued in the supposed privacy of their own homes.<sup>449</sup> Our collective consciousness about systemic racism is at an all-time high, which makes this an ideal time to reexamine the belief that embedded officers will keep our school children safe. Further, the psychological damage experienced by children during the COVID-19 era only increases the need for social-emotional support.<sup>450</sup> Considering the panoply of

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448. This information is a product of a conversation the Author had with Tara Ford on September 29, 2020. See also Sonali Kohli & Howard Blume, *Activists, Students, Parents Rally for End to L.A. School Police*, L.A. TIMES (June 16, 2020), <https://www.latimes.com/california/story/2020-06-16/activists-students-parents-rally-to-end-laUSD-school-police> [<https://perma.cc/9R63-YX83>] (detailing Los Angeles activists' fight to abolish school police following the murder of George Floyd); *Whitmer Won't Defund 'All The Police,' State Police Handle Her Emergency Communications*, MICH. CAPITOL CONFIDENTIAL (June 15, 2020), <https://www.michigancapitolconfidential.com/whitmer-wont-defund-all-the-police-state-police-handle-her-emergency-communications> [<https://perma.cc/2CMJ-NQ3G>] (stating that Michigan Governor Gretchen Whitmer wants to redirect state budget money to social services).

449. Jaclyn Peiser, *A Black Seventh-Grader Played with a Toy Gun During a Virtual Class. His School Called the Police*, WASH. POST (Sept. 8, 2020), <https://www.washingtonpost.com/nation/2020/09/08/black-student-suspended-police-toy-gun> [<https://perma.cc/78EK-HEWS>].

450. Rebecca T. Leeb, Rebecca H. Bitsko, Lakshmi Radhakrishnan, Pedro Martinez, Rashid Mjai & Kristin M. Holland, *Mental Health-Related Emergency Department Visits Among Children Aged <18 Years During the COVID-19 Pandemic — United States, January 1–*

evidence-based methods to actually address safety and positive school climates, especially relative to the constitutional and other harms posed by embedded school police and other prisonization methods, now is the time for all stakeholders to reassess and move in a different direction. It will not be easy, but it *is* in the best interests of our children.

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*October 17, 2020*, CDC MORBIDITY & MORTALITY WEEKLY REPORT (Nov. 13, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6945a3.htm> [https://perma.cc/Y976-KG8R]; *Parental Resources Kit*, *supra* note 405; *Helping Children Transition Back to School*, CDC, <https://www.cdc.gov/childrensmentalhealth/features/COVID-19-helping-children-transition-back-to-school.html> [https://perma.cc/AB58-BKNY].