

School “Safety” Measures Jump Constitutional Guardrails

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ABSTRACT

In the wake of George Floyd’s murder and efforts to achieve racial justice through systemic reform, this Article argues that widespread “security” measures in public schools, including embedded law enforcement officers, jump constitutional guardrails. These measures must be rethought in light of their negative impact on all children and in favor of more effective—and constitutionally compliant—alternatives to promote school safety. The Black Lives Matter, #DefundthePolice, #abolishthepolice, and #DefundSchoolPolice movements shine a timely and bright spotlight on how the prisonization of public schools leads to the mistreatment of children, particularly children with disabilities, boys, Black and brown children, and low-income children. Purportedly implemented to deter crime and ensure safety, many school prisonization measures are fear-based rather than evidence-based. Furthermore, this Article argues that schools engaging in prisonization practices violate the Fourth, Fifth, Eighth, and Fourteenth Amendment rights of children to be free from unreasonable search and seizure, compelled self-incrimination and procedural due process, cruel and unusual punishment, and discrimination based on a protected status such as race and gender.

By examining how a wide range of constitutional rights are affected by prisonization practices, this Article adds new and more profound dimensions to the existing literature on students’ constitutional rights in public schools. Since the seminal cases were decided, the pre-conditions that influenced a narrow majority of the Court to side with school officials

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have changed. Greater prevalence of law enforcement officers and practices in schools necessitate reexamination of privacy intrusions. Further, greater reluctance to allow harsh punishment of children in light of scientific discoveries about juvenile brain development. Finally, the confluence of current conditions—the COVID-19 pandemic and racial justice movements—make it an ideal time for school districts to divert funds away from prisonization practices and into stronger socio-emotional and mental health programs that are proven to improve school climate and safety.

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I. HOW GEORGE FLOYD’S DEATH INSPIRED CALLS TO DEFUND THE SCHOOL POLICE

The public school occupies singular importance in the American experience because of its ubiquity. Millions of children attend school every day and are affected at a cellular level by experiences and interactions at school, including interactions with law enforcement officers.¹ Most Americans attended or are attending a public school.² How schools interact with students reflects, teaches, and models the ways in which the individual interacts with the government.

The Supreme Court has repeatedly acknowledged the critical importance of public education as the conduit for teaching the skills necessary for citizenship and democratic participation.³ Further, in *Tinker v. Des Moines Independent Community School District*, the Court noted that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴ The Court has cited that language repeatedly in the context of other rights that students enjoy in public schools.⁵ The Court’s repeated affirmation that students do not shed their rights upon entering the public school, coupled with its refrain that the purpose of public schools is to train young people to become civic actors, leads to the conclusion that public schools must allow students to exercise the very rights inherent to civic engagement.

American society is at a crossroads in the dismantling of systemic racism. We are reexamining how the perceived need for law enforcement officers and other “security” measures in schools may be symptoms of and contributors to racism. It is a critical moment to consider the proper role—if any—of law enforcement in public schools and how their presence affects the meaningful exercise of protected rights. Based on first-person accounts of public schools from New Haven to Oakland, St. Paul to Albuquerque, and everywhere in between,⁶ this Article posits that

1. See Maya Riser-Kositsky, *Education Statistics: Facts About American Schools*, EDUC. WK. (June 16, 2020), <https://www.edweek.org/ew/issues/education-statistics/index.html> [<https://perma.cc/4KS5-VWZQ>].

2. See *id.*

3. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Plyler v. Doe*, 457 U.S. 202 (1982).

4. *Tinker*, 393 U.S. at 506.

5. See *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985) (holding that the Fourth Amendment applied to searches by school officials); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (holding that legislation intending to return prayer to public schools is a violation of the First Amendment).

6. As a social policy major at Northwestern University and through my work with the Marshall-Brennan Project, I have observed and taught in public and public charter classrooms all over the United States since 1997.

the very places that should symbolize the most deeply held American values of freedom, opportunity, compromise, collective values, and respect often reflect prejudice, fear, rigidity, and corporate greed.⁷

The Miami Herald reported on July 7, 2020, that forty of the 100 largest police departments in the U.S. made at least one change to their use-of-force policies since the police protests began at the end of May.⁸ In the context of municipal police, people have demanded a number of reforms, including limiting physical restraint options, removing chokeholds as an option, ending qualified immunity, creating citizen complaint agencies independent from police departments, and eliminating police departments as we know them.⁹

In the public school context, one of the most powerful—and controversial—proposed reforms has been to remove or reduce embedded¹⁰ school police.¹¹ The Justice Policy Institute's (JPI) Jeremy Kittredge is tracking the movement to defund school police, and he notes that the list of jurisdictions limiting the presence of law enforcement officers is growing by the day.¹² Since George Floyd's murder on May 25, 2020, numerous jurisdictions, including Minneapolis, Denver, Pittsburgh, Rochester, Charlottesville, and Los Angeles, have called for school police reform.¹³ Specific measures include deciding not to renew the Memoranda of Understanding between local school districts and local police

7. See Bayliss Fiddiman, Ashley Jeffrey & Scott Sargrad, *Smart Investments for Safer Schools*, CTR. FOR AM. PROGRESS (Dec. 19, 2018), <https://www.americanprogress.org/issues/education-k-12/reports/2018/12/19/464445/smart-investments-safer-schools/> [<https://perma.cc/2XHT-4LB8>].

8. Shirsho Dasgupta, *Amid Outcry, These Police Agencies Banned Chokeholds. But Critics Say More Reforms Needed*, MIA. HERALD (July 7, 2020), <https://www.miamiherald.com/news/local/community/miami-dade/article243980492.html> [<https://perma.cc/SHF6-BXYW>].

9. See *Police Reform: A Curated Collection of Links*, THE MARSHALL PROJECT (Sept. 19, 2020), <https://www.themarshallproject.org/records/110-police-reform> [<https://perma.cc/F7MT-RYUZ>].

10. There is an important distinction between embedded—whether permanent or roving—police officers at public schools and police officers who appear at public schools in response to calls. The latter is undisputed as a valid practice.

11. Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html> [<https://perma.cc/HPQ3-4HJF>].

12. Jeremy Kittredge, *SRO Update*, TABLEAU PUB., <https://public.tableau.com/profile/jeremy.kittredge#!/vizhome/SROUpdate/Dashboard1> (last updated Dec. 15, 2020).

13. Lauren Camera, *The End of Police in Schools*, U.S. NEWS & WORLD REP. (June 12, 2020), <https://www.usnews.com/news/the-report/articles/2020-06-12/schools-districts-end-contracts-with-police-amid-ongoing-protests> [<https://perma.cc/3DAG-9AHT>]; *Education Justice: We Will Not Stop Until All Schools Are Police-Free*, CTR. FOR POPULAR DEMOCRACY (July 24, 2020), <https://populardemocracy.org/blog/education-justice-we-will-not-stop-until-all-schools-are-police-free> [<https://perma.cc/CZ9Z-8R9S>]; Kenny Lo, *Assessing the State of Police Reform*, CTR. FOR AM. PROGRESS (July 16, 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/07/16/487721/assessing-state-police-reform/> [<https://perma.cc/QP96-5N2P>].

departments; diverting funds to support student achievement and resources; and moving officers out of embedded positions.¹⁴

This Article explores how embedded law enforcement officers in public schools may pose constitutional threats, particularly to children who are already vulnerable to racism and mistreatment. The piece follows up on the 2017 article, *The Prisonization of America’s Public Schools*,¹⁵ by arguing that prisonized public schools jump constitutional guardrails. First, the author contextualizes the current challenges facing schools, administrators, and teachers, and how schools have responded.¹⁶

After describing the rapid growth of prisonization practices, this Article explores the constitutional consequences, including Fourth, Fifth, Eighth, and Fourteenth Amendment concerns. Specifically, this Article argues that reasonable suspicion is the wrong standard for school police concerning the Fourth Amendment; threat assessments likely violate the Fifth Amendment’s due process clause; custodial interrogations at school trigger Fifth Amendment concerns; restraint and seclusion practices contradict the Eighth Amendment’s freedom from cruel and unusual punishment; and the school-to-prison pipeline (and its disproportionate affects students of color and students with disabilities) violates the Fourteenth Amendment.¹⁷ Finally, the Article argues that removing embedded school police and fortifying socio-emotional and health supports better addresses students’ needs and avoids unconstitutional state suppression of students’ rights.¹⁸

Admittedly, these arguments call for radical change. Court historians may opine that even the most liberal Court can hardly be described as radical. However, in addition to the strength of the legal arguments, empathy often opens a path forward. Even conservative originalists/textualist judges and justices, particularly those who are parents or grandparents of school-age children, may find at least some of these arguments convincing during this time and place.

II. SCHOOL POLICE AND OTHER PRACTICES CONTRIBUTE TO PRISONIZED SCHOOLS

In her dissenting opinion in *Vernonia School District 47J v. Acton*, Justice O’Connor wrote, “[B]lanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any

14. Kittredge, *supra* note 12.

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

16. *See infra* Part II.

17. *See infra* Part IV.

18. *See infra* Part V.

traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise.¹⁹ Since she penned those words in 1995, society—and schools, in particular—have fundamentally changed. Because of tragic and highly publicized instances of mass violence in society and schools, fear about safety and corresponding tolerance for invasive security measures has increased.²⁰ This Article focuses on the school setting, but it is worth noting that schools may be a microcosm of larger tensions.

Prisonization²¹ practices are policies and procedures that treat students like prisoners, even unintentionally. Policies usually manifest as zero tolerance policies, and procedures often include the installation of metal detectors, surveillance cameras, security personnel, and armed faculty and staff on school campuses.²² These policies and practices are an outsized, fear-based response to relatively infrequent but sensationalized school violence cases like the incidents at Columbine, Sandy Hook, and Marjory Stoneman Douglas.²³

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.”²⁴ There are several unintended negative consequences: students 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.²⁵

Academic and non-profit 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.²⁶ In Jason Nance’s study,

19. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 682 (1995) (O’Connor, J., dissenting).

20. Matthew T. Theriot & John G. Orme, *School Resource Officers and Students’ Feelings of Safety at School*, 14 *YOUTH VIOLENCE & JUV. JUST.* 130, 130 (2016).

21. Ahranjani, *supra* note 15, at 1098–99.

22. *Id.*

23. See John Woodrow Cox, Steven Rich, Allyson Chiu, John Muyskens & Monica Ulmanu, *More than 240,000 Students Have Experienced Gun Violence at School Since Columbine*, WASH. POST (Jan. 24, 2020), <https://www.washingtonpost.com/graphics/2018/local/school-shootings-database> [<https://perma.cc/A6EW-VYLW>].

24. Fiddiman, Jeffrey & Sargrad, *supra* note 7.

25. *Id.*

26. See generally 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 also Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 *EMORY L.J.* 765 (2017) (presenting data on school surveillance techniques and their relationship to implicit racial bias).

schools with more than 50% students of color were two to eighteen times more likely to use “metal detectors, school police and security guards, locked gates, and random sweeps . . . than at schools where the nonwhite population was less than 20 percent.”²⁷ 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.”²⁸ As Judith Browne Dianis, Executive Director of the Advancement Project National Office, mentions in the agency’s call to remove police in our schools, “Safety does not exist when Black and Brown young people are forced to interact with a system of policing that views them as a threat and not as students.”²⁹

For the past two decades, scholars, educators, and activists have been concerned with the rapidly increasing presence of police officers in public schools around the country.³⁰ Leading organizations like the American Psychological Association, American Civil Liberties Union (ACLU), Advancement Project, and the JPI have long argued that police should not be embedded in schools.³¹

Besides concerns about the harmful effects of prisonization practices, a tremendous amount of taxpayer money has been spent on them. Private security companies who lobby the government have capitalized on the fear-based market for their products and services. The JPI report, “The Presence of School Resource Officers (SROs) in America’s Schools,” states that, since 1999, close to one billion dollars has been invested in

27. 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/37NU-ZU9M]; see also Nance, *supra* note 26, at 811.

28. Fiddiman, Jeffrey & Sargrad, *supra* note 7.

29. ADVANCEMENT PROJECT, WE CAME TO LEARN: A CALL TO ACTION FOR POLICE-FREE SCHOOLS 2 (2018), <https://advancementproject.org/wp-content/uploads/WCTLweb/docs/We-Came-to-Learn-9-13-18.pdf?reload=1536822360635> / [https://perma.cc/R6TB-6ADZ].

30. See generally AM. BAR ASS’N, ABA TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE: REPORT, RECOMMENDATIONS AND PRELIMINARY REPORT (2018), https://www.americanbar.org/content/dam/aba/images/racial_ethnic_justice/Final%20School2PrisonPipeline-2nd-012618.pdf [https://perma.cc/5NBC-33Z3] (describing the recent history of the school-to-prison pipeline in the United States).

31. See generally *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852 (2008); Harold Jordan, *It Is Time to Get Real About School Policing*, AM. C.L. UNION (Oct. 5, 2016), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/it-time-get-real-about-school-policing> [https://perma.cc/4WHM-RAKF]; ADVANCEMENT PROJECT, ALL. FOR EDUC. JUST., DIGNITY IN SCHS. CAMPAIGN & NAACP LEGAL DEF. & EDUC. FUND, POLICE IN SCHOOLS ARE NOT THE ANSWER TO SCHOOL SHOOTINGS (2018), <https://advancementproject.org/resources/police-schools-not-answer-school-shootings/> [https://perma.cc/5GJQ-KGHU]; AMANDA PETTERUTI, JUST. POL’Y INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf [https://perma.cc/5744-HGZY].

putting cops in schools, particularly in communities of color.³² Over the past twenty years, the federal government has invested hundreds of millions of dollars in hiring high school police officers and purchasing security equipment.³³ State governments have also invested heavily in these security measures.³⁴

There is a lot of money to be made in selling school security products. Several law enforcement-led companies and organizations—the Partner Alliance for Safer Schools, Security Industry Association (SIA), the School Safety Advocacy Council, Allegion, National Systems Contractors Association, and others—have sold billions of dollars’ worth of security equipment to school superintendents to militarize their enclaves of community trust.³⁵ These organizations infiltrate Congress through their lobbying and campaign donations to promote the passage of prisonization-friendly legislation.³⁶ They also host conferences where security companies sell their products to liability-fearing school administrators.³⁷

Unfortunately, funding follows tragedy rather than evidence. After a former Marjory Stoneman Douglas High School student killed seventeen classmates and teachers, Florida Governor Rick Scott “signed a \$400 million bill into law that included a \$67.5 million appropriation to arm nonteaching staff, such as administrative and maintenance staff, at every public K-12 school in the state, as well as \$99.7 million to fund school resource officers.”³⁸ In the wake of the Stoneman Douglas tragedy, SIA convinced Congress to pass the STOP School Violence Act of 2018.³⁹ The Act enriches security industry insiders by providing grants “to states, local governments, and Indian tribes to improve security, including the placement and use of metal detectors and other deterrent measures, at schools and on school grounds.”⁴⁰

These efforts are often driven by the private security interest lobby without evidence proving that the benefits outweigh the harms. Nationally, evidence shows that police presence leads to the school-to-prison pipeline,

32. JUST. POL’Y INST., THE PRESENCE OF SCHOOL RESOURCE OFFICERS (SROs) IN AMERICA’S SCHOOLS 2 (2020), http://www.justicepolicy.org/uploads/justicepolicy/documents/School_Resource_Officers_2020.pdf [<https://perma.cc/AZS2-DSGM>].

33. Lynn A. Addington, *Cops and Cameras: Public School Security as a Policy Response to Columbine*, 52 AM. BEHAV. SCIENTIST 1426, 1440 (2009).

34. Michele Molnar, *Districts Invest in New Measures to Boost Security*, EDUC. WK. (Sept. 24, 2013), https://www.edweek.org/ew/articles/2013/09/25/05security_ep.h33.html [<https://perma.cc/DZA9-37XH>].

35. Fiddiman, Jeffrey & Sargrad, *supra* note 7.

36. *See id.*

37. *Id.*

38. *Id.*

39. Student, Teachers, and Officers Preventing School Violence Act of 2018, 34 U.S.C §§ 10551–10556.

40. H.R. 4909, 115th Cong. (2018) (enacted) (bill summary).

contributes to a hostile learning environment, traumatizes and re-traumatizes Black and brown children, and disproportionately affects children with disabilities. On the other hand, there is no evidence-based support for the idea that having police officers stationed in public schools deters crime or makes schools safer.⁴¹

By way of example, consider New Mexico, an under-resourced and mostly rural state where the late Judge Sarah Singleton ruled in 2018 that the State was not meeting its state constitutional burden to provide an adequate education.⁴² Among other findings, Judge Singleton concluded that the State was failing to meet its obligations to provide a constitutionally sufficient education for at-risk students by failing to increase the number of social workers, school counselors, and health services.⁴³ She explained that school counselors and social workers help “low-income children be successful,” improve educational outcomes, and “help struggling students attain academic success.”⁴⁴ Notably, “[w]hen school counselors are working at the recommended student-to-counselor ratio, students have fewer disciplinary problems and higher rates of graduation.”⁴⁵ 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.⁴⁶

In Albuquerque, on May 11, 2011, a seventh grader at Cleveland Middle School was *arrested* for repeatedly *burping* in class.⁴⁷ The teacher radioed for help, and the school’s on-site police officer appeared, patted down the boy, cuffed him, and placed him in the custody of the juvenile detention center because he had been disrupting other students in his physical education class by burping.⁴⁸

41. Fiddiman, Jeffrey & Sargrad, *supra* note 7.

42. *Martinez v. State*, No. D-101-CV-2014-00793, 2019 WL 4120213, at *1 (D. N.M. Feb. 14, 2019) (holding that with regard to certain vulnerable populations, including Native American children, children with disabilities, English Language Learners, and low-income children, the state fails to provide the adequate education required by the state constitution).

43. *Martinez v. State*, No. D-101-CV-2014-00793, 2018 WL 9489382, at *24 (D. N.M. Dec. 20, 2018).

44. *Id.* at *25–26.

45. *Id.* at *25.

46. *See, e.g.*, AMIR WHITAKER, SYLVIA TORRES-GUILLÉN, MICHELLE MORTON, HAROLD JORDAN, STEFANIE COYLE, ANGELA MANN & WEI-LING SUN, AM. C.L. UNION, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 8 (Emily Greytak, Sarah Hinger, Susan Mizner & Jessica Cobb eds. 2019), <https://www.aclu.org/report/cops-and-no-counselors> [<https://perma.cc/Z7ZE-YZT5>].

47. *Albuquerque Boy Arrested for Burping Must Digest Suspension, Court Rules*, THE GUARDIAN (July 30, 2016), <https://www.theguardian.com/us-news/2016/jul/30/albuquerque-boy-arrested-burping> [<https://perma.cc/7M6R-RAU5>].

48. *Id.*

On May 10, 2019, at Española Valley High School in northern New Mexico, an officer tased a fifteen-year-old student with special needs because the officer claimed he was resisting arrest.⁴⁹ Similarly, on August 27, 2019, in the city of Farmington, in a county ravaged by COVID-19,⁵⁰ an eleven-year-old girl was shoved against a school building and then slammed to the ground by a police officer at Mesa View Middle School.⁵¹ The school's police officer stated that she approached the child because she was seen taking too many milks from the cafeteria, was standing on the school bus, and was picking at a sign taped to a door.⁵²

In conjunction with the over-presence of law enforcement, Judge Singleton acknowledged a dearth of counselors, social workers, and psychologists in schools in New Mexico. A recent ACLU report provides staggering statistics that seem to lead to an over-reliance on law enforcement in New Mexico's public schools:

- Student-to-Counselor Ratio—391:1 (not meeting ACLU recommended ratio of 250:1)⁵³
- Student-to-Social Worker Ratio—945:1 (not meeting recommended 250:1)⁵⁴
- Student-to-School Psychologist Ratio—3,673:1 (not meeting recommended 700:1)⁵⁵

Although New Mexico's Black population is small,⁵⁶ according to New Mexico Voices for Children, "[t]he disproportionate discipline of students and the lack of a culturally-supportive education system are

49. Tabitha Clay, *Sheriff's Deputy Tases High School Student*, RIO GRANDE SUN (May 29, 2019), http://www.riograndesun.com/news/sheriffs-deputy-tases-high-school-student/article_d8768598-824d-11e9-b3f9-2b6caa5afc70.html [<https://perma.cc/S7RZ-N3NE>].

50. Robert Nott, *Farmington Finds Itself in Hot Spot as Cases Balloon in Four Corners*, SANTA FE NEW MEXICAN (Apr. 11, 2020), https://www.santafenewmexican.com/news/coronavirus/farmington-finds-itself-in-hot-spot-as-cases-balloon-in-four-corners/article_f583878c-78e5-11ea-bc5c-9fe0f6c53ff6.html [<https://perma.cc/VN9X-FREM>].

51. Reis Thebault, *Video Shows Police Officer Tackling an 11-Year-Old Girl He Accused of Being 'Disruptive' at School*, WASH. POST (Oct. 23, 2019), <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/TB3W-5H6F>].

52. *Id.*

53. WHITAKER, TORRES-GUILLÉN, MORTON, JORDAN, COYLE, MANN & SUN, *supra* note 46, at 12.

54. *Id.* at 13.

55. *Id.* at 14.

56. Darryl Lorenzo Wellington, *Black in Santa Fe: Small Population, Overlooked Stories*, SANTA FE REP. (Oct. 29, 2013), <https://www.sfreporter.com/news/coverstories/2013/10/29/black-in-santa-fe/> [<https://perma.cc/LXU9-NH6M>].

among the challenges New Mexico’s Black children face.”⁵⁷ With 25% of the state’s school-age population, Albuquerque Public Schools (APS) is the state’s largest school district and it tends to be a leader in the state in terms of policy, practice, and accountability.⁵⁸ According to Searchlight New Mexico, children of color (including Native American and Latina/o/x children) in APS are too frequently mistreated—some severely.⁵⁹ While APS likely mirrors the country in terms of disparity in the level of police presence and policing surveillance practices for those schools with higher levels of poverty and greater numbers of students of color, it has been difficult to obtain records despite public records requests.⁶⁰

The U.S. Department of Justice National Institute of Justice (NIJ) has an ongoing effort to “bring[] together the nation’s best minds to increase the safety of schools nationwide.”⁶¹ NIJ created the Comprehensive School Safety Initiative (CSSI) in response to high-profile incidents of school violence.⁶² Since 2014, CSSI has funded a number of research studies, many of which unfortunately adopt the underlying assumption that prisonization efforts are necessary.⁶³

Prisonization of public schools does not occur in our peer nations.⁶⁴ School security looks very different in Canada, Japan, the United Kingdom, and other industrialized countries.⁶⁵ As a policy matter, what

57. RAPHAEL PACHECO, *THE WELL-BEING OF BLACK CHILDREN IN NEW MEXICO* 3 (2018), <https://www.nmvoices.org/wp-content/uploads/2018/06/Black-Child-WellBeing-in-NM-web.pdf> [<https://perma.cc/KUF7-U7CN>].

58. *About APS*, ALBUQUERQUE PUB. SCHS., <https://www.aps.edu/about-us> [<https://perma.cc/P5EY-QVZT>].

59. See Ike Swetlitz, *Who’s the Threat?*, SEARCHLIGHT N.M. (Oct. 15, 2019), <https://searchlightnm.org/whos-the-threat/> [<https://perma.cc/N8V6-NPRW>]; see also Ed Williams, *Restraint, Seclusion, Deception*, SEARCHLIGHT N.M. (Oct. 8, 2019), <https://searchlightnm.org/restraint-seclusion-deception/> [<https://perma.cc/QK28-XZMZ>].

60. See E-mail from Hope Pendleton, Rsch. Assistant, Univ. of N.M., to Maryam Ahranjani, Associate Professor, Univ. of N.M. (Sept. 29, 2020) (on file with Seattle University Law Review) (summarizing efforts to reach Albuquerque Public School District officials and school board members, as well as Bernalillo County Sheriff’s Office).

61. NAT’L INST. OF JUST., *NIJ’S COMPREHENSIVE SCHOOL SAFETY INITIATIVE* (2018), <https://nij.ojp.gov/topics/articles/nij-comprehensive-school-safety-initiative#ongoing> [<https://perma.cc/3FHS-GVNP>].

62. *Id.*

63. See, e.g., *Publications Listing*, NAT’L INST. OF JUST., https://nij.ojp.gov/library/publications/list?subtopic=29691&field_published_sponsored_value=All&combine=&topic=All&series_filter=All&sort_by=field_date_published_value&sort_order=DESC&page=1 [<https://perma.cc/39SR-VBQ8>].

64. See Louise Brown, *Toronto Schools Reject the Cleveland Solution: Metal Detectors*, THE STAR (Sept. 24, 2014), https://www.thestar.com/yourtoronto/education/2014/09/24/toronto_schools_reject_the_cleveland_solution_metal_detectors.html [<https://perma.cc/7M2Y-62US>]; see also Associated Press, *Global School Security Measures Vary, but No Arming Teachers*, CANADIAN SEC. MAG. (Mar. 5, 2018), <https://www.canadiansecuritymag.com/global-school-security-measures-vary-but-no-arming-teachers/> [<https://perma.cc/W5UT-RQ94>].

65. Brown, *supra* note 64; Associated Press, *supra* note 64.

other countries do, matters. The United States Supreme Court, however, is not generally concerned with other countries' application of the law.⁶⁶ In recent years, however, the Court *has* been interested in how other countries treat children, particularly children accused of crimes. The Court has also relied upon scientific evidence about juvenile brain development in ascertaining culpability for crime and, correspondingly, proportionality of punishment.⁶⁷

III. BALANCING OF INTERESTS

Before turning to the legal analysis, one must acknowledge and understand the balance of interests at play. Public schools, which exist to train young people to be participants in our constitutional democracy, occupy a unique space in American society.⁶⁸ There are numerous stakeholders, and those stakeholders often have competing values and interests.⁶⁹

The stakeholders include parents, other community members (including school boards), students, and school administration and faculty. Sometimes their interests align, but often they do not. Even within the groups, of course, there are multiple viewpoints.⁷⁰ However, the difficult balance most often articulated⁷¹ and most relevant in this context is the school's responsibility to protect students entrusted to it by parents and guardians with the privacy and other rights of students.

The next section explores how this difficult balance has been navigated by the Court, specifically within the children's Fourth Amendment right against unreasonable searches and seizures and prisonization practices. This Article further argues that while current practices do not *per se* violate precedent, there is reason to believe that the

66. Peter Roudik, *The Impact of Foreign Law on Domestic Judgments: Comparative Summary*, LIBR. OF CONG. (Mar. 2010), <https://www.loc.gov/law/help/domestic-judgment/comparative.php> [<https://perma.cc/KC4D-LYQQ>].

67. See *Roper v. Simmons*, 543 U.S. 551 (2005); see also *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

68. Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1648 (1986).

69. *Stakeholder*, THE GLOSSARY OF EDUC. REFORM (Sept. 25, 2014), <https://www.edglossary.org/stakeholder/> [<https://perma.cc/M6MA-CR4A>].

70. See, e.g., David Washburn, *One in 3 Parents Fear for Their Children's Safety at School*, SURVEY FINDS, EDSOURCE (July 16, 2018), <https://edsources.org/2018/one-in-three-parents-fear-for-their-childrens-safety-at-school-survey-finds/600219> [<https://perma.cc/CQ9E-XDNN>].

71. See Shelby Perea, *Many Want Police Out of Schools Across NM*, ALBUQUERQUE J. (June 21, 2020), <https://www.abqjournal.com/1468386/many-want-police-out-of-schools-across-nm.html> [<https://perma.cc/Z7N4-AKG5>]; see also Eder Campuzano, *Portland Superintendent Says He's 'Discontinuing' Presence of Armed Police Officers in Schools*, THE OREGONIAN (June 5, 2020), <https://www.oregonlive.com/education/2020/06/portland-superintendent-says-hes-discontinuing-school-resource-officer-program.html> [<https://perma.cc/RH9Q-V2FK>].

Court could and should overturn precedent in light of the changing face of school security in American schools.

IV. CURRENT PRISONIZATION PRACTICES—INCLUDING OMNIPRESENT SCHOOL POLICE; THREAT ASSESSMENTS; AND RESTRAINT AND SECLUSION PRACTICES—JUMP CONSTITUTIONAL GUARDRAILS

Several decades have passed since the seminal Supreme Court cases relating to students’ rights vis-à-vis prisonization practices were decided.⁷² As such, there are three key considerations relevant to the argument that current “security” measures jump constitutional guardrails.⁷³ First, the seminal Fourth, Fifth, Eighth, and Fourteenth Amendment cases were decided quite a long time ago—in 1954,⁷⁴ 1975,⁷⁵ 1977,⁷⁶ and 1985⁷⁷—when public schools looked very different with regard to prisonization practices. School police, metal detectors, cameras, threat assessments, and zero tolerance policies largely did not exist when those cases were decided.⁷⁸ Second, nearly all the decisions were quite close in votes. In fact, the closest to a unanimous vote was in *Safford Unified School District No. 1 v. Redding*, in which eight Justices agreed that strip searches are impermissible.⁷⁹ Finally, recent scientific evidence about juvenile brain development changes demands reconsideration of earlier cases. Specifically, in the more recent cases, the Justices’ opinions are informed by scientific evidence of juvenile brain development, which signals a shifting intolerance of complete deference to school officials and harsh punishment.⁸⁰

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.⁸¹ 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

72. *Ingraham v. Wright*, 430 U.S. 651 (1977); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Goss v. Lopez*, 419 U.S. 565 (1975).

73. The Appendix to this Article documents the ten key cases to this argument in order of subject matter (the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments). See *infra* APPENDIX.

74. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

75. *Goss*, 419 U.S. at 565.

76. *Ingraham*, 430 U.S. at 651.

77. *T.L.O.*, 469 U.S. at 325.

78. See Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, 2 F. ON PUB. POL’Y, 2009, at 1, 8, <https://files.eric.ed.gov/fulltext/EJ870076.pdf> [<https://perma.cc/X5YN-CSAV>].

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

80. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 834–35 (2002); *Redding*, 557 U.S. at 372; *J.D.B. v. North Carolina*, 564 U.S. 261, 275–76 (2011).

81. See JUST. POL’Y INST., *supra* note 31, at 4–5.

the warrant and probable-cause requirement impracticable.”⁸² 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, drug testing at sobriety check-points, and drug testing railroad employees involved in an accident.⁸³ Since the Court created the special needs doctrine, critics fear it has swallowed the Court’s traditionally strong preference for warrants.⁸⁴

However, in the intervening decades, after most of the key school cases were decided, a key contextual element has changed: 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 stands to reason that a critical part of its calculus in weighing whether and how to apply constitutional guarantees to students has significantly changed.

A. *The Fourth Amendment: Reasonable Suspicion and Police Discretion*

The Court has decided only four cases about the application of the Fourth Amendment within the public school context: *New Jersey v. T.L.O.*; *Vernonia School District 47J v. Acton*; *Board of Education of Independent School District No. 92 v. Earls*; and *Safford v. Redding*.⁸⁵ The Court decided the first in 1985, when it held in *T.L.O.* 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.⁸⁶ The Court affirmed the two-pronged *T.L.O.* test of reasonable suspicion, at inception and in scope, by applying it in three subsequent cases.⁸⁷

There are a number of important features of *T.L.O.* that 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.”⁸⁸

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

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

84. See Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1224 (2004).

85. *Redding*, 557 U.S. at 379; *Earls*, 536 U.S. at 827; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995); *T.L.O.*, 469 U.S. at 327–28.

86. *T.L.O.*, 469 U.S. at 325.

87. See *Acton*, 515 U.S. at 655; *Earls*, 536 U.S. at 826; *Redding*, 557 U.S. at 370.

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

The Court’s decision to extend its reach reflects an interest in recognizing students’ rights.

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 suspicionless searches of student athletes in a school facing a serious drug problem.⁸⁹ In 2002, the Court narrowed its scope on suspicionless searches: Justice Ginsburg, who had previously voted with the majority in *Acton*, changed her stance in *Earls*, when she felt the Court went too far in permitting suspicionless 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.⁹⁰ In her dissent, she wisely pointed out that “[t]he government is nowhere more a teacher than when it runs a public school.”⁹¹ She specifically articulated an unwillingness to allow suspicionless searches of all students, which seemed to be a concern of the dissenting Justices—about where the *Acton* majority was headed.⁹²

In a recent 8–1 decision, with Justice Thomas (who had written the majority in *Earls*) dissenting, the Court held that a strip search of a thirteen-year-old girl, while at school, went too far.⁹³ In drawing that line, the Court indicated a shift in its tolerance of overly aggressive actions by school officials. 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.⁹⁴

The four Fourth Amendment cases were all decided before the explosion in school prisonization efforts. 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.

If the Court were to consider the facts again, with a greater awareness of the harmful effects of these practices, then it may come to a different conclusion with regard to the application of the reasonableness standard.

89. *Vernonia*, 515 U.S. at 656.

90. *Earls*, 536 U.S. at 834.

91. *Id.* at 855 (Ginsburg, J., dissenting).

92. *Id.*

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

94. *Id.* at 377.

Some critics assert that the lower standard has watered down Fourth Amendment rights of students to such an extent as to nearly extinguish them.⁹⁵ With the increased police presence in schools today, it makes even more sense for the Court to revisit the reasonable suspicion standard, especially given the much higher stakes involved in school-based infractions and the greater likelihood of children's referral to the criminal justice system. 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.⁹⁶ Today, 70% of all public schools have one or more embedded police officers.⁹⁷

In addition to the increased prevalence of embedded school police,⁹⁸ the current Court shows concerns about greater intrusion into privacy.⁹⁹ In recent cases about newer technology and the Fourth Amendment, both conservative and liberal justices have favored individual rights over the government's assertions that its surveillance is reasonable within the meaning of the Fourth Amendment. Therefore, it follows that an application of the traditional standard of probable cause should be utilized.

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.¹⁰⁰ However, on a number of occasions, the Court has reversed itself, for example, in a First Amendment case about the right *not* to speak in school.¹⁰¹ A few years after deciding that compelling the flag salute did not violate students' First Amendment rights, the Court held in *West Virginia State Board of*

95. See generally Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847 (2011); Matthew Lynch, *Mere Platitudes: The "Domino Effect" of School-Search Cases on the Fourth Amendment Rights of Every American*, 91 IOWA L. REV. 781 (2006).

96. See MEGAN FRENCH-MARCELIN & SARAH HINGER, AM. C.L. UNION, *BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING* 10 (2017) [hereinafter *BULLIES IN BLUE*], https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf [https://perma.cc/QF84-VXCV].

97. WHITAKER, TORRES-GUILLÉN, MORTON, JORDAN, COYLE, MANN & SUN, *supra* note 46, at 8.

98. *Id.*

99. See *United States v. Jones*, 565 U.S. 400, 406 (2012); *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (holding that a person has a legitimate expectation of privacy in the record of his physical movements in regard to cell site location information (CSLI)); *Grady v. North Carolina*, 575 U.S. 306, 309 (2015) (holding that a tracking device attached to a person's body without consent constituted a Fourth Amendment search).

100. 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).

101. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Education v. Barnette that Jehovah’s Witness students could not be compelled to salute the American flag, which they considered to be a graven image.¹⁰² In the context of the Fourth Amendment, Justice Stevens wrote in *Arizona v. Gant*:

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.¹⁰³

B. The Fifth Amendment: Privilege Against Compelled Self-Incrimination and Children

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*, a thirteen-year-old special education student who was suspected of committing two robberies was subjected to questioning by a uniformed police officer in a closed conference room at school.¹⁰⁴ Not surprisingly, the child confessed.¹⁰⁵ 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.¹⁰⁶ The child’s attorney argued that the confession should have been suppressed—an argument that made it up to the Supreme Court.

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.¹⁰⁷ The Court declined to go into any detail as to whether a child could be questioned at all, or what kind of notice to a parent or guardian might be required.

Experts have concluded that young people do *not* comprehend *Miranda* rights, making it critical for an attorney and a parent or guardian to be present during questioning.¹⁰⁸ Of course, in *Miranda*, the Court held that in order to waive one’s *Miranda* rights to silence and counsel, a person

102. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling Gobitis*, 310 U.S. at 586.

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

104. *J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011).

105. *Id.* at 269 (explaining studies that indicate that children are more likely to confess, and to falsely confess, than adults).

106. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

107. *J.D.B.*, 564 U.S. at 271–72.

108. Heather Zelle, Christina L. Riggs Romaine & Naomi E. S. Goldstein, *Juveniles’ Miranda Comprehension: Understanding, Appreciation, and Totality of Circumstances Factors*, 39 *LAW & HUM. BEHAV.* 281, 288 (2015); *see also* 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).

must do so knowingly, intelligently, and voluntarily.¹⁰⁹ In fact, the single most important factor that predicts comprehension of one's *Miranda* rights is age.¹¹⁰ Further, researchers have found that before the age of fifteen or sixteen—regardless of the child's experience with the criminal justice system—children are unlikely to produce valid *Miranda* waivers.¹¹¹

Provision of counsel to juveniles is an evolving area. In 1967, the Court in *In re Gault* decided that children are entitled to counsel in juvenile court proceedings.¹¹² Since 1967, however, states vary in terms of to whom, when, and how counsel is provided. Research indicates children are particularly susceptible to giving a false confession because of their fear of authority and their suggestibility.¹¹³ Reflecting the policy recommendation of researchers, some states automatically appoint counsel to juveniles upon arraignment.¹¹⁴

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 has expanded significantly since then.¹¹⁵ 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.

C. Procedural Due Process and the Threat of Threat Assessments

The threat assessment tool was first developed by the U.S. Secret Service as a process for preventing violent acts against elected officials.¹¹⁶ More recently, its use has been extended to prevent school shootings and is now a widespread tool that traps children with disabilities and other vulnerable children.¹¹⁷ The idea is that serious incidents of school violence

109. See *Miranda*, 384 U.S. at 479.

110. Sevin Goldstein, Oberlander Condie, Kalbeitzer, Osman & Geier, *supra* note 109, at 361, 368.

111. *Id.* at 361.

112. *In re Gault*, 387 U.S. 1 (1967).

113. Sevin Goldstein, Oberlander Condie, Kalbeitzer, Osman & Geier, *supra* note 109, at 361.

114. NAT'L JUV. DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 10 (2017), https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf [<https://perma.cc/L5KT-RNPE>].

115. See BULLIES IN BLUE, *supra* note 96, at 10–11.

116. See U.S. SECRET SER. NAT'L THREAT ASSESSMENT CTR., PROTECTING AMERICA'S SCHOOLS: A U.S. SECRET SERVICE ANALYSIS OF TARGETED SCHOOL VIOLENCE 1 (2019) [hereinafter SECRET SERVICE ANALYSIS], https://www.secretservice.gov/data/protection/ntac/Protecting_Americas_Schools.pdf [<https://perma.cc/R2X8-F85J>].

117. Swetlitz, *supra* note 59; Williams, *supra* 59.

can best be prevented if the assailants are on law enforcements’ radar.¹¹⁸ 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.¹¹⁹ For example, in Virginia, which is a well-resourced state that has been using threat assessment for two decades, researchers recently found that the threat assessment tool needed improvement with regard to training; consistency; and dissemination of procedures to parents, students, and school staff.¹²⁰ For poor states, like New Mexico, the ability to fairly implement the threat assessment tool seems impossible.

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.”¹²¹ The Due Process Clause provides both procedural and substantive protections.¹²² 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.¹²³

The Supreme Court extended procedural due process guarantees to apply when state government action deprives school children of minimal process requirements.¹²⁴ In the school context, the idea is that if a child is deprived of life, liberty, or property, then they should receive a fair process. The Court has considered only two cases challenging whether a student received a fair process: *Goss v. Lopez* and *Ingraham v. Wright*.¹²⁵

In *Goss*, nine students, including Dwight Lopez, were suspended for destroying school property and disrupting the learning environment.¹²⁶ In

118. SECRET SERVICE ANALYSIS, *supra* note 116, at 25.

119. See DEWEY CORNELL & JENNIFER MAENG, STUDENT THREAT ASSESSMENT AS A SAFE AND SUPPORTIVE PREVENTION STRATEGY: FINAL TECHNICAL REPORT 4 (2020), https://curry.virginia.edu/sites/default/files/images/YVP/Threat%20Assessment%20Project%20Technical%20Report%20NIJ_2014-CK-BX-0004%202-20-2020%20submitted%5B2523%5D.pdf [https://perma.cc/RD9H-BVBP].

120. *Id.*

121. U.S. CONST. amend. V.

122. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 615–16 (5th ed. 2017).

123. *Id.* at 1185–86.

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

125. *Id.*; *Ingraham v. Wright*, 430 U.S. 651 (1977).

126. *Goss*, 419 U.S. at 570.

a 5–4 decision, the Court held that the school violated the students’ due process rights by suspending them without a hearing.¹²⁷ In the holding, Justice White reiterated that “students do not shed their constitutional rights at the schoolhouse gate.”¹²⁸ 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.¹²⁹ *Goss* ultimately held that a ten-day suspension was more than a *de minimis* deprivation of property because suspending students had the potential of seriously harming their reputation and affecting their future employment and education.¹³⁰

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.¹³¹ He disagreed that the punishment implicated a deprivation to the degree protected by the Due Process Clause.¹³² The dissenters felt the safeguards in place—written notice to parents within twenty-four hours of the suspension decision—were sufficient.

It is important to consider the rationale of the dissent because today, the punishments are very different. Punishments affect not just a student’s access to education but indeed their liberty and, in some cases, long-term liberty. Surely that would be part of the Court’s calculus today.

I, and others, have criticized New Mexico’s efforts to implement its threat assessment tool as lacking due process.¹³³ Albuquerque Public Schools, the state’s largest district, fails to meet all three basic hallmarks of procedural due process when the state deprives children of their liberty and property interests in education. The three hallmarks include: a notice, a hearing, and an impartial decision-maker. Current 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.¹³⁴ 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. Swetlitz also found that a child’s parents are notified *after* the threat assessment

127. *Id.* at 579.

128. *Id.* at 574.

129. *Id.*

130. *Id.* at 575.

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

132. *Id.* at 573 (majority).

133. See Swetlitz, *supra* note 59.

134. See *id.*; see also Williams, *supra* note 59.

team meets to assess the threat posed by their child; parents are only brought in once intervention is recommended.¹³⁵

*D. Restraint and Seclusion, Excessive Force and
the Eighth Amendment*

Restraint and seclusion is problematic and far too prevalent a response to a range of student behavior.¹³⁶ 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.¹³⁷ Seclusion is “involuntarily confining a student alone in a room or area from which he or she cannot physically leave.”¹³⁸ 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.¹³⁹

Numerous reports from districts across the country have detailed the extreme use of this 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 the[ir] head to the ground.”¹⁴⁰ Urijah is a Native American student receiving special education services through the district.¹⁴¹ According to school records, he was subjected to the “team control position” 150 times in a four-year period.¹⁴²

In many states, restraint is only allowed “when a child poses an immediate physical threat” to themselves or others.¹⁴³ Though this may seem to be a high standard, hundreds of children die or are severely injured

135. Swetlitz, *supra* note 59. Further, special education attorney Gail Stewart has filed a case in federal district court challenging APS’s threat assessment process as a violation of IDEA. *See* Complaint Under IDEA and Federal Law Prohibiting Disability Discrimination Against Board of Education of Albuquerque Public Schools, *Brainard v. Bd. of Educ. of Albuquerque Pub. Schs.*, No. 20-cv-00420 (D. N.M. May 1, 2020).

136. *See* 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), <http://www.chicagotribune.com/investigations/ct-seclusion-room-ban-durbin-duckworth-illinois-20200115-wgeqs6rprczdmxujv6gymu4ly-story.html> [<https://perma.cc/6PNQ-QFLJ>]; *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).

137. JACQUELINE M. NOWICKI, U.S. GOV’T ACCOUNTABILITY OFF., *GAO-19-418T, K-12 EDUCATION: FEDERAL DATA AND RESOURCES ON RESTRAINT AND SECLUSION 2* (2019), <https://www.gao.gov/assets/700/697114.pdf> [<https://perma.cc/ZN3F-6MPW>].

138. *Id.*

139. *See* Williams, *supra* note 59.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

each year from restraint.¹⁴⁴ Even if the children subjected to these practices do not die, they can suffer long-term psychological harm.¹⁴⁵ 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.”¹⁴⁶ Miranda Johnson, a professor at Loyola University School of Law, shares that research shows practices that prevent students’ behavior from escalating are effective and keep students safe but, “[w]hat [she] ha[sn’t] seen in research is any evidence that seclusion and restraint do help to keep young people and adults safe at school. In fact, they come with great risks, including the risk of death.”¹⁴⁷

According to a recent GAO report, boys and children with disabilities are more likely to be subjected to restraint and seclusion.¹⁴⁸ There has been public outcry about the harsh practice, causing districts to sometimes underreport their use of restraint and seclusion.¹⁴⁹

In a January 2019 press release, Betsy DeVos, U.S. Secretary of Education, announced the creation of an initiative regarding the use of restraint and seclusion in public schools.¹⁵⁰ According to the Department of Education, its initiative includes three components: compliance reviews, civil rights data collection, and support for districts receiving funds.¹⁵¹ However, the announcement did not satisfy disability advocates, who wanted more definitive action to abolish restraint and seclusion. Almost exactly one year later, responding to calls for congressional action, legislators—Senators Tammy Duckworth and Dick Durbin of Illinois and ten members of the House—wrote a letter¹⁵² urging Secretary Betsy DeVos

144. *Id.*

145. *Id.*

146. Richards & Cohen, *supra* note 138.

147. *Id.*

148. NOWICKI, *supra* note 137, at 3.

149. Jenny Abamu, *How Some Schools Restrain or Seclude Students: A Look at a Controversial Practice*, NPR (June 15, 2019), <https://www.npr.org/2019/06/15/729955321/how-some-schools-restrain-or-seclude-students-a-look-at-a-controversial-practice> [<https://perma.cc/K9N2-BBL6>].

150. Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces Initiative to Address the Inappropriate Use of Restraint and Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Laws (Jan. 17, 2019) [hereinafter Press Release, U.S. Dep’t of Educ. Initiative], <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws> [<https://perma.cc/4Z7K-795P>].

151. *Id.*

152. Letter from Congress of the U.S. to Betsy DeVos, Sec’y of U.S. Dep’t of Educ. (Jan. 15, 2020) [hereinafter Letter to Sec’y DeVos], <https://casten.house.gov/sites/casten.house.gov/files/1.15.20%20Seclusion%20Letter.pdf> [<https://perma.cc/87H7-5FXU>].

to update a 2016 “Dear Colleague” letter¹⁵³ from the U.S. Department of Education’s Office for Civil Rights on how federal law limits the use of restraint and seclusion of students in public schools.¹⁵⁴ The lawmakers asked the Secretary to ban the use of seclusion outright; ban restraints that restrict breathing and are life-threatening; and promote evidence-based alternatives to restraint.¹⁵⁵

The Supreme Court declined to extend Eighth Amendment protections to students in public schools in *Ingraham v. Wright* on the theory that “cruel and unusual punishments” may only be banned in prisons and prison-like settings.¹⁵⁶ 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.¹⁵⁷

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.¹⁵⁸ 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.¹⁵⁹ In response to the disappointing outcome, many states banned corporal punishment in schools.¹⁶⁰

Ingraham was decided in 1977 and the Court has not since revisited the question of whether the Eighth Amendment applies in the school setting. This Article posits that since 1977, public schools have become prison-like settings and the Eighth Amendment’s protections against corporal punishment should apply to school children.¹⁶¹ As of 2018, while thirty-one states have banned corporal punishment in schools, nineteen still allow it.¹⁶²

153. Dear Colleague Letter from the U.S. Dep’t of Educ. on Restraint and Seclusion of Students with Disabilities (Dec. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf> [<https://perma.cc/PF3X-M283>].

154. Press Release, U.S. Dep’t of Educ. Initiative, *supra* note 150.

155. Letter to Sec’y DeVos, *supra* note 152.

156. *Ingraham v. Wright*, 430 U.S. 651, 669–71 (1977).

157. *Id.* at 683.

158. *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://perma.cc/UY5M-Q9Z7>].

159. *Ingraham*, 430 U.S. at 669–71.

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

161. *Id.* (explaining how many states still allow corporal punishment in schools).

162. Christina Caron, *In 19 States, It’s Still Legal to Spank Children in Public Schools*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/corporal-punishment-school-tennessee.html> [<https://perma.cc/2J2C-9M4V>].

Corporal punishment was more social and legally acceptable in 1977 in the United States and across the globe than it is now.¹⁶³ In recent years, a number of leading organizations have issued policy statements about the harm spanking can cause.¹⁶⁴ Child development experts argue that parents should never spank children,¹⁶⁵ and if parents should never spank children, then school officials *certainly* should never spank children.¹⁶⁶

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.¹⁶⁷ 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.¹⁶⁸ The deputy sheriff was accused of previously handcuffing children as young as five-years-old.¹⁶⁹ After the traumatizing event that led to the suit, the two plaintiffs experienced frequent bed-wetting and nightmares, and they would not let their mothers out of sight.¹⁷⁰ The federal district court ruled that the deputy sheriff's behavior constituted excessive force.¹⁷¹

In sum, due to greater awareness of the harm related to corporal punishment, as well as the increasingly prison-like conditions of public schools, it stands to reason that, given the chance, the Supreme Court could reconsider its refusal forty-three years ago to extend the Eighth Amendment to the public-school context. 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*.

163. See *Research*, HANDS ARE FOR HOLDING, <https://stopspanking.org/research/> [<https://perma.cc/GB5G-ZU7R>].

164. See *id.*

165. *Id.*

166. 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 160, at 410 n.65.

167. Susan Mizner, *Children Cruelly Handcuffed Win Big Settlement Against the Police in Kentucky*, AM. C.L. UNION (Nov. 2, 2018), <https://www.aclu.org/blog/disability-rights/disability-rights-and-education/children-cruelly-handcuffed-win-big> [<https://perma.cc/76MU-Z8Q6>].

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

E. Equal Protection and the School-to-Prison Pipeline

Scholars in the fields of education, law, and sociology have extensively documented the school-to-prison pipeline.¹⁷² There is no question that current prisonization practices in schools funnel children into the criminal legal system. 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 so forth.¹⁷³

Because of the disproportionate impact of prisonization on children of color, especially those who also have disabilities, the number of lawsuits against districts based on violation of the Fourteenth Amendment’s Equal Protection Clause (EPC) has increased. In 1954, the Supreme Court found that the EPC applies in public schools, in the infamous case *Brown v. Board of Education of Topeka, Shawnee County, Kansas (Brown I)*.¹⁷⁴

Disability only receives rational basis scrutiny under the EPC,¹⁷⁵ but race receives strict scrutiny.¹⁷⁶ To bring a successful race-based discrimination claim under the EPC, challengers must show discrimination (either on its face or as applied), and the government must then show it has a compelling state interest and that the classification is necessary to serve that interest. This would be an as applied rather than facial challenge because, presumably, the state’s efforts would not discriminate on their face but rather in purpose and effect.¹⁷⁷ Because the harmful effects of prisonization practices are widely known, creative lawyers and advocates challenging school practices could argue that discriminatory purpose could be met by implication.

In this context, a school may argue, convincingly even, that it must implement prisonization practices to meet its compelling interest in student safety. However, if the school’s harsh punishment regime disproportionately negatively affects Black children, the state or school district must show not only that there is a compelling state interest in safety but also that the particular punishment is necessary to serve the interest. The school would likely fail the second prong since there are many less restrictive ways to handle even serious misbehavior than the harsh policies and practices described earlier in this Article.

172. See generally Nance, *supra* note 26; see also Jordan, *supra* note 31; AM. BAR ASS’N, *supra* note 30.

173. See *School-to-Prison Pipeline*, AM. C.L. UNION, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> [<https://perma.cc/6NHX-ZS7D>].

174. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

175. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

176. CHEMERINSKY, *supra* note 122, at 760.

177. See generally *Washington v. Davis*, 426 U.S. 229 (1976).

After *Brown I*, the Court decided a number of cases where students raised equal protection claims, including *San Antonio v. Rodriguez* in 1973 and *Plyler v. Doe* in 1982.¹⁷⁸ *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.¹⁷⁹ Disappointingly, the Court indicated that there was no federal right to education.¹⁸⁰ Applying rational basis scrutiny, it found that the school district's funding scheme was rationally related to a legitimate interest and therefore did not violate the parents' equal protection rights.¹⁸¹

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.¹⁸² The Court affirmed the application of the EPC to people who are undocumented but, again, declined recognizing a federal right to education.¹⁸³ 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."¹⁸⁴ 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."¹⁸⁵

Brown I certainly represents the high-water mark in terms of the Court's willingness to make sweeping holdings with regard to students' equal protection rights. A number of articles and reports explore the reasons the Court and lower courts have not quite extended equal protection to children in schools.¹⁸⁶ However, the Court clearly stated that

178. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1973); *Plyler v. Doe*, 457 U.S. 202, 202 (1982).

179. *San Antonio*, 411 U.S. at 4–5.

180. *Id.* at 35.

181. *Id.* at 55.

182. *Plyler*, 457 U.S. at 205.

183. *Id.* at 221.

184. *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.")

185. *Id.* at 202.

186. See generally Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009 (2009). See also U.S. COMM'N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES (2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> [<https://perma.cc/ZJ3T-6BEG>]; Lorelei Laird, *Students of Color with Disabilities Are Being Pushed*

race-based discrimination against schoolchildren is difficult for the government to justify. Therefore, it stands to reason that the Court would not look favorably upon prisonization practices that disproportionately negatively affect children of color, if not also children with disabilities.

V. CONCLUSION

In her dissenting opinion in *Acton*, Justice O’Connor wrote that “the greatest threats to our constitutional freedoms come in times of crisis.”¹⁸⁷ The confluence of the worldwide pandemic caused by the coronavirus and the sharp focus on racist policing practices during the 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.¹⁸⁸

As noted earlier, in *West Virginia v. Barnette*, the Court famously reversed itself just three years after deciding that schoolchildren may be required to salute the flag.¹⁸⁹ 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.”¹⁹⁰ Similarly, our current time of crisis calls for serious scrutiny and condemnation of the prisonization practices currently employed in so many schools.

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 over-policing of children. Justice Amy Coney Barrett, the Court’s newest member, has two young Black children. Further, several sitting justices have law enforcement-side experience, and Justice Gorsuch also may be open to these arguments. In the Albuquerque burping case, then-Tenth

into the School-to-Prison Pipeline, Study Finds, ABA J. (July 24, 2019), <https://www.abajournal.com/web/article/report-finds-more-discipline-are-at-the-intersection-of-race-and-disability> [<https://perma.cc/A4VE-HUDH>] (summarizing the U.S. Commission on Civil Rights report).

187. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 682 (1995).

188. 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/BK6W-CFQW>].

189. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

190. *See id.* at 637.

Circuit Judge Neil Gorsuch expressed a common-sense concern about the embedded police officer's actions.¹⁹¹

A. Reduction or Removal of Prisonization Practices Necessary to Balance Interests and Quell Constitutional Concerns

The movement to defund the police is about diverting money away from police departments and funneling it to other areas, like schools and education.¹⁹² It is not about completely abolishing police departments but rather right-sizing them to fit what they are uniquely trained and suited to do, which is to resolve violent crime.¹⁹³ Only one percent of police time in large cities is spent on serious violent crime.¹⁹⁴ 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.¹⁹⁵

On the other hand, the #AbolishthePolice movement¹⁹⁶ recognizes that systemic racism is inherent in police departments.¹⁹⁷ 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.¹⁹⁸ Similarly, the Coalition on Racial and Ethnic Justice and the Council for Racial and Ethnic Diversity in the Educational Pipeline proposed the following resolution to the ABA:

[T]he American Bar Association urges all federal, state, territorial and local legislative bodies and governmental agencies to:

191. THE GUARDIAN, *supra* note 47; see *A.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”).

192. 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/RC7T-RLMT>].

193. *Id.*

194. 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/E9U3-BV8Y>].

195. Alex S. Vitale, *Five Myths About Policing*, WASH. POST (June 26, 2020), https://www.washingtonpost.com/outlook/five-myths-about-policing/2020/06/25/65a92bde-b004-11ea-8758-bfd1d045525a_story.html [<https://perma.cc/G5MP-WGBQ>].

196. 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/3EY5-3NAN>].

197. *Id.*

198. 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/4JAE-ZWHX>].

- (a) adopt policies, legislation, and initiatives designed to eliminate the school to prison pipeline . . . ;
- (b) adopt laws and policies supporting legal representation for students at point of exclusion from school, including suspension and expulsion;
- (c) support ongoing implicit bias training for teachers, administrators, school resource officers, police, juvenile judges, prosecutors, and lawyers and others dealing with juveniles;
- (d) require data reporting relating to school discipline, including distinctions between educator discipline and law enforcement discipline to the Office of Civil Rights;
- (e) support legislation that eliminates the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses; and,

FURTHER RESOLVED, That the American Bar Association urges state and local prosecutors’ offices, and national and state prosecutors associations to develop screening and charging policies and statements of best practices for school referred cases to juvenile courts.¹⁹⁹

It is clear there are 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 *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 school districts, and (3) expanding expertise in culturally appropriate conflict resolution. If every teacher in America read *Lost at School*,²⁰⁰ millions of children would be positively affected.

199. AM. BAR ASS’N, *supra* note 30, at 3.

200. GREENE, *supra* note 138 (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).

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

B. Investing in Evidence-Based Methods of Ensuring Safety in Public Schools

Funds currently allocated to embedded law enforcement and other prisonization practices may be reallocated in a number of ways. First, schools must look at their own data. They ought to identify which children were most likely to interact with law enforcement and for what infractions. They also ought to identify 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.²⁰¹ Finally, schools must provide implicit bias training and dismantling of racist and ableist systems and structures.

Investing in more teacher training and additional supports such as social workers, counselors, and school psychologists is an evidence-based, cost-effective strategy for schools. These highly trained experts keep children and school personnel safe in a way that preserves democratic values and students’ constitutional rights.²⁰²

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.²⁰³ We inflict harsh punishments on children who actually need extra love and care. In the heat of the moment, when a child fails to listen to the adult authority, far too often we 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.

201. See Aaron Stagoff-Belfort, *To Cut Police Budgets, Start in Public Schools*, THE APPEAL (Aug. 3, 2020), <https://theappeal.org/to-cut-police-budgets-start-in-public-schools/> [https://perma.cc/C25V-XGBK].

202. JUST. POL’Y INST., *supra* note 31.

203. GREENE, *supra* note 138.

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.²⁰⁴

Removing embedded police officers and prisonization practices from public schools will be no small feat. In fact, even during the time when schools are mostly online, police overreach and the targeting of children with disabilities and students of color continues in the supposed privacy of their own homes.²⁰⁵

But if change does not happen now, when will it? Our collective conscience about racism is at an all-time high. Further, most K-12 schooling will occur remotely, likely through June 2021, thereby reducing the need for on-site police. COVID-19, through all of its challenges, has presented us with an opportunity to reverse our over-reliance on law enforcement and educate ourselves about better ways to address student safety.

APPENDIX

		VOTES		OPINIONS		
Key Cases	Year	Majority	Dissent	Majority	Concurring	Dissent
<i>New Jersey v. T.L.O.</i> ²⁰⁶	1985	Burger, White, Blackmun, Rehnquist,	Brennan, Marshall, Stevens	White	Powell joined by O’Connor. Blackmun concurring in judgment.	

204. 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/F86E-GDPR]; ELLA BAKER CTR. FOR HUM. RTS., PUBLIC SAFETY BEGINS WITH PUBLIC HEALTH: MAKING OAKLAND SAFER TOGETHER 6–7 (2017), https://www.ellabakercenter.org/sites/default/files/media/PublicSafetyBeginswithPublicHealth_OaklandSafetyPlan_2017.pdf [https://perma.cc/FS22-2SD6]; *Whitmer Won’t Defund ‘All The Police,’ State Police Handle Her Emergency Communications*, MICH. CAPITOL CONFIDENTIAL (June 15, 2020), <https://www.michiganapitolconfidential.com/whitmer-wont-defund-all-the-police-state-police-handle-her-emergency-communications> [https://perma.cc/LFC4-YSZD].

205. Jaelyn 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/648H-A8U8].

206. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (unreasonable search and seizure).

		O'Connor, Powell			Brennan with whom Marshall joined, concurring in part, dissenting in part. Stevens with whom Marshall joined & with whom Brennan joins Pt. 1, concurring in part, dissenting in part.	
<i>Vernonia Sch. Dist. 47J v. Acton</i> ²⁰⁷	1995	Rehnquist, Scalia, Kennedy, Thomas, Ginsburg, Breyer	Stevens, O'Connor, Souter	Scalia	Ginsburg	O'Connor joined by Stevens & Souter.
<i>Bd. of Educ. of Indep. Sch. Dist. No. 92. v. Earls</i> ²⁰⁸	2002	Rehnquist, Scalia, Kennedy, Thomas, Breyer	Stevens, O'Connor, Souter, Ginsburg	Thomas	Breyer	O'Connor joined by Souter. Ginsburg joined by Stevens, O'Connor & Souter.
<i>Safford Unified Sch. Dist. No. 1 v. Redding</i> ²⁰⁹	2009	Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito		Souter	Stevens with whom Ginsburg joined, concurring in part & dissenting in part. Ginsburg, concurring in part & dissenting in part. Thomas, concurring in judgment & dissenting in part.	

207. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (suspicion-less drug testing of student athletes).

208. *Bd. of Educ. of Indep. Sch. Dist. No. 92. v. Earls*, 536 U.S. 822 (2002) (suspicionless drug testing of students involved in competitive extracurricular activities).

209. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (strip searches in schools).

<i>Goss v. Lopez</i> ²¹⁰	1975	Douglas, Brennan, Stewart, White, Marshall	Burger, Powell, Blackmun, Rehnquist	White		Powell joined by Burger, Blackmun & Rehnquist
<i>J.D.B. v. North Carolina</i> ²¹¹	2011	Kennedy, Ginsburg, Breyer, Sotomayor, Kagan	Roberts, Scalia, Thomas, Alito	Sotomayor		Alito joined by Roberts, Scalia & Thomas.
<i>Ingraham v. Wright</i> ²¹²	1977	Burger, Stewart, Blackmun, Powell, Rehnquist	Brennan, White, Marshall, Stevens	Powell		White joined by Brennan, Marshall & Stevens. Stevens
<i>Brown v. Bd. of Educ. of Topeka</i> ²¹³	1954	Warren, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton		Warren		
<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> ²¹⁴	1973	Burger, Stewart, Blackmun, Powell, Rehnquist	Douglas, Brennan, White, Marshall	Powell	Stewart	Brennan, White joined by Douglas. Brennan, Marshall joined by Douglas.
<i>Plyler v. Doe</i> ²¹⁵	1982	Brennan, Marshall, Blackmun, Powell, Stevens	Burger, White, Rehnquist, O'Connor	Brennan	Marshall, Blackmun, Powell	Burger joined by White, Rehnquist & O'Connor.

210. *Goss v. Lopez*, 419 U.S. 565 (1975) (procedural due process).

211. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (self-incrimination).

212. *Ingraham v. Wright*, 430 U.S. 657 (1977) (corporal punishment).

213. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (equal protection and racial discrimination).

214. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (equal protection and wealth-based classifications).

215. *Plyler v. Doe*, 457 U.S. 202 (1982) (equal protection and undocumented students).

