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# School Surveillance and the Fourth Amendment

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# SCHOOL SURVEILLANCE AND THE FOURTH AMENDMENT

JASON P. NANCE\*

In the aftermath of several highly publicized incidents of school violence, public school officials have increasingly turned to intense surveillance methods to promote school safety. The current jurisprudence interpreting the Fourth Amendment generally permits school officials to employ a variety of strict measures, separately or in conjunction, even when their use creates a prison-like environment for students. Yet, not all schools rely on such strict measures. Recent empirical evidence suggests that low-income and minority students are much more likely to experience intense security conditions in their schools than other students, even after taking into account factors such as neighborhood crime, school crime, and school disorder. These empirical findings are problematic on two related fronts. First, research suggests that students subjected to these intense surveillance conditions are deprived of quality educational experiences that other students enjoy. Second, the use of these measures perpetuates social inequalities and exacerbates the school-to-prison pipeline.

Under the current legal doctrine, students have almost no legal recourse to address conditions creating prison-like environments in schools. This Article offers a reformulated legal framework under the Fourth Amendment that is rooted in the foundational Supreme Court cases evaluating students' rights under the First, Fourth, and Fourteenth Amendments. The historical justification courts invoke to abridge students' constitutional rights in schools, including their Fourth Amendment rights, is to promote the educational interests of the students. This justification no longer holds true when a school creates a prison-like environment that deteriorates the learning environment and harms students' educational interests. This Article maintains that in these circumstances, students' Fourth Amendment rights should not be abridged but strengthened.

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*I grew up on the West Side of Chicago, where I attended and graduated from Orr Academy High School. My high school seemed like its own personal prison. From the moment we stepped through the doors in the morning, we were faced with metal detectors, x-ray machines and uniformed security. Upon entering the school, it was like we stepped into a prison.*

—Edward Ward,

Testimony for the U.S. Senate Committee Hearing on

“Ending the School-to-Prison Pipeline.”<sup>1</sup>

## INTRODUCTION

Several years ago, I taught math in a public middle school located in a large metropolitan city. Approximately 95 percent of the students attending this school were Hispanic or African American, and nearly all of the students came from low-income households and qualified for free or reduced school lunch. Having attended public schools in homogeneous, suburban areas with relatively low poverty rates, I was unprepared for what I experienced during my first year of teaching. At

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1. *Ending the School-to-Prison Pipeline: Hearing before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 1 (2012) (testimony of Edward Ward, Blocks Together, Dignity in Schools Campaign) [hereinafter Edward Ward Testimony], available at <http://www.judiciary.senate.gov/pdf/12-12-12WardTestimony.pdf>.

the public schools I attended, students had substantial freedom. There were no police officers on campus. I never walked through a metal detector. My personal belongings were never searched. I never saw a drug-sniffing dog. There were no surveillance cameras. I was free to leave campus at lunchtime. I felt that my teachers and administrators trusted me, and I trusted them. Overall, my public school experience helped me become independent and prepared me well for college and many of the challenges I now face.

Students attending the school at which I worked, however, had a very different educational experience from mine. At times, students walked through metal detectors. Police officers maintained a visible presence in the school. Students were not permitted to use lockers, and they could only carry clear backpacks. After class ended, students marched in a line to their next class. Students were not allowed to use the restrooms during breaks between classes but used them as a group during class time in the presence of a teacher. Before classes began, students were not permitted to walk around in the school, go to the library, sit outside, or even sit at their desks. Rather, students were required to sit on the floor in the hallways or the gymnasium until the first bell rang when they would march to their first class. There was also a clear sense of distrust that I had to work hard to overcome, especially as a white teacher.

In 1954, the United States Supreme Court issued the landmark ruling of *Brown v. Board of Education*<sup>2</sup> to address the racial inequalities that existed in the public school system.<sup>3</sup> That ruling eliminated the “separate but equal” doctrine established in *Plessy v. Ferguson*<sup>4</sup> as applied to public schools and no longer allowed public schools to segregate students solely on the basis of race.<sup>5</sup> The Court in *Brown* recognized that education “is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>6</sup> The Court reasoned that segregating children on the basis of race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>7</sup> The sense

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2. 347 U.S. 483 (1954).

3. *Id.* at 493.

4. 163 U.S. 537 (1896).

5. *Brown*, 347 U.S. at 495 (“We conclude that, in the field of public education the doctrine of ‘separate but equal’ has no place. . . . [P]laintiffs . . . by reason of the segregation complained of, [are] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

6. *Id.* at 493.

7. *Id.* at 494.

of inferiority is magnified when sanctioned by law and “affects the motivation of a child to learn.”<sup>8</sup>

More than fifty years after *Brown*, great racial inequalities still exist in our public education system—inequalities that may generate feelings of inferiority and affect the hearts and minds of children in a way that is difficult to undo. Much scholarly attention has been devoted to discussing many of these inequalities, including resource disparities in schools that minorities attend and minorities’ disproportionate exposure to exclusionary measures.<sup>9</sup> The focus of this Article, however, addresses another inequality that has received far less attention in the legal scholarship: the implementation of strict security measures in schools serving primarily minority students. Such measures include using metal detectors, conducting random sweeps for contraband, having law enforcement present on campus, controlling access to school grounds by locking or monitoring gates, and installing security cameras.

Recent empirical research indicates that schools serving higher proportions of minority and low-income students are more likely to implement these harsh, intense security conditions than other schools—even after accounting for factors such as school crime, neighborhood crime, school disorder, school location, and school size.<sup>10</sup> This is a problem that must be addressed for at least two reasons. First, research suggests that schools that rely on intense surveillance methods often have poor school climates that are detrimental to student learning and positive student growth, meaning that poor students and students of color often do

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8. *Id.*

9. *See, e.g.*, Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404–09 (2012) (explaining the inferior resources and opportunities that low-income minorities receive); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1470–72 (2003) (describing the substantial disparities in school funding); Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2436–42 (2004) (discussing school finance reform); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 866 (2012) (discussing several empirical studies that demonstrate racial disparities in school punishment); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999) (describing the funding gaps relative to low-income minority students); *see also* DANIEL J. LOSEN & JONATHAN GILLESPIE, THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL (2012), *available at* <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crrr-research/losen-gillespie-opportunity-suspended-2012.pdf> (analyzing national data from the U.S. Department of Education’s Office of Civil Rights showing racial disparities in suspensions).

10. *See* Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 41 (2013).

not enjoy the same educational experiences that other students do.<sup>11</sup> Second, the use of intense surveillance methods is a component of a larger, more complex problem called the school-to-prison pipeline. The school-to-prison pipeline refers to the practice of funneling students currently enrolled in school to the juvenile justice system or removing students from school temporarily or permanently, thereby creating conditions under which the students are more likely to end up in prison.<sup>12</sup> Many school officials use intense surveillance techniques in conjunction with zero-tolerance policies to push low-performing students who are perceived as troublemakers out of school.<sup>13</sup> Unfortunately, minority students—especially African-American male students—are disproportionately affected by such policies, leading to tremendous inequalities in both our public schools and our justice system.<sup>14</sup>

This Article goes beyond the current literature by proposing a new framework for evaluating the constitutionality of suspicionless search practices in schools under the Fourth Amendment. Under the current framework, using metal detectors, drug-sniffing dogs, security cameras, random sweeps, or a combination of these practices in conjunction with locked gates and law enforcement officers, is permitted because preventing school crime is an important government interest that overrides students' expectations of privacy.<sup>15</sup> This holds true even though low-income and minority students are subjected to these conditions more often. This Article proposes a reformulated legal framework to address these issues that is rooted in the foundational Supreme Court cases evaluating students' rights under the First, Fourth, and Fourteenth Amendments. The historical justification for diluting students' constitutional rights in schools—including their Fourth Amendment rights—is to promote students' educational interests by

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11. Cf. Press Release, U.S. Dep't of Educ., New Data from U.S. Department of Education Highlights Educational Inequities around Teacher Experience, Discipline and High School Rigor (Mar. 6, 2012), available at <http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teache> (detailing the inequalities that exist for minorities in the public education system across the country and explaining that “[t]he undeniable truth is that the everyday educational experience for many students of color violates the principle of equity at the heart of the American promise”).

12. See, e.g., ADVANCEMENT PROJECT ET AL., FEDERAL POLICY, ESEA REAUTHORIZATION, AND THE SCHOOL-TO-PRISON PIPELINE 2 (2011), available at [http://b3cdn.net/advancement/ceb35d4874b0ffde10\\_ubm6baeap.pdf](http://b3cdn.net/advancement/ceb35d4874b0ffde10_ubm6baeap.pdf); *School to Prison Pipeline*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/case/school-prison-pipeline> (last visited Feb. 8, 2014).

13. See *infra* Part II.

14. See, e.g., ADVANCEMENT PROJECT ET AL., *supra* note 12, at 2–3; *School to Prison Pipeline*, *supra* note 12.

15. See *infra* Part III.A.

providing an environment that is conducive to learning.<sup>16</sup> This Article maintains that when this justification no longer holds true—when conducting suspicionless searches or, worse, creating a prison-like environment contributes to a deteriorated learning climate and harms students’ educational interests—students’ Fourth Amendment rights should not be abridged, but strengthened. Accordingly, students should have the opportunity to submit evidence showing that strict security measures do not promote their educational interests but detract from an educational climate, and thus their privacy interests should be given greater consideration against the government’s interest in conducting these searches. Such a test more closely aligns with the overall tenor of cases evaluating students’ constitutional rights in schools and is more consistent with good education policy and practice. Further, because primarily students of color more often are subjected to intense surveillance environments, applying this test will help ameliorate the disproportionate use of strict security measures against minorities.

This Article proceeds in three parts. Part I reviews the empirical evidence revealing disparities in the use of strict security measures along racial and economic lines. Part II contextualizes the empirical evidence, explaining why schools rely on strict security measures and how their use is inconsistent with good educational and social policy and contributes to the school-to-prison pipeline. Part III proposes a reformulated legal framework to evaluate the constitutionality of suspicionless searches under the Fourth Amendment that may help prevent the disparate application of strict security measures and provide a better learning environment for all students.

## I. THE EMPIRICAL FINDINGS

The unequal treatment of minorities in public schools, especially of black males, is well documented and remains one of the most pressing educational issues of our day.<sup>17</sup> Nancy Dowd explains that for many

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16. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (stating that the Court, in evaluating students’ Fourth Amendment rights, must “strike the balance between the schoolchild’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place”); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (explaining that the nature of students’ Fourth Amendment rights in schools “is what is appropriate for children in school” and further stating that “Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children”).

17. See, e.g., CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 53–54 (2010) (observing that minority students are over-represented in restrictive special education programs); Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 *HOW. L.J.* 303,

minority students, particularly black males, “school is not a place of education and opportunity. Instead, it is a place that significantly undermines opportunity and pushes [them] into the juvenile justice system.”<sup>18</sup> Pedro Noguera observes that in schools throughout United States, black males “are more likely than any other group in American society to be punished (typically through some form of exclusion), labeled, and categorized for special education (often without an apparent disability), and to experience academic failure.”<sup>19</sup> Recent data disseminated by the U.S Department of Education’s Office of Civil Rights (OCR) confirmed the disparate treatment of minority students in public schools.<sup>20</sup> That data, gathered from surveys from over 72,000 schools around the United States serving approximately 85 percent of the nation’s public school students, show that minority students are disciplined more often and more severely, have less access to complex, higher-level courses, and more often are assigned teachers that are less experienced and are lower paid.<sup>21</sup> Responding to these findings, U.S. Secretary of Education Arne Duncan declared that “[t]he undeniable truth is that the everyday educational experience for many students of color violates the principle of equity at the heart of the American

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326–27 (2011) (showing that black students are “over-represented in more restrictive educational settings such as separate classrooms or schools”); Nancy E. Dowd, *What Men? The Essentialist Error of the “End of Men,”* 93 B.U. L. REV. 1205, 1216–22 (2013) (explaining that minorities, particularly black males, are physically marginalized, psychologically and socially isolated, disproportionately disciplined, have less access to mental health services, but are more likely to be referred to an under-resourced mental health system); Theresa Glennon, *Knocking against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL’Y 10, 11 (2002) (stating that black males are more likely to be labeled as disabled and are more likely to be referred to educational programs that provide fewer services and institute greater control); Theresa Glennon, *Looking for Air: Excavating Destructive Educational and Racial Policies to Build Successful School Communities*, in JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 107, 110–11 (Nancy E. Dowd ed., 2011) [hereinafter Glennon, *Looking for Air*] (citing several studies that show that minority students are disproportionately disciplined); Russell J. Skiba, Suzanne E. Eckes & Kevin Brown, *African American Disproportionality in School Discipline: The Divide between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1086–89 (2010) (discussing empirical evidence of racial disproportionality in school discipline). Indeed, providing equal, high-quality education opportunities for all students is one of the greatest challenges our nation faces today. See generally DEREK W. BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM (2013); LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE (2010).

18. See Dowd, *supra* note 17, at 1216.

19. PEDRO A. NOGUERA, THE TROUBLE WITH BLACK BOYS AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION xvii (2008).

20. See Press Release, U.S. Dep’t of Educ., *supra* note 11.

21. *Id.*



promise.”<sup>22</sup> Daniel Losen and Jonathan Gillespie conducted additional analysis on the OCR data and found that one out of every six black students enrolled in K–12 public schools has been suspended at least once, but only one out of twenty white students has been suspended.<sup>23</sup> Further, they found that one out of every four disabled black children was suspended during the 2009–10 school year.<sup>24</sup>

Unfortunately, the OCR data do not allow researchers to probe deeply into reasons behind the disparities because the data do not list the offenses that led to the suspensions.<sup>25</sup> However, other studies indicate that minority students, especially black students, are indeed punished disproportionately relative to their violations of school rules.<sup>26</sup> For example, Kelly Welch and Allison Ann Payne conducted a national study involving 294 public schools and discovered that schools serving higher percentages of black students were more likely to suspend, expel, or refer students to law enforcement officials for violating school rules.<sup>27</sup> Welch and Payne also discovered that schools serving higher percentages of black and low-income students were less likely to rely on softer forms of punishment, such as oral reprimands or referrals to visit with school counselors.<sup>28</sup> In addition, Welch and Payne found that schools serving more black students were less likely to consider alternative forms of discipline such as requiring students to complete community service or participate in restorative justice initiatives.<sup>29</sup> Indeed, the OCR recently

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22. *Id.*

23. LOSEN & GILLESPIE, *supra* note 9, at 6.

24. *Id.* at 7.

25. *Id.* at 32–33.

26. See TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 45 (2011), available at [http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf) (reporting the results of a statewide Texas study showing that black students were more likely to be removed from class and more likely to be disciplined for “discretionary reasons”); DANIEL J. LOSEN, THE CIVIL RIGHTS PROJECT, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 4–5 (2011), available at <http://nepc.colorado.edu/files/NEPC-SchoolDiscipline.pdf> (demonstrating that racial disparities in the number of school suspensions has increased considerably over the last forty years); Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 J. EDUC. PSYCHOL. 508, 511–12 (2010) (reporting that black students were more likely than white students to receive office referrals after controlling for teachers' ratings of their students' classroom behavior); Ciolfi & Ryan, *supra* note 17, at 327–28 (citing several studies showing that minority students are punished disproportionality relative to their offenses).

27. See Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 25, 36 (2010)

28. *Id.* at 36–37.

29. *Id.* at 37.

acknowledged that although the racial disparities in student discipline rates may be caused by a range of factors, the abundant research suggests that these disparities “are not explained by more frequent or more serious misbehavior by students of color.”<sup>30</sup>

While many studies demonstrate the disparate treatment of minorities in schools in several facets,<sup>31</sup> very few examine the disproportionate use of strict security measures on minorities. I recently tested the hypothesis that low-income and minority students are subject to intense surveillance methods more often than other students, even after taking into account additional factors that might influence a school official’s decision to implement strict security measures.<sup>32</sup> To test this hypothesis, I analyzed restricted data from the U.S. Department of Education’s 2009–10 School Survey on Crime and Safety (SSOCS). The SSOCS is a rich, national dataset that contains information submitted by school principals dealing with school security practices, school crime, and school demographics.<sup>33</sup> The dataset was the restricted version, meaning that the data contained detailed, sensitive information such as the number of incidents that involved weapons or drugs that occurred on school campuses during the school year.<sup>34</sup> The restricted dataset recently became available to researchers who met specific conditions.<sup>35</sup>

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30. See U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 4 n.7 (Jan. 8, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [hereinafter DEAR COLLEAGUE LETTER].

31. See, e.g., *supra* note 17.

32. For a detailed description of the data, analysis, and findings see Nance, *supra* note 10, at 28. In this Article, I briefly summarize the most important findings.

33. See U.S. DEP’T OF EDUC. NAT’L CTR. FOR EDUC. STATISTICS, SCHOOL SURVEY ON CRIME AND SAFETY PRINCIPAL QUESTIONNAIRE: 2009–10 SCHOOL YEAR 5 [hereinafter 2009–10 SSOCS QUESTIONNAIRE], available at [http://nces.ed.gov/surveys/ssocs/pdf/SSOCS\\_2010\\_Questionnaire.pdf](http://nces.ed.gov/surveys/ssocs/pdf/SSOCS_2010_Questionnaire.pdf) (last visited Feb. 11, 2014).

34. See *Statistical Standards Program: Getting Started*, NAT’L CTR. FOR EDUC. STATS., [http://nces.ed.gov/statprog/instruct\\_gettingstarted.asp](http://nces.ed.gov/statprog/instruct_gettingstarted.asp) (last visited Feb. 11, 2014). The restricted-use data has “a higher level of detail in the data compared to public-use data files.” *Id.* Although the restricted datasets are not available to the general public, datasets that contain less sensitive data for prior school years are currently available. *Id.* Those datasets can be downloaded at *School Survey on Crime and Safety (SSOCS)*, NAT’L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/surveys/ssocs/data\\_products.asp](http://nces.ed.gov/surveys/ssocs/data_products.asp) (last visited Feb. 11, 2014).

35. NCES provides restricted-use datasets to certain researchers in qualified organizations. *Statistical Standards Program: Getting Started*, *supra* note 34. To qualify, an organization must provide a justification for access to the restricted-use data, submit the required legal documents, agree to keep the data safe from unauthorized disclosures at all times, and to participate fully in unannounced, unscheduled inspections of the researcher’s office to ensure compliance with the terms of the License and the Security Plan form.

The 2009–10 SSOCS restricted-use dataset provides a unique opportunity to view on a national scale the types of strict security measures that schools employ. In the 2009–10 SSOCS, school principals were asked to respond to several questions relating to school security.<sup>36</sup> For example, principals were asked if, during the 2009–10 school year, it was a practice in the principal’s school to require students to pass through metal detectors each day, perform one or more random metal detector checks on students, perform one or more random sweeps for contraband (for example, drugs or weapons), control access to school grounds during school hours, use security cameras to monitor the school, and have any security guards or law enforcement officers present at the principal’s school at least once a week.<sup>37</sup> Principals responded with a “yes” or “no” to each one of these questions.<sup>38</sup> The dependent variables for my study represented the likelihood that a school principal responded affirmatively to using various combinations of strict security practices that can create an intense surveillance environment.<sup>39</sup>

I measured student race by including the percentage of the schools’ minority student population.<sup>40</sup> I measured student poverty by including the percentage of students who were eligible for free or reduced-price lunch.<sup>41</sup> I also included other student demographic information that

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*Id.* See also *Statistical Standards Program: Applying for a Restricted-Use Data License*, NAT’L CTR. FOR EDUC. STATISTICS, available at [http://nces.ed.gov/statprog/instruct\\_apply.asp?type=rl](http://nces.ed.gov/statprog/instruct_apply.asp?type=rl) (last visited Feb. 11, 2014) (providing guidelines for applying to receive a restricted-use dataset license).

36. 2009–10 SSOCS QUESTIONNAIRE, *supra* note 33, at 5, 8.

37. *Id.*

38. *Id.*

39. Nance, *supra* note 10, at 31. I examined four different combinations of the strict security practices: (a) metal detectors and guards; (b) metal detectors, guards, and random sweeps; (c) metal detectors, guards, random sweeps, and security cameras; and (d) metal detectors, guards, random sweeps, security cameras, and locked gates. *Id.*

40. *Id.* at 32. A school’s minority population consisted of the number of students who were African American, Hispanic, Asian/Pacific Islander, and American Indian/Alaskan Native. See SIMONE ROBERS ET AL., NAT’L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY 2011, at 112 (2012) [hereinafter 2011 INDICATORS OF SCHOOL CRIME AND SAFETY], available at <http://nces.ed.gov/pubs2012/201202rev.pdf>. Racial data for the 2009–10 SSOCS came from the 2007–08 CCD school data file. See NAT’L CTR. FOR EDUC. STATISTICS, 2009–2010 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS): RESTRICTED-USE DATA FILE USER MANUAL 29 [hereinafter 2009–10 RESTRICTED USE MANUAL] (2011) (on file with author). Although there was a two-year difference, it is unlikely that a school would experience a major shift in student population over a two-year period.

41. Nance, *supra* note 10, at 32. Free or reduced-price lunch is a common proxy to measure student poverty. See, e.g., Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1441 (2007); *Federal Education Budget Project*, NEW AM. FOUND., <http://febp.newamerica.net/background-analysis/federal-school-nutrition-programs> (last visited Feb. 7, 2013) (“Researchers often

might account for whether a school decided to employ strict surveillance methods such as the percentage of students who have limited English proficiency, the percentage enrolled in special education, and the percentage who scored in the bottom 15 percent on the state standardized exam.<sup>42</sup>

Importantly, I accounted for school crime in my analysis.<sup>43</sup> The SSOCS asks school officials to report the number of incidents of various types of school crime during the school year.<sup>44</sup> Because the severity of the school crimes may influence whether schools implement tighter security measures,<sup>45</sup> I categorized the crimes according to their degree of severity. I included violent incidents;<sup>46</sup> threats of physical attack with or without a weapon;<sup>47</sup> incidents involving possession of a firearm, explosive device, knife, or other sharp object;<sup>48</sup> incidents of distribution, possession, or use of illegal drugs, inappropriate prescription drugs, or alcohol;<sup>49</sup> incidents of theft of items over \$10,<sup>50</sup> and incidents of vandalism.<sup>51</sup>

Further, I accounted for school disorder, which also may influence a school's decision to implement tighter security measures.<sup>52</sup> In addition, I controlled for the principals' perception of crime problems near the school,<sup>53</sup> the involvement of various external community groups in the schools,<sup>54</sup> the geographic region of the schools,<sup>55</sup> school urbanicity,<sup>56</sup>

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use free or reduced price lunch (FRPL) enrollment figures as a proxy for poverty at the school level, because Census poverty data (which is used at the state and district level) is not available disaggregated below the school district level and is not collected annually.”).

42. Nance, *supra* note 10, at 33. See also Aaron Kupchik & Geoff K. Ward, *Race, Poverty, and Exclusionary School Security: An Empirical Analysis of U.S. Elementary, Middle, and High Schools*, YOUTH VIOLENCE & JUV. JUST. (forthcoming) (manuscript at 10) (on file with author).

43. Nance, *supra* note 10, at 33. See also Welch & Payne, *supra* note 27, at 27 (“One factor presumed to be closely associated with school punitiveness and disciplinary practice is the level of school crime and disorder.”).

44. 2009–10 SSOCS QUESTIONNAIRE, *supra* note 33, at 11.

45. See Kupchik & Ward, *supra* note 42 (manuscript at 13–14).

46. Violent incidents included rape or attempted rape, sexual battery other than rape, robbery with or without a weapon, and physical attacks with or without a weapon. 2009–10 SSOCS QUESTIONNAIRE, *supra* note 33, at 11.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Nance, *supra* note 10, at 33–34. See also Kupchik & Ward, *supra* note 42 (manuscript at 10–11); Welch & Payne, *supra* note 27, at 27.

53. Nance, *supra* note 10, at 34.

54. *Id.*

each school's total student enrollment,<sup>57</sup> the building level,<sup>58</sup> and whether the school was nontraditional like a magnet or charter school.<sup>59</sup> Finally, I included the school's average percentage of students that attend school each day.<sup>60</sup>

The empirical analysis revealed that both student race and student poverty were strong predictors for whether a school chose to employ high surveillance security methods. And, importantly, these findings held true even after controlling for the other above-listed factors that might influence the school officials' decisions to employ strict security measures, such as school crime, neighborhood crime, and school disorder.<sup>61</sup>

These findings support what many scholars have observed anecdotally—that large, urban schools serving primarily low-income or minority students are more likely to create intense surveillance environments than other schools.<sup>62</sup> They suggest that schools with high percentages of minority or low-income students tend to rely on heavy-handed, punitive-based measures to maintain order and control crime. They also suggest that these schools are more inclined to coerce students into compliance and to promote safety by identifying, apprehending, and excluding students that school officials perceive as being dangerous, disruptive, or low-performing.<sup>63</sup>

The findings further suggest that schools serving primarily affluent or white students find alternative ways to create safer environments.

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55. *Id.* at 35.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 35–36.

61. Other significant predictors included student enrollment (positive predictor), schools located in the South (positive predictor), schools located in urban areas (positive predictor), the percentage of students who had limited English proficiency (negative predictor), and the percentage of students who received low test scores (positive predictor). *Id.* at 41–42.

62. See, e.g., Kevin P. Brady, Sharon Balmer & Deinya Phenix, *School-Police Partnership Effectiveness in Urban Schools*, 39 EDUC. & URBAN SOC. 455, 456–57 (2007) (explaining that “[a]n increasing fear of school violence coupled with the public’s misperceptions of [school safety] has caused school officials, especially those located in urban areas, to implement more punitive-based . . . policies”); Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189, 206 (1995) (observing that most urban high schools serving high percentages of minority students rely upon coercive or excessive forms of control to promote school safety).

63. See Paul Hirschfield, *School Surveillance in America: Disparate and Unequal*, in SCHOOLS UNDER SURVEILLANCE 38, 45 (Torin Monahan & Rodolfo D. Torres eds., 2010); Noguera, *supra* note 62, at 192.

However, this does not mean that schools serving affluent and white students do not rely on any security measures at all. But schools serving primarily white and affluent students appear to be more inclined to use less intrusive measures, such as surveillance cameras.<sup>64</sup> As Paul Hirschfield maintains, “criminalization in middle class schools is less intense and more fluid than in the inner-city . . . . In short, the gated community may be a more apt metaphor to describe the security transformation of affluent schools, while the prison metaphor better suits that of inner-city schools.”<sup>65</sup> Similarly, Pedro Noguera observes: “I frequently visit schools in suburban communities and private schools that serve affluent students and see quite clearly that poor children in the inner city are more likely to receive an education that places greater emphasis on order and control than academic rigor.”<sup>66</sup>

## II. CONTEXTUALIZING THE EMPIRICAL FINDINGS

These empirical findings showing disparities in the application of strict security measures are disturbing and problematic on several fronts. This Part provides the theoretical backdrop exploring why some schools choose to rely on strict security measures, why there are disparities in the application of strict security measures, and the societal and educational harms that strict security measures cause—especially when applied disproportionately to minority students.

### *A. The Movement towards Increased Reliance on Strict Security Measures*

Why some schools choose to rely on intense surveillance methods while others do not is a complex question. The current state of affairs is due, at least in part, to several highly publicized acts of school violence, as well as several federal, state, and local laws, policies, and practices.

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64. See 2011 INDICATORS OF SCHOOL CRIME AND SAFETY, *supra* note 40, at 164–65 (disaggregating the use of security measures by student race and socio-economic status). In fact, recent data from the U.S. Department of Education indicate that schools serving high percentages of white or affluent students tend to rely more on drug-sniffing dogs than other schools. See *id.* at 165; see also Kupchik & Ward, *supra* note 42, (manuscript at 12) (indicating that high schools with lower percentages of racial minorities were more likely to use drug-sniffing dogs than other schools). Nevertheless, as the empirical analysis summarized here suggests, schools serving higher percentages of minority students are more likely to use several different surveillance methods in conjunction that create a more intense surveillance environment than other schools. *Id.*

65. Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 84 (2008).

66. See Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 348 (2003).

Unfortunately, many of these laws, policies, and practices also have contributed to the disparate application of strict security measures on minority and low-income students.

#### 1. A RESPONSE TO HIGHLY PUBLICIZED ACTS OF SCHOOL VIOLENCE

Even though schools remain among the safest places for children,<sup>67</sup> one cannot discount the role that fear plays in a school official's decision to adopt strict security practices.<sup>68</sup> In the wake of several highly publicized incidents of school violence, it is no surprise that school officials and policymakers have resorted to strict security measures to demonstrate to the public that they are implementing measures to reduce

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67. See, e.g., BARBARA FEDDERS, JASON LANGBERG & JENNIFER STORY, SCHOOL SAFETY IN NORTH CAROLINA: REALITIES, RECOMMENDATIONS & RESOURCES 4 (2013), available at [http://www.legalaidnc.org/public/learn/media\\_releases/2013\\_MediaReleases/school-safety-in-north-carolina.pdf](http://www.legalaidnc.org/public/learn/media_releases/2013_MediaReleases/school-safety-in-north-carolina.pdf) (“School violence that results in death is extremely rare. Young people are much more likely to be harmed in the home or on the street than they are in schools.”) (citations omitted); Randall R. Beger, *The “Worst of Both Worlds”: School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 338 (2003) (“Contrary to popular belief, schools remain among the safest places for children.”); Randy Borum et al., *What Can Be Done about School Shootings? A Review of the Evidence*, 39 EDUC. RESEARCHER 27, 27 (2010) (explaining that the number of homicides that occur on school grounds represents less than 1 percent of the annual homicides of children age 5 to 18, and that “any given school can expect to experience a student homicide about once every 6,000 years” (citation omitted)); Nance, *supra* note 10, at 17; Noguera, *supra* note 66, at 343 (“Despite surveys that suggest a growing number of teachers and students fear violence in school, schools in the United States are generally safe places.” (citation omitted)); Arne Duncan, *Resources for Schools to Prepare for and Recover from Crisis*, HOMEROOM: U.S. DEP’T OF EDUC. BLOG (Dec. 17, 2012), <http://www.ed.gov/blog/2012/12/resources-for-schools-to-prepare-for-and-recover-from-crisis/> (“Schools are among the safest places for children and adolescents in our country, and, in fact, crime in schools has been trending downward for more than a decade.”).

68. AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 3 (2010) (explaining that fears and insecurities are powerful motivators to increase security measures in response to high-profile incidents of school violence); Beger, *supra* note 67, at 338 (“Widely publicized incidents of juvenile violence in public schools have created the public misconception that such behavior is commonplace.”); Borum et al., *supra* note 67, at 27 (“[S]chool shootings receive such intense publicity, and are such inherently disturbing events, that they generate an inflated perception of danger.”); Hirschfield, *supra* note 63, at 38 (“The importation of surveillance tactics from criminal justice and the military into schools is most commonly attributed to elevated fears of school violence and a growing realization that ‘it can happen here.’”); Matthew J. Mayer & Peter E. Leone, *School Violence and Disruption Revisited: Equity and Safety in the School House*, 40 FOCUS ON EXCEPTIONAL CHILD. 1, 6 (2007) (“[M]edia coverage of school violence has shaped the public’s beliefs, and in many cases has led to a distorted perception of violence in schools, as well as adolescent violence more generally.”).

school crime, maintain order, and protect children.<sup>69</sup> As Torin Monahan and Rodolfo Torres observe, “the threat of ‘another Columbine’ (or Virginia Tech, and so on) haunts the social imagery, leading parents, policy makers, and others to the sober conclusion that any security measure is worth whatever trade-offs are involved in order to ensure safety.”<sup>70</sup> Indeed, since the Newtown shootings, several lawmakers and school officials have responded by enacting policies that include the use of intense surveillance methods to monitor not only campus visitors but their own students as well.<sup>71</sup>

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69. Brady, Balmer & Phenix, *supra* note 62, at 456 (“An increasing fear of school violence coupled with the public’s misperceptions of the actual degree of violence in our nation’s schools has caused school officials, especially those located in urban areas, to implement more punitive-based school discipline policies and practices for responding to and preventing student crime and violence.”); see Welch & Payne, *supra* note 27, at 26.

70. Torin Monahan & Rodolfo D. Torres, *Introduction*, in *SCHOOLS UNDER SURVEILLANCE*, *supra* note 63, at 1, 2–3. Elizabeth Scott has described this general social phenomena as the “moral panic problem.” See Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of Juvenile Crime Regulation*, 31 L. & INEQUALITY 535, 541 (2013) (describing that although school shootings are rare events, after the Columbine shootings “legislatures across the country rushed to pass strict zero tolerance laws, making it a crime to threaten violence in school”).

71. See, e.g., S.B. 2267, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (proposing funding to equip schools with “alarms, cameras, electronic door locks, emergency response call buttons, intercom systems, key or pass cards, [and] metal detectors”); S.B. 2230, 2013 Leg., Reg. Sess. (N.Y. 2013) (funding security aid to provide schools with metal detectors, electronically operated partitions, and security cameras); H. 2343, 2013 Gen. Assemb., Reg. Sess. (Va. 2013) (providing funding to schools for purchasing security equipment); H.B. 612, 2013 Leg., Reg. Sess. (Ala. 2013) (proposing funding to school districts for “surveillance cameras, metal detectors, and other safety equipment”). See also Tom Barton, *Board Members Unsure Metal Detectors Needed at Beaufort County Schools*, ISLAND PACKET (May 8, 2013), <http://www.islandpacket.com/2013/05/08/2495164/board-members-unsure-metal-detectors.html> (discussing a South Carolina school board’s consideration of adding metal detectors in schools); Doug Finke, *State Board of Education Calls for \$874M Increase in School Funding*, J. STAR (Jan. 25, 2013, 12:01 AM), <http://www.pjstar.com/news/x1503807290/State-Board-of-Education-calls-for-874M-increase-in-school-funding> (“The Illinois State Board of Education called for an \$874 million increase in state spending on elementary and secondary education on Thursday, including \$20 million that would be available for school security measures.”); Liz Hayes, *Burrell Board Focuses on School Safety*, TRIBLIVE (May 7, 2013, 12:51 AM), <http://triblive.com/neighborhoods/yourallekiskivalley/yourallekiskivalleymore/3970294-74/burrell-security-wagner#axzz2THQXVCDR> (discussing a Pennsylvania school district that is considering using metal detectors more regularly, installing X-ray equipment to screen student backpacks, and making windows “more bulletproof”); Mary Wilson, *Pa. Senate Leader Suggests Steep Increase in School Security Funding*, NEWSWORKS (Jan. 22, 2013), [http://www.newsworks.org/index.php/local/item/49955-pa-senate-leader-suggests-steep-increase-in-school-security-funding?linktype=hp\\_topstorylist](http://www.newsworks.org/index.php/local/item/49955-pa-senate-leader-suggests-steep-increase-in-school-security-funding?linktype=hp_topstorylist) (“The leader of Pennsylvania’s Senate wants to increase grant funding twentyfold for school security, including armed guards.”).



Nevertheless, while fear of an extreme incident most likely explains some of the impetus behind more schools adopting strict security measures, it fails to fully explain this recent trend for at least two reasons. First, as scholar Paul Hirschfield points out, fear does not explain why schools have maintained or intensified their security efforts long after the public panic over highly publicized violent incidents has subsided.<sup>72</sup> Second, fear does not fully explain why some schools adopt harsher, stricter security measures than other schools if, as the school shootings demonstrate, an extreme incident can occur in any type of school, including a school in a white suburban neighborhood.

## 2. THE SCHOOL ACCOUNTABILITY LAWS

Some school officials may adopt strict security measures as part of an overall effort to push low-performing students out of their schools. Federal and state school accountability laws require school officials to test students each year and impose severe consequences for schools that do not meet certain standards. For instance, under the No Child Left Behind Act of 2001 (NCLBA),<sup>73</sup> all schools that receive federal funds are required to test students at various stages during grades three through twelve in reading, language arts, math, and science.<sup>74</sup> Under the NCLBA, schools must demonstrate improvement in student test scores across all student sub-groups to avoid receiving a negative label, being placed on probation, or eventually being taken over by the state.<sup>75</sup> To avoid these sanctions, many scholars are concerned that school officials may push low-performing students out of their schools by suspending, expelling, or referring low-performing students to the juvenile justice system.<sup>76</sup> James

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72. See Hirschfield, *supra* note 65, at 85; Welch & Payne, *supra* note 27, at 26–27.

73. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.)

74. See *Testing: Frequently Asked Questions*, U.S. DEP'T OF EDUC. at <http://www2.ed.gov/nclb/accountability/ayp/testing-faq.html> (last modified on Nov. 17, 2014). See also Monahan & Torres, *supra* note 70, at 5.

75. Monahan & Torres, *supra* note 70, at 5.

76. See, e.g., ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 28–33 (2010), available at [http://b3cdn.net/advancement/d05cb2181a4545db07\\_r2im6caqe.pdf](http://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf); KUPCHIK, *supra* note 68, at 28 (discussing that the NCLBA puts pressure on schools to push out low performing students); Linda Darling-Hammond, *Race, Inequality and Educational Accountability: The Irony of ‘No Child Left Behind’*, 10 RACE, ETHNICITY & EDUC. 245, 252–55 (2007); Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL’Y 585, 602–03 (2009); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 969–70 (2004); see also Jason P.

Ryan observes, “the temptation to exclude low-performing students, enhanced by the NCLBA, can hardly be denied: One less student performing below the proficiency level increases the overall percentage of students who have hit that benchmark.”<sup>77</sup> Empirical evidence provides support for these theories. For example, one study of Texas’s educational accountability program, which became a model for the NCLBA, found that test scores were boosted in part by finding ways to keep students out of the testing count and excluding thousands of other students from school.<sup>78</sup> Empirical studies examining accountability programs in other states find similar results.<sup>79</sup>

The incentive that the NCLBA creates to push low-performing students out is bolstered by the fact that the NCLBA does not have the same accountability standards for graduation rates.<sup>80</sup> Data on graduation rates since the NCLBA was passed in 2002 are telling. Focusing on only the one hundred largest school districts in the United States, which serve about 40 percent of the nation’s African-American, Latino, and Native American students, graduation rates have plummeted since 2002.<sup>81</sup> Specifically, from 2002 to 2006, seventy-three of those school districts reported decreases in graduation rates, and seventeen of those districts reported decreases greater than 10 percent.<sup>82</sup> Further, since the NCLBA was passed, the overall graduation rates of these districts are low. In 2006, only ten of those one hundred districts graduated 80 percent of their students; sixty-seven of them had a graduation rate of 66 percent or lower; and in twenty-five of those districts, less than half of their students graduated.<sup>83</sup>

### 3. THE DECLINE OF STUDENTS’ FOURTH AMENDMENT RIGHTS

Over the last few decades, students’ Fourth Amendment rights have steadily declined as courts have provided school officials with

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Nance, *Random, Suspicionless Searches of Students’ Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 397 (2013).

77. Ryan, *supra* note 76, at 969; *see also* Darling-Hammond, *supra* note 76, at 252 (“Perhaps the most adverse, unintended consequence of NCLB’s accountability strategy is that it undermines safety nets for struggling students rather than expanding them. The accountability provisions of the Act actually create large incentives for schools that can to keep such students out and to hold back or push out students who are not doing well.”).

78. Darling-Hammond, *supra* note 76, at 253.

79. *Id.* at 252–55.

80. Ryan, *supra* note 76, at 970.

81. ADVANCEMENT PROJECT, *supra* note 76, at 30.

82. *Id.*

83. *Id.*

constitutional leeway to maintain order and discipline within schools.<sup>84</sup> This movement in the law has made it easier for school officials to rely on intense surveillance measures in their schools without fear of legal challenges. To conduct a search, school officials are not required to obtain a warrant, show probable cause, or have an individualized suspicion that a student participated in wrongdoing.<sup>85</sup> As a result, school officials are permitted to invoke a host of suspicionless search practices in schools. For example, courts routinely uphold the use of metal detectors<sup>86</sup> and random searches through lockers,<sup>87</sup> and—if this issue were presented to a court—most likely would uphold the use of surveillance cameras in the hallways and public rooms through the school.<sup>88</sup> Further, no law prohibits school officials from using these strict security measures in combination even when their cumulative use creates an intense environment that may not be conducive to a healthy learning climate.<sup>89</sup>

#### 4. FEDERAL AND STATE POLICIES SUPPORT A PUNITIVE APPROACH

Finally, the increase of strict security measures may be due, at least in part, to broad government support for “tough on crime” policies. Under a theory developed by scholar Jonathon Simon, federal and state governments have played a centralized role in education that once

84. See *infra* Nance, *supra* note 10, at 7–12; Part III; see also Nance, *supra* note 76, at 376, 391–94; James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1415 (2000) (stating that “the Court’s decisions regarding student searches rest on the value-laden view that maintaining discipline is necessary to preserve the educational process of schools”).

85. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653–54 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985).

86. See, e.g., *Hough v. Shakopee Pub. Sch.*, 608 F. Supp. 2d 1087, 1104 (D. Minn. 2009); *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 886–87 (Cal. Ct. App. 1998); *State v. J.A.*, 679 So. 2d 316, 319–20 (Fla. Dist. Ct. App. 1996); *In re F.B.*, 726 A.2d 361, 366 (Pa. 1999).

87. See, e.g., *State v. Jones*, 666 N.W.2d 142, 150 (Iowa 2003); *In re Patrick Y.*, 746 A.2d 405, 414–15 (Md. 2000); *In re Isiah B.*, 176 Wis. 2d 639, 500 N.W.2d 637, 641 (1993). However, there is a substantial disagreement among courts regarding whether students possess an expectation of privacy in their lockers. See KIM ET AL., *supra* note 17, 115–16; Barry C. Feld, *T.L.O. and Redding’s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 933–37 (2011); Nance, *supra* note 76, at 411–12 and accompanying notes.

88. See, e.g., *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991) (“Videotaping of suspects in public places, such as banks, does not violate the [F]ourth [A]mendment . . .”). However, courts do not permit surreptitious video surveillance in certain locations such as student lockers rooms or bathrooms. See *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 499 (6th Cir. 2008) (holding that surreptitious video surveillance of a student locker room violates the Fourth Amendment).

89. See *infra* Part III.B.2.

belonged to local governments and have recast disruptive students as criminals who must be reformed through punitive measures.<sup>90</sup> Zero-tolerance policies are a good example of this mindset.<sup>91</sup> Under the Federal Gun-Free Schools Act, states receiving federal education funds are required to have a state law that compels schools to expel students for at least one year for bringing a firearm to school.<sup>92</sup> Although this law recently has softened somewhat by permitting superintendents to modify the expulsion requirement on a case-by-case basis,<sup>93</sup> many states and schools have adopted laws and policies modeled after the Federal Gun-Free Schools Act by creating strict rules that impose predetermined consequences for certain acts, irrespective of the surrounding circumstances or intent of the students.<sup>94</sup> These zero-tolerance policies have pushed more students out of schools and have increased referrals to the juvenile justice system.<sup>95</sup>

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90. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 215–16, 218–21 (2007); Hirschfeld, *supra* note 65, at 87. *But see* Welch & Payne, *supra* note 27, at 27 (suggesting that the “governing through crime” orientation . . . does not address the changing nature of discipline that is not a result of federal or state initiatives because much discipline continues to originate with individual teachers and principals”).

91. So-called “zero-tolerance policies” refer to policies that require school officials to issue severe punishments, such as suspension or expulsion, for both serious and minor infractions. See Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 1063, 1063 (Carolyn M. Evertson & Carol S. Weinstein eds., 2006).

92. See 20 U.S.C. § 7151(b)(1) (2012).

93. See *id.* See also *Federal Law on Guns in Schools*, LAW CENTER TO PREVENT GUN VIOLENCE (May 21, 2012), <http://smartgunlaws.org/federal-law-on-guns-in-schools/>.

94. See Klehr, *supra* note 76, at 589.

95. *Id.* at 590. Barry Feld explains that schools that adopt zero-tolerance policies towards trivial violations adopt the “broken window” theory that failure to address minor infractions will lead to more serious disruption. See Feld, *supra* note 87, at 886–87. As a result, schools often suspend, expel, or refer students to the juvenile justice system for minor infractions such as disorderly conduct, cursing, fighting, or bringing nail clippers, pocket knives, scissors, or plastic knives to campus. See *id.* Scholars and policymakers have strongly criticized zero tolerance policies, demonstrating that they are ineffective and counterproductive. See, e.g., Am. Psychol. Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 859–60 (2008). Very recently, the U.S. Department of Education’s Office of Civil Rights issued a resource guide for improving school climate and discipline, suggesting that schools employ a tiered approach to discipline and reminding schools that the Federal Gun-Free Schools Act “does not require that states or schools implement wide-ranging zero-tolerance policies or rely on exclusionary discipline” for acts that do not involve firearms. See U.S. DEP’T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 15 (2014) [hereinafter GUIDING PRINCIPLES], available at <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>.

Additional evidence of government support for a punitive approach to educating children includes programs that have provided schools with millions of dollars for strict security measures. For example, the U.S. Department of Justice's Community Oriented Policing Services (COPS) initiatives allowed schools to request up to \$500,000 to support half the cost of their security programs.<sup>96</sup> Schools used this money to purchase metal detectors, locks, lighting, to hire security and law enforcement officers, and to fund other deterrent measures.<sup>97</sup> Since 1995, COPS has provided schools with approximately \$913 million for security measures.<sup>98</sup> In another federal program, created by the Safe and Drug-Free Schools and Communities Act,<sup>99</sup> Congress authorized money for schools to acquire metal detectors, electronic locks, surveillance cameras, or other related equipment and technologies.<sup>100</sup> Further, several states have programs that provide money to schools for strict security measures,<sup>101</sup> and the Newtown tragedy has prompted other state

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96. See OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, 2011 SECURE OUR SCHOOLS PROGRAM 1 (2011), available at <http://www.cops.usdoj.gov/pdf/2011AwardDocs/CSPP-SOS-CHP/SOSMethodology.pdf>.

97. *Id.*

98. See OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, FACT SHEET: SECURE OUR SCHOOLS (Sept. 2011), available at <http://www.cops.usdoj.gov/pdf/2011AwardDocs/CSPP-SOS-CHP/2011-SOS-Post-FactSheet.pdf>.

99. 20 U.S.C. §§ 7101–65 (2006).

100. 20 U.S.C. § 7115(b)(2)(E)(ii) (2006). Notably, the grant application procedures make clear that the Department of Education views school security equipment as only one component of an overall strategy designed to create a safe and healthy learning environment. See U.S. DEP'T OF EDUC. ET AL., SAFE SCHOOLS/HEALTHY STUDENTS: INFORMATION AND APPLICATION PROCEDURES FOR FISCAL YEAR 2009, at 22 (2009), available at <http://www2.ed.gov/programs/dvpsafeschools/2009-1841.pdf>. In the 2009 application, no more than 10 percent of the grant could be used to fund security equipment. *Id.* The remainder of the grant must be used for programs designed to address student safety and health holistically by providing behavioral, social, and emotional support; mental health services; early childhood social and emotional learning programs; and alcohol, tobacco, and other drug prevention activities for students, their families, and the community. *Id.* at 22–24.

101. See ALA. CODE § 41-15B-2.2(b)(2)(b.1.) (2) (2013) (“School Safety Enhancement Programs eligible for grants shall be designed to prevent or reduce violence in the schools . . . . The programs shall relate to one or more of the following: . . . (v) Safety plans involving the use of metal detectors, other security devices, uniforms, school safety resource officers, or other personnel employed to provide a safe school environment.”); GA. CODE ANN. § 20-2-1185(b) (2012) (“A public school may request funding assistance from the state for the installation of safety equipment including, but not limited to, video surveillance cameras, metal detectors, and other similar security devices.”); 24 PA. CONS. STAT. ANN. § 13-1302-A(c)(9) (2013) (“[T]he office is authorized to make targeted grants to school entities to fund programs which address school violence, including . . . metal detectors, protective lighting, surveillance equipment . . . and training in the use of security-related technology.”); S.C. CODE ANN. § 59-66-30 (2013) (“Using funds appropriated by the General Assembly, each public

legislatures to pass or consider passing legislation that will provide additional funding to schools for school security.<sup>102</sup> These federal and state initiatives often are promoted by powerful networks of criminal justice professionals who serve as law enforcement officers, private security officers, school security consultants, and vendors of school security equipment.<sup>103</sup> Lamentably, these funds could be better used to support alternative, more effective programs that reduce school crime and do not harm the learning environment.<sup>104</sup>

### B. Why Disparities Exist

The empirical evidence indicates that minority and low-income students are disproportionately subjected to strict security measures.<sup>105</sup> No doubt, some of the policies described above contribute to these disparities, such as the political appeal of a “tough on crime” approach in inner-city schools, money from state and federal governments for strict security measures, and school accountability policies that motivate school officials to push low-performing students out of schools.

Pedro Noguera, a scholar who has studied the plight of inner-city schools and youth for decades, offers further insight into why schools serving disadvantaged students tend to adopt strict security measures. He observes that schools traditionally carry out three important roles: (1) to sort children according to their abilities and aptitudes and place them on paths that will affect their future occupations and societal roles as adults; (2) to socialize children by teaching them norms and values that are central to our society and social order; and (3) to provide a custodial function by protecting and caring for children while they are away from their parents.<sup>106</sup> According to Noguera, schools cannot accomplish the

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middle, junior high, and high school in the State must be equipped with one hand-held metal detector.”).

102. See *supra* note 71 and accompanying text.

103. See Paul J. Hirschfield & Katarzyna Celinska, *Beyond Fear: Sociological Perspectives on the Criminalization of School Discipline*, 5 SOC. COMPASS 1, 6 (2011).

104. See Nance, *supra* note 10, at 48–56. See also Hirschfield & Celinska, *supra* note 103, at 6. Indeed, as Paul Hirschfield and Katarzyna Celinska point out, the billions of tax dollars spent on mass incarceration deprives schools of needed funds to hire more qualified teachers, better counselors and mental health services, and alternative means to improve student behavior. *Id.*

105. See *supra* Part I.

106. Noguera, *supra* note 66, at 344. As one might imagine, exactly what role public schools do and should play has been the subject of much debate. See, e.g., Betsy Levin, *Educating Youth for Citizenship: The Conflict between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986) (“The mission of schools as transmitters of social, moral, and political values makes it inevitable that disputes will arise over which values are to be inculcated and who is authorized to make these decisions. There is no consensus, for example, on whether schools should emphasize a

first two functions without maintaining order and control.<sup>107</sup> However, while sorting children according to their presumed aptitudes and abilities, children soon learn where they stand and develop certain expectations about their future occupations and societal roles.<sup>108</sup> They begin to comprehend that some of them will reap the benefits of an education and some will not. Those students who will benefit will acquire useful knowledge and skills, become admitted to college, have access to well-paying jobs, and assume leadership roles in private and public institutions.<sup>109</sup> Students also understand that some of them will achieve at least minimum economic security.<sup>110</sup> But students also understand that still others will not be admitted to college and will end up with dead-end jobs, struggle to meet basic needs with a poverty-level income their entire lives, and become subordinated.<sup>111</sup> Students that comprehend that the educational process is not working for them—that they most likely will not enter college or have a promising career—have very few incentives to comply with school rules.<sup>112</sup> Those students often cause the most trouble in schools.<sup>113</sup> They misbehave out of frustration or embarrassment because they are behind academically and are not able to meet grade-level expectations.<sup>114</sup> They recoil from the traditional educational system; challenge the mandatory attendance policies; disrupt classroom activities; and find other illegitimate ways to establish their

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common language, history, and culture promoting assimilationist and national norms, or emphasize pluralism and diversity.”). For an interesting discussion of two competing missions of schools, see Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 64–69 (1996) (describing two different philosophies for the mission of public schools: (1) “social reconstruction,” where the school “is an institution where power is necessary only to facilitate the child in his attempts to reconstruct a new social order” and (2) “social reproduction,” where the school’s mission is to “proclaim the child’s place in society by inculcating society’s traditions and habits”).

107. Noguera, *supra* note 66, at 344; *see also* Levin, *supra* note 106, at 1648–49.

108. Noguera, *supra* note 66, at 344.

109. *Id.* at 343.

110. *Id.* at 344.

111. *Id.*

112. *Id.* *See also* MATTHEW P. STEINBERG ET AL., STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND SCHOOL SOCIAL ORGANIZATION 27–31 (2011), *available at* <http://ccsr.uchicago.edu/sites/default/files/publications/SAFETY%20IN%20CPS.pdf> (finding that the academic skills of the students are strongly related to school safety); PAUL WILLIS, LEARNING TO LABOR: HOW WORKING CLASS KIDS GET WORKING CLASS JOBS 72 (1977) (arguing that for students who believe that knowledge and credentials acquired in schools are irrelevant, “the teachers’ authority becomes increasingly the random one of the prison guard, not the necessary one of the pedagogue”).

113. Noguera, *supra* note 66, at 343–44.

114. *Id.* at 342.

self-worth, identity, and status among their peers.<sup>115</sup> Further, students who suffer from abusive home environments, have language barriers, have health problems, are neglected, frequently move from school to school, or are harassed or bullied by other students also tend to misbehave and be disruptive.<sup>116</sup> Noguera argues that ultimately, then, it is the dire “needs of students and the inability of the schools to meet those needs” that causes students to be disruptive and dangerous at school.<sup>117</sup>

School officials generally understand that students on dead-end educational paths or those who have the greatest needs typically tend to be more disruptive at school.<sup>118</sup> However, rather than focusing on meeting students’ challenging needs; finding ways to keep students focused on learning or being intellectually engaged; preventing students from becoming restless, bored, or falling behind academically; inspiring them to understand that the educational system can and will work for them; or providing appropriate levels of nurturing and kindness, schools too often become fixated on maintaining order and discipline—particularly because of the recent, highly publicized incidents of school

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115. See STEINBERG, ET AL., *supra* note 112, at 46 (observing that low-achieving students are less likely to be engaged in school, more likely to be frustrated by their performance, more likely to misbehave, and less likely to respond appropriately to punishment).

116. See Noguera, *supra* note 66, at 342.

117. *Id.* Of course, these dire needs also underscore the reasons why schools that serve high concentrations of students who live in poverty and in unstable environments require more resources to properly educate. See, e.g., GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 29–30 (2006), available at <http://files.eric.ed.gov/fulltext/ED500822.pdf>. However, schools serving disadvantaged students most often have fewer resources to serve students with greater needs. See DARLING-HAMMOND, *supra* note 17, at 27–65 (reporting that disadvantaged students often receive unequal access to qualified teachers, lack access to high quality curriculum, and are subject to dysfunctional learning environments); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. (forthcoming 2014) (maintaining that majority-minority schools often have limited access to adequate resources), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235771](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235771); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1547 (2003) (finding that segregated black learning environments offer fewer resources to educate students); Gary Orfield, *The Growth of Segregation: African-Americans, Latinos, and Unequal Education*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 53, 67–69 (Gary Orfield & Susan E. Eaton, eds. 1996) (observing that low-income and minority students typically have less qualified teachers and fewer instructional resources and lamenting that “disadvantaged students face more barriers and receive less reinforcement to succeed in school”).

118. Noguera, *supra* note 66, at 344.



violence.<sup>119</sup> Thus, schools serving large numbers of academically unsuccessful students, many of whom attend inner-city schools and are low-income or minority students, often use extreme forms of discipline, punishment, and control that include relying on strict security measures.<sup>120</sup> Noguera observes:

Such schools often operate more like prisons than schools. They are more likely to rely on guards, metal detectors, and surveillance cameras to monitor and control students, restrict access to bathrooms, and attempt to regiment behavior by adopting an assortment of rules and restrictions. . . . In any educational setting where children are regarded as academically deficient, and where the adults view large numbers of them as potentially bad or even dangerous, the fixation on control tends to override all other educational objectives and concerns.<sup>121</sup>

The empirical findings discussed here provide support for Noguera's theory. They indicate that large, urban schools serving large percentages of historically disadvantaged student populations are more likely to create intense surveillance environments than other schools.<sup>122</sup>

### *C. Educational and Social Harms*

Instead of relying on strict security measures, many educational and sociological considerations suggest that schools should adopt alternative methods to reduce violence and school crime. One very important consideration is that the use of strict security measures in schools contributes significantly to the school-to-prison pipeline, which disproportionately affects students of color. The school-to-prison pipeline is a phenomenon that has been extensively discussed and criticized in the literature.<sup>123</sup> It refers to the practice of funneling students directly into the juvenile justice system or suspending or expelling students, thereby creating conditions under which students are more likely to be arrested

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119. *Id.* at 342, 345, 348. Again, this highlights the point that educators serving disadvantaged students require more resources than they currently have to help them address students' acute needs in more productive ways.

120. *Id.* at 345.

121. *Id.*

122. *See supra* Part I.

123. *See, e.g.,* Feld, *supra* note 87, at 884–95; Kim, *supra* note 9; Lisa Thureau & Joanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977 (2010).

and sent to prison.<sup>124</sup> When strict security measures are used in conjunction with zero-tolerance policies, students discovered carrying contraband automatically are suspended, expelled, or arrested—regardless of students’ motives.<sup>125</sup> The result is that too many students spend more time out of school or are funneled into the juvenile justice system, neither of which is in those students’ best interests.<sup>126</sup> Spending more time away from school causes students to fall behind academically, stigmatizes the suspended or expelled students, and precludes access to school resources that might address those students’ needs.<sup>127</sup> Unfortunately, such consequences may cause the students to continue their disruptive behavior because they become frustrated, embarrassed, or simply give up on the education system.<sup>128</sup> The long-term consequences of exclusionary discipline practices are devastating to students. Several empirical studies show a correlation between exclusionary discipline policies and “school avoidance, diminished educational engagement, decreased academic achievement, increased behavioral problems, increased likelihood of dropping out, substance abuse, and involvement with juvenile justice systems.”<sup>129</sup>

Law enforcement referrals and arrests can be even more detrimental to students’ futures. Catherine Kim, Daniel Losen, and Damon Hewitt report that an arrest of a student “nearly doubles the odds of dropping out of school and, if coupled with a court appearance, nearly quadruples the odds of dropout; lowers standardized-test scores; reduces future employment prospects; and increases the likelihood of future interaction with the criminal justice system.”<sup>130</sup> They further report that student arrests can have a significant negative impact on other students and on the larger community. They continue:

Classmates who witness a child being arrested for a minor infraction may develop negative views or distrust of law enforcement. Juvenile-court dockets and detention centers become crowded with cases that could be handled more efficiently and more effectively by school principals. And the community pays the costs associated with an increase in

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124. ADVANCEMENT PROJECT ET AL., *supra* note 12, at 2.

125. *See supra* Part II.A.4.

126. KIM ET AL., *supra* note 17, at 112–13. *See also* DEAR COLLEAGUE LETTER, *supra* note 30, at 4.

127. Noguera, *supra* note 66, at 345–46. *See also* DEAR COLLEAGUE LETTER, *supra* note 30, at 4.

128. Noguera, *supra* note 66, at 342, 345–46.

129. DEAR COLLEAGUE LETTER, *supra* note 30, at 4–5.

130. KIM ET AL., *supra* note 17, at 113.

dropouts, crime, and unemployment, and, in extreme cases, the incarceration of children.<sup>131</sup>

Apart from contributing to the school-to-prison pipeline, strict security measures may be harmful in and of themselves because they may contribute to poor learning climates. Most educators understand that trust is a fundamental component to the teaching and learning process.<sup>132</sup> Indeed, students learn best when they are treated with kindness and respect, have positive self-esteem, and have positive relationships with their classmates and their teachers.<sup>133</sup> Educational scholar Linda Darling-Hammond observes that successful schools, especially in challenging environments, have “strong teaching faculties who work in organizational structures that create more coherence and a ‘communal’ orientation, in which staff see themselves as part of a family and work together to create a caring environment.”<sup>134</sup> Yet many scholars argue that strict security measures undermine trust and send a negative signal to students—that they are dangerous and prone to commit illegal, violent acts.<sup>135</sup> This message, scholars fear, may sour students’ attitudes towards school and school officials.<sup>136</sup> Martin Gardner explained the problem in the following way:

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131. *Id.*

132. See David Domenici & James Forman Jr., *What It Takes to Transform a School inside a Juvenile Justice Facility: The Story of the Maya Angelou Academy*, in JUSTICE FOR KIDS, *supra* note 17, at 283, 289 (“High achieving schools are places where a culture of trust dominates.”); Roger D. Goddard, Megan Tschannen-Moran & Wayne K. Hoy, *A Multilevel Examination of the Distribution and Effects of Teacher Trust in Students and Parents in Urban Elementary Schools*, 102 ELEM. SCH. J. 3, 3–4 (2001) (observing that trust is an important element of the learning process); Megan Tschannen-Moran & Wayne K. Hoy, *A Multidisciplinary Analysis of the Nature, Meaning, and Measurement of Trust*, 70 REV. EDUC. RES. 547, 547 (2000).

133. See Donna Lieberman, N.Y. Civil Liberties Union, Testimony before the New York City Council Committee on Education and Public Safety Regarding the Impact of Over-Policing in Schools on Students’ Education and Privacy Rights, (June 14, 2006), available at <http://www.nyclu.org/content/over-policing-schools-students-education-and-privacy-rights> (last visited Jan. 28, 2013).

134. DARLING-HAMMOND, *supra* note 17, at 65.

135. See, e.g., Beger, *supra* note 67, at 340; Noguera, *supra* note 62, at 190–91.

136. See Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 943 (1988); Hirschfield, *supra* note 63, at 46 (explaining that strict security measures produce barriers between students and their schools and are “a frequent cause of disunity or discord within the school community”); Jen Weiss, *Scan This: Examining Student Resistance to School Surveillance*, in SCHOOLS UNDER SURVEILLANCE, *supra* note 63, at 213, 227–28 (concluding after a qualitative study that strict security measures caused students to distrust school authorities).

In a very real sense, each and every student stands accused, has become a “suspect” in generalized school searches, especially given the special relationship of trust which supposedly exists between student and teacher. Surely a student even indirectly accused by his teacher as a possible thief or drug user suffers a greater indignity and loss of self-esteem by being subjected to a generalized search than does an airline passenger passing through a metal detector or a driver [through] a checkpoint. Far from “morally neutral,” school searches are instead particularly rife with moral overtones.<sup>137</sup>

Along similar lines, Donna Liebermann, Executive Director of the New York Civil Liberties Union, testified that strict security measures do not contribute to environments that are conducive to educational and social growth.<sup>138</sup> Rather, they “foster environments where children perceive that they are being treated as criminals; where they are diminished by such perceptions; and where they, consequentially, cultivate negative attitudes toward their schools.”<sup>139</sup> Another teacher summed up her experience with strict security measures as follows: “The medium is the message. And the message that [strict security measures] give[] out is that we are afraid of our students.”<sup>140</sup>

Indeed, scholar Tom Tyler has studied and written extensively about the social costs in communities subject to high surveillance and the threat of government punishment. Tyler believes that intense surveillance environments harm the social climate because their use implies distrust, decreasing people’s ability to feel positively about themselves and the organizations to which they belong.<sup>141</sup> Further, Tyler observes that individuals subject to intense surveillance climates may also perceive such intrusions as unfair, causing them to become angry and less willing

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137. Gardner, *supra* note 136, at 943. In addition, it should be emphasized that students are required to submit to searches against their will because they are subject to mandatory school attendance policies. Airline passengers, on the other hand, decide voluntarily to board a plane.

138. See Lieberman, *supra* note 133.

139. *Id.*

140. Carol Ascher, *Gaining Control of Violence in the Schools: A View from the Field*, 100 ERIC DIGEST 4 (1994), available at <http://www.eric.ed.gov/PDFS/ED377256.pdf>.

141. See Tom R. Tyler & Lindsay E. Rankin, *Legal Socialization and Delinquency*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 353, 361 (Barry C. Feld & Donna M. Bishop eds., 2012); see also David Kipnis, *Trust & Technology*, in TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY & RESEARCH 39, 46–47 (Roderick M. Kramer & Tom R. Tyler, eds. 1996).

to comply with the law.<sup>142</sup> Thus, regardless of whether intense surveillance works in the short term, its use introduces other unintended social costs such as distrust and paranoia, which have a deleterious effect on individuals' willingness to cooperate and participate in the system in the long term.<sup>143</sup>

Apart from their negative effect on the learning climate, there are serious questions regarding whether strict security measures actually promote school safety or only provide a false sense of security.<sup>144</sup> For example, Abigail Hankin, Marci Hertz, and Thomas Simon recently conducted an extensive review of the literature regarding the impact of metal detector use in schools.<sup>145</sup> They determined that there was "insufficient evidence to draw a conclusion about the potential beneficial effect of metal detector use on student and staff behavior or perceptions."<sup>146</sup> They further acknowledged that much of the research shows that the use of metal detectors correlates with "lower levels of students' perceptions of security in school and higher levels of school disorder."<sup>147</sup> Interestingly, many scholars maintain that strict security

142. See Tyler & Rankin, *supra* note 141, at 361; Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC. REV. 513, 514 (2003).

143. See Tyler & Rankin, *supra* note 141, at 361–62.

144. See ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 8 (2005), available at <http://www.advancementproject.org/sites/default/files/publications/FINALEOLrep.pdf> (arguing that strict security measures may "produce a perception of safety, [but] there is little or no evidence that they create safer learning environments or change disruptive behaviors"); Ascher, *supra* note 140, at 4 ("Rather than offering reassurance, metal detectors and other mechanical devices, as well as security forces, are seen as providing a false sense of safety, if not a harsh symbol of the failure to create safe schools."); Richard E. Redding & Sarah M. Shalf, *The Legal Context of School Violence: The Effectiveness of Federal, State, and Local Law Enforcement Efforts to Reduce Gun Violence in Schools*, 23 LAW & POL'Y 297, 319 (2001) ("It is hard to find anything better than anecdotal evidence" to demonstrate that strict security measures such as metal detectors and guards reduce violence in schools.). Research on the effectiveness of school security measures is extremely limited, especially causal research demonstrating the effects of strict security measures. See Mayer & Leone, *supra* note 68, at 12.

145. Abigail Hankin, Marci Hertz & Thomas Simon, *Impacts of Metal Detector Use in Schools: Insights from 15 Years of Research*, 81 J. SCH. HEALTH 100, 105 (2011).

146. *Id.*

147. *Id.* See also John Blosnich & Robert Bossarte, *Low-Level Violence in Schools: Is There an Association between School Safety Measures and Peer Victimization?*, 81 J. SCH. HEALTH 107, 107, 111–12 (2011) (finding that school security measures did not reduce violent behaviors related to bullying); Matthew J. Mayer & Peter Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT OF CHILD. 333, 349–52 (1999) (concluding that student victimization and school disorder were higher in schools using strict security measures). *But see* Centers for Disease Control and Prevention, *Violence-Related Attitudes and Behaviors of High School Students—New York City*,

measures may actually hamper school officials' efforts to promote safe environments because their use may engender mistrust and alienate students, leading to more disorder in schools.<sup>148</sup>

Furthermore, one must not forget that strict security measures cannot and will not prevent serious acts of violence from occurring on school grounds, which is the reason why these measures only provide an illusory sense of security. Crystal Garcia reports that a mere 32 percent of the school safety officers that she interviewed believed that strict security measures effectively prevented violence in their schools.<sup>149</sup> The atrocity that took place in Littleton, Colorado, occurred at a school that

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1992, 42 MORBIDITY & MORTALITY WKLY. REP. 773 (1993), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00022011.htm> (reporting that students who attended schools using metal detectors were less likely to carry a weapon inside a school (7.8 percent versus 13.6 percent), but the use of metal detectors did not reduce school violence); Renee Wilson-Brewer & Howard Spivak, *Violence Prevention in Schools and Other Community Settings: The Pediatrician as Initiator, Educator, Collaborator, and Advocate*, 94 PEDIATRICS 623, 626–27 (1994) (stating that one school system in New York City reported that after the school security staff began using hand-held metal detectors to conduct unannounced lobby searches of students at the beginning of the school day, weapon-related incidents decreased in thirteen of fifteen schools); Rachana Bhatt & Tomek Davis, *The Impact of Random Metal Detector Searches on School Violence, Contraband Possession, and Perceptions of Safety* 22–23 (Dec. 2012) (unpublished manuscript), available at <https://www.yumpu.com/en/document/view/11524996/the-impact-of-random-metal-detector-searches-on-georgia-state-> (reporting that, when comparing two school districts in Florida, the district that used random metal detector searches reduced the probability of a student bringing a weapon to school).

148. See KUPCHIK, *supra* note 68, at 7–9 (arguing that punitive measures increase rather than decrease student misbehavior). Ascher, *supra* note 140, at 5 (arguing that strict security measures “increase, rather than alleviate, tension in schools”); Beger, *supra* note 67, at 340 (explaining that “aggressive security measures produce alienation and mistrust among students”); Michael Easterbrook, *Taking Aim at Violence*, 32 PSYCHOL. TODAY 52, 56 (1999) (arguing that strict security measures alienate students); Clifford H. Edwards, *Student Violence and the Moral Dimensions of Education*, 38 PSYCHOL. SCHS. 249, 250 (2001) (observing that “intrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence”); Mayer & Leone, *supra* note 147, at 350, 352 (finding that student disorder and victimization were higher in schools using strict security measures and arguing that “less attention should be paid to running schools in an overly restrictive manner and rather, schools should concentrate more on communicating individual responsibility to students”); Noguera, *supra* note 62, at 190–91 (observing that a “get tough” approach can hamper school officials' efforts to create safe environments because coercive measures create mistrust and resistance among the student body); Noguera, *supra* note 66, at 345 (“When children are presumed to be wild, uncontrollable, and potentially dangerous, it is not surprising that antagonistic relations with the adults who are assigned to control them develop.”).

149. See Crystal A. Garcia, *School Safety Technology in America: Current Use and Perceived Effectiveness*, 14 CRIM. JUST. POL'Y REV. 30, 40 (2003).

had metal detectors and armed guards.<sup>150</sup> In 2005, a student shot another student in a Red Lake, Minnesota, high school that had metal detectors, perimeter fencing, and guards.<sup>151</sup> Ronald Stephens, an executive director of the National School Safety Center, points out that strict security measures are “more of a comfort” because “rule-followers will follow the rules[, and r]ule-breakers will break the rules.”<sup>152</sup> Indeed, many scholars and commentators report that students know how to bring weapons into schools without being discovered by metal detectors.<sup>153</sup>

But perhaps most importantly, strict security measures do not address the underlying problems associated with school crime and thus do not support the long-term solutions needed to effectively prevent school violence.<sup>154</sup> At a recent conference titled “Safe and Secure Schools: Perspectives after Newtown,” Dr. Maurice Elias reminded us that “[o]ur children cannot learn, and our teachers cannot teach, in schools that are unsafe, unsupportive, uncaring, uncivil or lacking in intellectual challenge. . . . These are the ultimate sources of school security to children and in ways that are more lasting than metal detectors.”<sup>155</sup> In fact, two comprehensive studies on school safety both independently concluded that one of the most important components—if not the most important component—for establishing safe, secure schools was not strict security measures but developing positive relationships among members of the school community. The first study, conducted by the U.S. Secret Service and the Department of Education,<sup>156</sup> examined

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150. See Marcus Wright, *Experts Say Intrusive Security at Public Schools Reproduces Social Inequality*, MICH. CITIZEN (Nov. 15, 2012), <http://michigancitizen.com/dps-eea-tighten-security/>.

151. Sara Neufeld & Sumathi Reddy, *Violent Week Renews Metal Detector Debate*, BALTIMORE SUN, Oct. 14, 2006, at 1A, available at [http://articles.baltimoresun.com/2006-10-14/news/0610140131\\_1\\_metal-detectors-school-students-park-elementary-school](http://articles.baltimoresun.com/2006-10-14/news/0610140131_1_metal-detectors-school-students-park-elementary-school).

152. *Id.*

153. See, e.g., Ascher, *supra* note 140, at 5 (“[T]hose few students intent on bringing in weapons are inevitably a step ahead of the security devices, which means that enforcement activities alone cannot create a safe school.”); Noguera, *supra* note 62, at 193 (reporting that most students he spoke to in his visits to urban schools knew how to bring a weapon into schools using strict security measures without being detected); Neufeld & Reddy, *supra* note 151 (reporting that students interviewed stated that it was “easy to get around” metal detectors).

154. See KUPCHIK, *supra* note 68, at 6 (observing that the underlying issues for student misbehavior often are not addressed by schools).

155. Joe Green, *South Jersey Schools Discuss Safety Following ‘Perspectives after Newtown’*, NJ.COM (Jan. 23, 2013, 8:12 AM), [http://www.nj.com/gloucester-county/index.ssf/2013/01/south\\_jersey\\_schools\\_to\\_talk\\_s.html](http://www.nj.com/gloucester-county/index.ssf/2013/01/south_jersey_schools_to_talk_s.html) (internal quotation marks omitted).

156. See ROBERT A. FEIN ET AL., U.S. SECRET SERV. & U.S. DEP’T OF EDUC., *THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES* (2002), available at <http://www.secretservice.gov/>

thirty-seven incidents of school violence that occurred in U.S. schools from 1974 to 2000.<sup>157</sup> The joint report concluded:

In educational settings that support climates of safety, adults and students respect each other. A safe school environment offers positive personal role models in its faculty. It provides a place for open discussion where diversity and differences are respected; communication between adults and students is encouraged and supported; and conflict is managed and mediated constructively.<sup>158</sup>

The second study, conducted by Matthew Steinberg, Elaine Allensworth, and David Johnson in the Chicago Public School System,<sup>159</sup> found that even in schools with large populations of students from high crime and high poverty areas, “it is the quality of relationships between staff and students and between staff and parents that most strongly defines safe schools.”<sup>160</sup> Unfortunately, strict security measures may even hinder the development of strong relationships among members of the school community because they forge barriers of adversity and mistrust.<sup>161</sup> Rather than addressing the underlying issues, investing millions of dollars in strict security measures diverts scarce resources away from other programs and strategies that have proven to effectively reduce school violence and enhance—not degrade—the learning environment.<sup>162</sup>

The fact that schools with larger percentages of minority students appear to be more inclined to rely on strict security measures is

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ntac/ssi\_guide.pdf. This report was brought again to the forefront by the Obama administration after the Newtown shootings. See THE WHITE HOUSE, NOW IS THE TIME 12–13 (2013), available at [http://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_full.pdf](http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf).

157. See FEIN ET AL., *supra* note 156, at 4.

158. *Id.* at 11. See also BARBARA FEDDERS, JASON LANGBERG & JENNIFER STORY, SCHOOL SAFETY IN NORTH CAROLINA: REALITIES, RECOMMENDATIONS & RESOURCES 6 (2013), available at [http://www.legalaidnc.org/public/learn/media\\_releases/2013\\_MediaReleases/school-safety-in-north-carolina.pdf](http://www.legalaidnc.org/public/learn/media_releases/2013_MediaReleases/school-safety-in-north-carolina.pdf) (“Positive relationships among students, families, teachers, administrators, and staff are the most effective tools in creating a safe school environment.”).

159. STEINBERG ET AL., *supra* note 112, at 15.

160. *Id.* at 1.

161. See, e.g., Beger, *supra* note 67, at 340; Noguera, *supra* note 62, at 190–91.

162. See, e.g., Hankin, Hertz & Simon, *supra* note 145, at 105 (“Metal detector programs are expensive, and funds spent on metal detectors would not be available for other programs and strategies that have been shown to be effective at reducing youth risk for violence and promoting pro-social behaviors.”); Nance, *supra* note 10, at 48–55 (describing alternative methods that effectively reduce violence without degrading the learning environment).



particularly disturbing.<sup>163</sup> The disproportionate use of strict security measures on minorities is fundamentally unfair, exacerbates the inequalities already present in our public education system, and can potentially perpetuate racial inequalities in our society. Schools that focus on custody and control rather than academic rigor may deprive students of quality educational experiences that other students enjoy, inhibiting minority students' future educational and employment opportunities.<sup>164</sup> In addition, as discussed above, the use of strict security measures—especially when used in conjunction with zero-tolerance policies—is part and parcel of the school-to-prison pipeline, which also severely limits students' future opportunities.<sup>165</sup>

Further, the use of strict security measures negatively affects minorities' perceptions of government authorities and can skew their views about themselves and their roles in society.<sup>166</sup> Henry Leonardatos, an experienced school administrator in urban schools, worries that minority students are subject to intense surveillance in both their neighborhoods and schools and, accordingly, see their school as simply “another appendage to the police state.”<sup>167</sup> He is also concerned that when minority students are treated like criminals, they begin to act like criminals. He observes:

They play the role that is expected of them—they will play the role of the criminal and victimizer because the cops will say, “don't do this and don't [do] that.” When you do that to a kid you're telling the kid that this is how the world is supposed to be. You end [up] putting the idea in the kid's head that this is what he's supposed to be doing.<sup>168</sup>

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163. See Nance, *supra* note 10, at 41.

164. See Kupchik & Ward, *supra* note 42, (manuscript at 7) (“[M]arginalized youth are presumed to be young criminals and treated as such through exposure to the hard edge of exclusive practices (e.g., police surveillance and metal detectors), while youth with social, political, and cultural capital are presumed to be near normal and habituated for social absorption in their selective exposure to inclusive security regimes.”).

165. See *supra* notes 123–29, and accompanying text.

166. See Noguera, *supra* note 66, at 343–44.

167. Daryl Khan, *Perps or Pupils? Safety Policy Creates Prison-like New York City Schools*, JUV. JUST. INFO. EXCHANGE (Sept. 20, 2012), <http://jjie.org/york-story/>; accord VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS xiv, 133–38 (2011) (maintaining that low-income and minority youth experience surveillance disproportionately because there is a “system in which schools, police, probation officers, families, community centers, the media, businesses, and other institutions systematically treat young people's everyday behaviors as criminal activity”).

168. Khan, *supra* note 167.

Indeed, scholars have long understood that the way students are labeled and treated affects how students learn, act, view themselves, and what they become.<sup>169</sup>

Moreover, the trust necessary to establish a healthy learning environment is severely undermined when minority students are aware that strict security measures are applied disproportionately.<sup>170</sup> As Linda Darling-Hammond maintains,

Young people are very observant. They note these patterns, and they understand when they have been identified as not deserving a high-quality, humane education. It is little wonder that in settings like these, students of color may come to doubt their academic ability and distrust the school, ultimately rejecting what it was to offer.<sup>171</sup>

A recent example illustrates this point well. When Minerva Dickson discovered that other students were not subject to the strict security conditions she faced every day, it “blew her mind.”<sup>172</sup> She commented, “I thought all schools were like mine . . . I couldn’t believe a student could just walk into their school without dealing with all that.”<sup>173</sup> Unfortunately, the disproportionate use of strict security measures on minorities may further impair the often strained relationships of trust that already exist between many minority students and educators.<sup>174</sup>

169. See Noguera, *supra* note 66, at 343. See generally RONNIE CASELLA, BEING DOWN: CHALLENGING VIOLENCE IN PUBLIC SCHOOLS (2001).

170. See Glennon, *Looking for Air*, *supra* note 17, at 112 (maintaining that it is difficult for schools to create positive learning climates when students see racial disparities in the application of discipline).

171. DARLING-HAMMOND, *supra* note 17, at 65.

172. See Khan, *supra* note 167.

173. *Id.* Paul Hirschfield’s interview of a former inner-city student also illustrates the sense of unfairness some students perceive. This student commented,

That school was run more like a prison than a high school. It don’t have to be nothing illegal about it. But you’re getting arrested. No regard for if a college going to accept you with this record. No regard for none of that, because you’re not expected to leave this school and go to college. You’re not expected to do anything.

Hirschfield, *supra* note 65, at 79.

174. See Constance Flanagan et al., *School and Community Climates and Civic Commitments: Patterns for Ethnic Minority and Majority Students*, 99 J. EDUC. PSYCHOL. 421, 423 (2007) (observing that studies show that minority groups report “a lower sense of school belonging than do their European American peers”); Susan Rakosi Rosenbloom & Niobe Way, *Experiences of Discrimination among African American, Asian American, and Latino Adolescents in an Urban High School*, 35 YOUTH & SOC. 420, 434 (2004) (stating that “[w]hen African American and Latino students were asked about their experiences with discrimination, they described hostile relationships with adults in positions of authority such as . . . teachers in school”); Rosa Hernández Sheets, *Urban*

Disproportionate use also may lead to more disorder and student behavior problems. One of the most consistent findings of empirical research is that students tend to follow rules when they believe those rules are fair and evenly applied.<sup>175</sup>

### III. A REFORMULATED FOURTH AMENDMENT FRAMEWORK

This Part begins with the premise that the use of strict security measures in schools is inconsistent with students' best interests and delegitimizes the educational process, especially when they are applied disproportionately to minorities and low-income students.<sup>176</sup> The question is what to do about it. Elsewhere, I have strongly advocated that school-led reform is the most effective means for addressing this problem and have described several measures that school administrators can adopt to reduce violence more effectively in both their schools and in their communities, including restorative justice initiatives, a data-driven program called School-wide Positive Behavioral Interventions and Supports, and other initiatives targeted to develop emotional and social stability.<sup>177</sup> I have also encouraged state and federal agencies to stop providing grants for strict security measures and, instead, to make those funds available to support alternative initiatives.<sup>178</sup> Further, I have called on the U.S. Department of Education to provide grants for researchers to more closely study the harmful effects of strict security measures and have recommended that the Department of Education's Office of Civil Rights play a more active role in addressing the disproportionate use of strict security measures on minority students.<sup>179</sup> I also believe that state legislatures should provide the necessary funding, training, and incentives for schools to implement these alternative measures.

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*Classroom Conflict: Student-Teacher Perception: Ethnic Integrity, Solidarity, and Resistance*, 28 URB. REV. 165, 175–76 (1996) (reporting that minority students in a study on classroom conflict believed that their teachers did not care about them or respect them and that they abused their authority); cf. Noguera, *supra* note 62, at 201 (observing that many black communities believe that black children are not treated fairly in schools).

175. See KUPCHIK, *supra* note 68, at 7–8. See also Tyler & Rankin, *supra* note 141, at 361–62 (finding that harsh surveillance systems engender mistrust, especially with respect to racial minority groups, leading them to disobey the rules).

176. See *supra* Part II.

177. See Jason P. Nance, *School Security Considerations after Newtown*, 65 STAN. L. REV. ONLINE 103, 108–09 (2013). It bears noting that the U.S. Department of Education's Office of Civil Rights very recently recommended that schools implement these alternative approaches to promote safe and orderly school climates. See DEAR COLLEAGUE LETTER, *supra* note 30, at app. 2; see also GUIDING PRINCIPLES, *supra* note 95, at 5–7.

178. Nance, *supra* note 10, at 55.

179. *Id.*

While I continue to support these recommendations, I believe that courts also have an important role to play in addressing this problem. In fact, courts are uniquely situated to address this issue in a way that perhaps other government bodies are not. Currently, policymakers and school officials are mired in a school security political quagmire resulting from recent highly publicized incidents of school violence—most notably the Newtown tragedy. Policymakers and school officials are under enormous pressure to demonstrate to their constituencies that they are taking steps to address the perceived school safety crisis by spending substantial sums of money to purchase strict security measures. When political trends threaten core rights and values, courts have a responsibility to establish a clear constitutional standard to guide these government bodies. This is particularly important in schools because they are charged with the responsibility of inculcating students with the constitutional values that underpin our democracy.<sup>180</sup> Once courts set this standard, I believe that lawmakers and school officials will put their resources to better use and tackle school crime in a more pedagogically sound manner that is more consistent with students' constitutional rights.

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180. See *New Jersey v. T.L.O.*, 469 U.S. 325, 373–74 (1985) (Stevens, J., dissenting) (“Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.”); *Doe v. Renfrow*, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting from denial of certiorari) (“Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“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.”); Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 7 (1992) (arguing that students have the right to be subjected to a socializing process that inculcates values consistent with the Constitution); Feld, *supra* note 87, at 963 (“Schools are the incubators of future citizens, and school officials convey moral lessons by their actions. Providing young people with real Fourth Amendment protection and meaningful enforcement mechanisms will better socialize them to participate effectively in a democratic society as adults.”); Martin R. Gardner, *Strip Searching Students: The Supreme Court’s Latest Failure to Articulate a “Sufficiently Clear” Statement of Fourth Amendment Law*, 80 MISS. L.J. 955, 997 (2011) (“Teaching students to obey society’s laws is surely a fundamental aspect of their learning the meaning of good citizenship.”); Betsy Levin, *Educating Youth for Citizenship: The Conflict between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1648 (1986) (explaining that schools play a critical role in helping students learn necessary skills and society’s common values, which enables them to exercise the responsibilities of citizenship); Samantha E. Shutler, *Random, Suspicionless Drug Testing of High School Athletes*, 86 J. CRIM. L. & CRIMINOLOGY 1265, 1302–03 (1996) (“In order to preserve Constitutional reverence among a youth that is rapidly losing respect for many of the traditional underpinnings of our society, courts must not assist in eroding what little respect remains for the Constitution and the rights it provides.”).

Drawing from alternative theories proposed by scholars to evaluate Fourth Amendment rights in other contexts—as well as a recent theory Catherine Kim offered to evaluate students’ due process rights under the Fourteenth Amendment<sup>181</sup>—this Part describes a reformulated test under the Fourth Amendment to evaluate the use of strict security measures in schools.<sup>182</sup>

Before discussing the reformulated balancing test under the Fourth Amendment, it is important to explain that neither the Equal Protection Clause of the Fourteenth Amendment nor Title VI of the Civil Rights Act of 1964 currently provides a satisfactory method to redress the problem that harsh security measures are disproportionately applied to minority students generally.<sup>183</sup> In *Washington v. Davis*,<sup>184</sup> two unsuccessful black applicants to the Washington, D.C. police force claimed that the police department’s recruiting procedures discriminated on the basis of race in violation of the Equal Protection Clause.<sup>185</sup> The applicants challenged the police department’s use of a personnel test that was designed to test verbal ability, vocabulary, reading, and comprehension, claiming that this test bore no relationship to job performance and excluded a disproportionate number of black applicants.<sup>186</sup> The Supreme Court held that while the central purpose of the Equal Protection Clause is to prevent official misconduct discriminating on the basis of race, “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, [will not be considered] unconstitutional *solely*

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181. See Kim, *supra* note 9, at 864–65.

182. Alternative Fourth Amendment tests proposed by scholars can be distilled into two major categories: (a) tests that call for a reformulated balancing test (or to do away with a balancing test altogether); and (b) tests based on the political process theory. See Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 127–36 (2010). In this Article, I propose a reformulated balancing test. However, a test based on the political process theory, which I will discuss in an upcoming scholarly article, would also be a suitable alternative framework to the test courts currently employ. The political process theory is most associated with the work of John Hart Ely, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87–88 (1980), but it has also been applied to the Fourth Amendment. See Dan M. Kahan & Tracey L. Mearns, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763–68 (1991); Slobogin, *supra*, at 136–38; William J. Stuntz, *Implicit Bargains, Government Power and the Fourth Amendment*, 44 STAN. L. REV. 553, 588 (1992) [hereinafter Stuntz, *Implicit Bargains*]; William J. Stuntz, *Local Policing after the Terror*, 111 YALE L.J. 2137 (2002); Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93 (2007).

183. The relevant provisions of Title VI are codified at 42 U.S.C. §§ 2000d–2000d-1 (2006).

184. 426 U.S. 229 (1976).

185. *Id.* at 232–33.

186. *Id.* at 234–35.

because it has a racially disproportionate impact.”<sup>187</sup> The Court continued:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.<sup>188</sup>

Thus, *Washington v. Davis* and other cases that followed made clear that plaintiffs seeking to establish an Equal Protection Clause violation cannot rely solely on disparate impact; rather, they must also have other independent evidence that government officials acted with a discriminatory intent when crafting their policies.<sup>189</sup> And, as Derek Black points out, “[e]vidence of discriminatory purpose in the various areas of educational inequality is rarely obvious. . . . [F]ew school systems today would openly engage in blatant discrimination.”<sup>190</sup> Instead, racial discrimination today is more often the result of subtle or unconscious biases.<sup>191</sup>

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187. *Id.* at 239. See also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.15 (1977) (“In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the ‘heterogeneity’ of the Nation’s population.”).

188. *Washington v. Davis*, 426 U.S. at 242.

189. See *Vill. of Arlington Heights*, 429 U.S. at 266 (holding that although disparate impact “may provide an important starting point . . . impact alone is not determinative”); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185 (11th Cir. 1983) (“It is, rather, the cumulative evidence of action and inaction which objectively manifests discriminatory intent.”); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1293 (S.D.N.Y. 1985), *aff’d*, 837 F.2d 1181 (2d Cir. 1987) (“The factors that are to be considered in determining whether actions were taken with discriminatory intent include the degree of any discriminatory effect; the historical background of the actions; the specific sequence of events leading up to the actions; the presence or absence of departures from normal procedures or substantive criteria; and the legislative history of the actions.”). See also MARK G. YUDOF, BETSY LEVIN, RACHEL F. MORAN, JAMES E. RYAN & KRISTI L. BOWMAN, *EDUCATIONAL POLICY AND THE LAW* 430 (5th ed. 2012) (discussing *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*).

190. See DEREK BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 147 (2013).

191. *Id.* See also Gary Blasi, *Advocacy against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276 (2002) (arguing that Americans’ behavior is driven to some degree by unconscious racial stereotypes); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005) (arguing that discrimination is still pervasive, but most often emerging in the form of stereotyping or unconscious bias); Jerry Kang, *Trojan Horses of*

A satisfactory remedy under Title VI of the Civil Rights Act of 1964 is also difficult to obtain under the current state of the law. Title VI prohibits discrimination on the grounds of race, color, or national origin by programs receiving federal funds.<sup>192</sup> Although the OCR's regulations prohibit schools from implementing facially neutral policies that result in disparate impact,<sup>193</sup> in *Alexander v. Sandoval*<sup>194</sup> the Supreme Court held that there is no private right of action to enforce the OCR's disparate impact regulations.<sup>195</sup> And while the OCR continues to enforce its disparate impact regulations,<sup>196</sup> one significant enforcement challenge may be to identify a district or school policy that has a disparate impact on an identifiable racial group within that district or school.<sup>197</sup> Stated

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*Race*, 118 HARV. L. REV. 1489, 1506–14 (2005) (discussing social cognition research that demonstrates that most people have implicit biases against racial minorities); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO STATE L.J. 575, 628 (2011) (“[N]ot only is it rare for racial motives to be articulated, but they are often subconscious.”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that unconscious bias is the most prevalent form of discrimination).

192. 42 U.S.C. § 2000d (2006) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

193. See 34 C.F.R. § 100.3(b)(2) (2013) (providing that recipients of federal funds may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin”).

194. 532 U.S. 275 (2001).

195. *Id.* at 281. Although *Sandoval* did not address § 1983, Justice John Paul Stevens’s dissent suggested that private plaintiffs could assert that Title VI disparate impact regulations create a federal right, which is enforceable under 42 U.S.C. § 1983. *Id.* at 299–302 (Stevens, J., dissenting). However, most circuits have rejected this view. See *Peters v. Jenney*, 327 F.3d 307, 316 n.9 (4th Cir. 2003) (disallowing a private cause of action under § 1983 based on a federal regulation); *Kissimmee River Valley Sportsman Ass’n v. City of Lakeland*, 250 F.3d 1324, 1327 (11th Cir. 2001). But see *Robinson v. Kansas*, 295 F.3d 1183, 1186–87 (10th Cir. 2002) (holding that § 1983 allows a private cause of action for violating 34 C.F.R. § 100). *Robinson* is the only court of appeals case to adopt Stevens’s opinion on the § 1983 issue. Sam Spital, *Restoring Brown’s Promise of Equality after Alexander v. Sandoval: Why We Can’t Wait*, 19 HARV. BLACKLETTER L.J. 93, 112 (2003). Further, federal appellate courts have rejected attempts to establish discriminatory intent based on the school officials’ deliberate indifference to the disparate impact of school policies. See *Pryor v. Nat’l Collegiate Athletic Ass’n*, 288 F.3d 548, 567–68 (3d Cir. 2002).

196. See, e.g., DEAR COLLEAGUE LETTER, *supra* note 30, at 11 (“Schools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race. The resulting discriminatory effect is commonly referred to as ‘disparate impact.’”).

197. See Daniel J. Losen & Christopher Edley, Jr., *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline Is a Civil Rights Issue*, in ZERO

another way, in schools implementing intense surveillance conditions, typically all students in a school or district are subject to those conditions; thus, usually there will be no school or district policies that a student can identify that are applied disproportionately in that school or district.<sup>198</sup> Nevertheless, simply because all of the students in a school or district are subject to the same harsh conditions should not justify a school or district's actions to create a prison-like environment for students.

Accordingly, I turn to a solution under the Fourth Amendment, which also has a distinct advantage. While the disparate application of strict security measures to minorities is inequitable and harmful, a prison-like environment for *any* student is harmful. Thus, a solution under the Fourth Amendment focuses on the crux of the problem: that a student's—*any student's*—expectation of privacy is violated when a school creates a prison-like environment in schools. It is the student's sense of dignity that has been violated in a place where government officials should be preserving dignity, where students should be building self-worth and building confidence in themselves, each other, government institutions, and our democratic society.<sup>199</sup> The fact that minorities are disproportionately subjected to prison-like environments in schools only exacerbates that indignity and teaches harmful lessons to both white and minority students, as well as low-income and affluent students.<sup>200</sup> Subpart A describes the current test under the Fourth Amendment, and Subpart B proposes a reformulated balancing test.

#### A. The Current Test

School officials—who are government officials for constitutional law purposes, but are not law enforcement officers—generally perform or oversee two types of searches on students: (a) searches based on individualized suspicion to uncover evidence of wrongful behavior, and (b) random, suspicionless searches on the general student population or on a segment of the student population to deter school crime. Courts

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TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS: A HANDBOOK FOR PARENTS, STUDENTS, EDUCATORS, AND CITIZENS 237 (William Ayers, Bernardine Dohm & Rick Ayers eds., 2001).

198. Indeed, many school districts throughout the country serve primarily minority students, especially those districts situated in large metropolitan areas. See U.S. DEP'T OF EDUC., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2008–09, at iii (2010) (stating that the “majority of students in the 100 largest school districts were Hispanic or Black”).

199. See Gardner, *supra* note 136, at 943.

200. See Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 42 (1997); Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 20–21 (1999).



evaluate searches based on individualized suspicion under a reasonableness standard the Supreme Court developed in *New Jersey v. T.L.O.*,<sup>201</sup> where the Court determined (1) “whether the . . . action was justified at its inception,” and (2) “whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”<sup>202</sup> This Article, however, is primarily concerned with the use of suspicionless searches that are designed to deter, detect, or prevent crime by routinely subjecting a group of students—the vast majority of whom are innocent and have no plans at all to commit any type of wrongdoing—to a significant intrusion of their privacy interests.<sup>203</sup> The Fourth Amendment currently offers students almost no protection from random, suspicionless searches designed to deter school crime.<sup>204</sup> When the students’ expectation of privacy is weighed against the government interest in protecting students from harm, the government almost always prevails.<sup>205</sup>

The test to evaluate suspicionless searches in schools was first described in *Vernonia School District 47J v. Acton*.<sup>206</sup> In *Vernonia*, the Court evaluated a school district’s suspicionless drug-testing program on student athletes.<sup>207</sup> Students wishing to participate in interscholastic

201. 469 U.S. 325 (1985).

202. *Id.* at 340–41 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). *See also Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 370 (2009). Although outside of the scope of this Article, as commentators and courts have observed, the increased presence of law enforcement officers in schools and the increased use of evidence to prosecute students have complicated this analysis. *See* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1070 (2003) (arguing that courts should apply the probable cause standard when school searches involve law enforcement officers or when school officials are required to turn evidence of criminal violations over to the police); Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 982–86 (2009/10) (describing the disparate views of courts when analyzing student searches involving law enforcement officers).

203. In the Fourth Amendment scholarship and case law, these searches also have been called government dragnets, special needs searches, or administrative searches. I emphasize that my proposed legal analysis should not necessarily apply to situations where there is an imminent threat of harm to students, such as when school officials have received a warning from a credible source that a student has brought a loaded weapon to school and intends to harm other students.

204. *See supra* Part II.A.3. *But see* Nance, *supra* note 76, at 376–94 (arguing that the Fourth Amendment requires that students receive greater protection from highly intrusive search practices such as searches through students’ belongings).

205. *See, e.g., Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 825–27 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

206. 515 U.S. 646, 664–65 (1995).

207. *Id.* at 650.

sports would be tested at the beginning of the season, and each week of the season, a student under the supervision of two adults would blindly select 10 percent of the student-athlete population for drug testing.<sup>208</sup> In the fall of 1991, James Acton, a seventh-grade student who was well behaved and who did not have a drug problem, signed up to play football.<sup>209</sup> The school officials would not allow James to participate in school athletics because he and his parents refused to sign a drug-testing consent form.<sup>210</sup> The Actons claimed that Vernonia's drug-testing program violated the Fourth Amendment, but the Court disagreed.<sup>211</sup>

The Court observed that, as the text of the Fourth Amendment directs, the constitutionality of a government search ultimately turns on "reasonableness."<sup>212</sup> Whether a search meets the reasonableness standard is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."<sup>213</sup> Accordingly, the Court's framework for evaluating suspicionless searches consists of the following three factors: (1) "the scope of the legitimate expectation of privacy at issue," (2) "the character of the intrusion that is complained of,"<sup>214</sup> and (3) "the nature and immediacy of the governmental concern at issue . . . and the efficacy of this means for meeting it."<sup>215</sup>

While acknowledging that students retain some expectation of privacy at school, the Court explained that the scope of students' privacy rights "are different in public schools than elsewhere."<sup>216</sup> According to the Court, "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibilit[ies]," which required students'

208. *Id.*

209. See Robert M. Bloom, *The Story of Pottawatomie County v. Lindsay Earls: Drug Testing in the Public Schools*, in EDUCATION LAW STORIES 337, 346 (Michael A. Olivas & Ronna Greff Schneider eds., 2008) ("At the time, James said, 'I was like one of the smartest kids in class. I never got a referral (to the principal's office) and I thought that was probably enough for them to see I wasn't taking drugs.'").

210. *Vernonia*, 515 U.S. at 651.

211. *Id.* at 651, 664–65.

212. *Id.* at 652. The text of the Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

213. *Vernonia*, 515 U.S. at 652–53 (quoting *Skinner v. Ry. Labor Execs.' Assn.*, 489 U.S. 602, 619 (1989)).

214. *Id.* at 658.

215. *Id.* at 660.

216. *Id.* at 656.

expectation of privacy to be diminished.<sup>217</sup> The Court reasoned that if schools are to carry out their important educational mission and provide a “proper educational environment,” it must authorize “a degree of supervision and control that could not be exercised over free adults.”<sup>218</sup> Thus, the nature of students’ constitutional rights “is what is appropriate for children in school.”<sup>219</sup> Importantly, when establishing this diminished expectation of privacy of students, the Court relied on several prior cases where the Court similarly reduced students’ constitutional rights in light of the school’s responsibility to provide an appropriate environment conducive to learning.<sup>220</sup> Viewing this diminished expectation of privacy against (a) the “minimally intrusive” drug-testing conditions that resembled conditions that students commonly encounter in public restrooms, (b) the school district’s important interest in deterring drug use, and (c) the rampant use of drugs among the student athletes in Vernonia School District, the Court upheld the district’s drug-testing policy.<sup>221</sup>

Seven years later, in *Board of Education v. Earls*,<sup>222</sup> the Court arguably abridged students’ Fourth Amendment rights even further. There, the Court upheld a program requiring students enrolled in extracurricular activities to submit to random drug testing.<sup>223</sup> But unlike in *Vernonia*, where the Court justified those suspicionless searches in part because the drug problem in the district was “alarming,” the school district in *Earls* had made no such showing.<sup>224</sup>

217. *See id.*

218. *Id.* at 655.

219. *Id.* at 656.

220. *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977); *Goss v. Lopez*, 419 U.S. 565, 581–82 (1975)).

221. *Id.* at 658, 661–63. In dissent, Justice Sandra Day O’Connor heavily criticized the Court’s decision to eliminate the individualized suspicion requirement outlined in *T.L.O.* *Id.* at 681 (O’Connor, J., dissenting). O’Connor was concerned that suspicionless searches send harmful messages to students that they cannot be trusted. *Id.* at 682. She argued,

[I]ntrusive, blanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any 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. As James Acton’s father said on the witness stand, “[suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they’re innocent . . . , and I think that kind of sets a bad tone for citizenship.”

*Id.*

222. 536 U.S. 822 (2002).

223. *Id.* at 825.

224. *Id.* at 849 (Ginsburg, J., dissenting).

In *Earls*, Lindsay Earls, a student enrolled in “the show choir, the marching band, the Academic Team, and the National Honor Society,” challenged Pottawatomie School District’s drug-testing policy as unconstitutional.<sup>225</sup> Earls argued that Pottawatomie had failed to identify a special need for implementing its random drug-testing program because it had not demonstrated that her school had a drug problem.<sup>226</sup> In a five-to-four decision, the Supreme Court upheld Pottawatomie’s drug-testing policy.<sup>227</sup>

The Court balanced the same three factors that it did in *Vernonia*, largely reaching the same conclusions.<sup>228</sup> The Court explained that students’ privacy interests must be viewed in the context of the public school environment. That is, when “the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.”<sup>229</sup> Thus, a student’s privacy interest is limited in a place where the government has a responsibility to maintain discipline, health, and safety.<sup>230</sup>

Departing somewhat from the holding in *Vernonia*, the Court held that it was unnecessary for the district to identify a drug abuse problem before imposing a suspicionless drug-testing policy.<sup>231</sup> The Court justified the suspicionless drug-testing program because “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”<sup>232</sup> This broad holding has provided a clear path for schools to conduct a sweeping array of suspicionless search practices without first having to demonstrate a drug or weapons problem.<sup>233</sup> As a result of this movement in the law, lower courts routinely justify the use of a variety of random, suspicionless search practices in schools.<sup>234</sup>

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225. *Id.* at 826–27.

226. *Id.* at 827.

227. *Id.* at 824–25.

228. *Id.* at 830–38; *see also* Nance, *supra* note 76, at 384–87.

229. *Earls*, 536 U.S. at 830 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995)).

230. *Id.*

231. *Id.* at 835.

232. *Id.* at 834.

233. *See supra* Part II.A.3. *But see* Nance, *supra* note 76, at 391–94 (arguing that the Fourth Amendment requires school officials to have particularized evidence of a substance use or weapons problem before performing suspicionless searches that are “highly intrusive,” such as a search through a student’s personal belongings).

234. *See supra* Part II.A.3.

*B. A Reformulated Balancing Test*

Many scholars have called for better balancing tests to evaluate citizens' Fourth Amendment rights when government officials conduct suspicionless searches.<sup>235</sup> Most of these scholars argue that courts should afford less weight to the government's interest and more weight to the individuals' interests.<sup>236</sup> The reformulated balancing test proposed in this Article also maintains that courts should afford more weight to students' interests under certain circumstances—but for reasons grounded primarily in pedagogy and the overall welfare of students. Working primarily within the existing Fourth Amendment framework, this Subpart identifies two different ways that a court can afford more weight—and why a court should afford more weight—to the students' privacy interests under the Fourth Amendment when students are subjected to prison-like conditions in schools. The first way is rooted in the Court's cases evaluating students' rights under the First, Fourth, and Fourteenth Amendments. The second way is to rethink the concept of "intrusion."

## 1. PEDAGOGICAL CONCERNS UNDERLIE THE COURT'S ANALYSES

The Supreme Court's jurisprudence evaluating students' Fourth Amendment rights is better understood when viewed in connection with Supreme Court cases evaluating students' First and Fourteenth Amendment rights. In these cases, the underlying justification for abridging students' constitutional rights in schools, including their Fourth Amendment rights, is to promote the educational interests of the students.<sup>237</sup> That is, courts reduce students' constitutional rights to

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235. See, e.g., Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 29–46 (2013); Emily Buss, *Constitutional Fidelity through Children's Rights*, 2004 SUP. CT. REV. 355, 386–91; Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1157–60 (2012); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 296–97 (2011); Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1494–1502 (2010); Stuntz, *Implicit Bargains*, *supra* note 182, at 553–55; Scott E. Sundby, "Everyman"'s Fourth Amendment: *Privacy or Mutual Trust between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1784–85 (1994).

236. See Slobogin, *supra* note 182, at 127.

237. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (holding that the current framework needed to evaluate students' Fourth Amendment rights in schools must strike "a balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place"). See also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) (holding that the nature of students' Fourth Amendment rights in schools "is what is appropriate for children in school"); *id.* at 656 ("Fourth Amendment rights, no less than

provide school officials with the constitutional leeway to create an orderly environment conducive to learning.<sup>238</sup> This Article maintains that when this justification no longer holds true—when conducting suspicionless searches or, worse, creating a prison-like environment contributes to a deteriorated learning climate and harms the educational interests of the students—students’ Fourth Amendment rights should not be abridged but strengthened.

*a. The foundational cases*

In *Tinker v. Des Moines Independent School District*,<sup>239</sup> the Court evaluated students’ First Amendment right to wear black armbands to publicize their objections to the Vietnam War and their support for a truce.<sup>240</sup> When school officials became aware of the students’ plan to wear armbands, the officials adopted a policy that all students wearing armbands would be asked to remove them, and if they refused, they would be suspended until they did.<sup>241</sup> When a group of students arrived at school wearing their armbands, they were sent home and suspended from school until they returned without them.<sup>242</sup>

The Court famously held in *Tinker* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>243</sup> and that “state-operated schools may not be enclaves of totalitarianism.”<sup>244</sup> However, the Court also recognized the

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First and Fourteenth Amendment rights, are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”); Kim, *supra* note 9, at 867.

238. While scholars disagree on how far students’ rights should extend in schools, as Catherine Kim recently observed, “both sides of the debate share a common starting point: such restrictions must be justified, if at all, by pedagogical goals.” Kim, *supra* note 9, at 866. See also Dupre, *supra* note 106, at 53 (applauding the Supreme Court’s recent jurisprudence that restricts students’ Fourth Amendment rights because doing so enhances the ability of school officials to provide students with a serious education); Levin, *supra* note 106, at 1648–49 (describing the need to find an equilibrium between respecting students’ constitutional rights so that students learn to value those rights, and restricting students’ rights to help school officials maintain an orderly environment conducive to learning); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1338–43 (2000) (arguing that courts understandably limit students’ free speech, right to privacy, and due process rights in schools because there, the government acts as an educator, and it would be impossible to “fully protect[] students’ constitutional rights while simultaneously ensuring the effective operation of public schools”).

239. 393 U.S. 503 (1969).

240. *Id.* at 505.

241. *Id.* at 504.

242. *Id.*

243. *Id.* at 506.

244. *Id.* at 511.

comprehensive authority of school officials “consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools.”<sup>245</sup> Thus, while the Court maintained that the Constitution protected the students’ right to express their views in schools, it also restricted those rights if speech “materially disrupt[ed] classwork or involv[e]d substantial disorder or invasion of the rights of others.”<sup>246</sup> In *Tinker*, because the record did not show that the students materially disrupted the learning environment, interfered with school activities, or intruded in the lives of others, the Court concluded that the Constitution did not permit school officials to deny the students the right to wear their armbands at school.<sup>247</sup>

*Tinker* is important because the Court clearly articulated the general principles for evaluating students’ constitutional rights in schools and established the tone for cases that would follow. Students do not shed their constitutional rights at the schoolhouse gate; yet, those rights must be balanced against the school’s interest in providing a productive learning environment. When students’ speech disrupts the learning environment, school officials can limit students’ First Amendment right to self-expression. *Tinker* is important for another reason as well. It demonstrates the Court’s attempt to align its constitutional jurisprudence affecting public schools with good educational policy. For example, the Court emphasized the pedagogical benefits of safeguarding students’ free speech rights. The Court noted that students are trained by exposure to a “marketplace of ideas,” and suppressing students’ expressions would dampen what should be a robust exchange of thoughts and opinions.<sup>248</sup> Further, the Court explained that safeguarding students’ free speech rights in schools would help them learn the importance of their constitutional rights and not discount them “as mere platitudes.”<sup>249</sup>

Six years later, the Court invoked these same principles when evaluating students’ right to procedural due process under the Fourteenth Amendment in disciplinary proceedings. In *Goss v. Lopez*,<sup>250</sup> the Court addressed whether a school district violated several high school students’ due process rights by temporarily suspending them without holding a

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245. *Id.* at 507.

246. *See id.* at 513.

247. *Id.* at 514.

248. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

249. *Id.* at 507 (quoting *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). The Court has relied on this line of reasoning in several other First Amendment cases when examining students’ constitutional rights. *See Morse v. Frederick*, 551 U.S. 393, 403–04 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

250. 419 U.S. 565 (1975).

hearing.<sup>251</sup> One of those students, Dwight Lopez, was suspended in connection with a disturbance in the lunchroom that resulted in damage to school property.<sup>252</sup> Lopez claimed that he did not participate in the destructive conduct but was only an innocent bystander.<sup>253</sup> He was nevertheless suspended without a hearing.<sup>254</sup> Another student, Betty Crome, was present at a demonstration that took place at a high school that she did not attend.<sup>255</sup> After she was arrested with the other students and subsequently released without being formally charged, she received notice from her school that she had been suspended for ten days.<sup>256</sup> The school did not provide a reason for the suspension; nor was Crome given a hearing.<sup>257</sup>

The Court first held that although the Constitution does not guarantee the right to an education at the public's expense, these students had a legitimate property interest because they were entitled to a public education under their state's constitution, and that interest could not be taken away absent minimal procedures required under the Fourteenth Amendment.<sup>258</sup> Nevertheless, the Court concluded that students were not entitled to the full panoply of protections normally provided to citizens under the Fourteenth Amendment in other contexts such as criminal proceedings.<sup>259</sup> Thus, at least with respect to short suspensions, students were not entitled to secure counsel, confront or cross-examine witnesses, or call their own witnesses to support their version of the incident.<sup>260</sup> Rather, students facing suspension were guaranteed only "some kind of notice and afforded some kind of hearing."<sup>261</sup> The Court explained that in the vast majority of cases, this constitutional requirement would be met if school officials simply conducted "an informal give-and-take," which included informing the student of the misconduct and the basis for the accusation, then providing the student with an opportunity to explain his or her version of the facts.<sup>262</sup>

As in *Tinker*, the justification for abridging the students' constitutional rights in *Goss* was to protect the state's interest in

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251. *Id.* at 567.

252. *Id.* at 570.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 570–71.

257. *Id.* at 571.

258. *Id.* at 574.

259. *Id.* at 583.

260. *See id.*

261. *Id.* at 579 (emphasis omitted).

262. *Id.* at 582, 584.



providing an environment conducive to learning.<sup>263</sup> The Court reasoned that “[s]ome modicum of discipline and order is essential if the educational function is to be performed.”<sup>264</sup> The Court acknowledged that disciplinary events are “frequent occurrences” and sometimes require immediate action to be effective.<sup>265</sup> Thus, an immediate response to a violation of a school rule was not only “a necessary tool to maintain order but a valuable educational device.”<sup>266</sup> Equally important, as in *Tinker*, *Goss* highlights the educational value of students retaining their constitutional rights. The Court explained that the risk of error without holding at least some kind of hearing “is not at all trivial,” and

it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done.<sup>267</sup>

Thus, it is apparent that the Court also was concerned that the students *perceived* that they were treated fairly in a government institution charged with teaching students about their constitutional rights.<sup>268</sup>

In his dissent, Justice Lewis Powell, joined by three other Justices, sought to abridge students’ due process rights even further for pedagogical reasons, arguing that students should not be entitled even to the minimal due process protections outlined in the majority’s opinion.<sup>269</sup> According to Justice Powell, students had no legitimate need for due process protection because the government’s interest was aligned with the students’ best long-term interests.<sup>270</sup>

In 1985, the Supreme Court in *T.L.O.* evaluated students’ Fourth Amendment rights in schools for the first time, following the same pattern it established in prior cases evaluating students’ free speech and

263. *Id.* at 580.

264. *Id.*

265. *Id.*

266. *Id.* The idea that suspension should be considered a “valuable educational device” has received substantial criticism by scholars. *See, e.g.*, Noguera, *supra* note 62, at 342 (explaining that the students who are suspended or expelled often have the greatest academic, economic, and social needs).

267. *Goss*, 419 U.S. at 580.

268. *See also* Levin, *supra* note 106, at 1676 (arguing that procedural protections in schools is important because it socializes students to understand that they are respected participants in the educational process, which is an important value to convey in a democracy).

269. *Goss*, 419 U.S. at 585–86 (Powell, J., dissenting).

270. *Id.* at 592–93.

due process rights in *Tinker* and *Goss*.<sup>271</sup> In *T.L.O.*, a school official searched high school freshman T.L.O.'s purse for cigarettes after a teacher claimed that she spotted T.L.O. smoking in the bathroom and T.L.O. denied those accusations.<sup>272</sup> During the search, the school official discovered marijuana and other materials suggesting that T.L.O. was dealing marijuana.<sup>273</sup> The school official turned the evidence over to the police, who brought delinquency charges against T.L.O. in juvenile court.<sup>274</sup> T.L.O. moved to suppress the evidence, arguing that the school official's search violated the Fourth Amendment.<sup>275</sup> The Supreme Court disagreed.<sup>276</sup>

As it did when evaluating students' free speech and due process rights, the Court evaluated the constitutionality of the search by balancing T.L.O.'s expectation of privacy against the school's need to maintain an orderly environment conducive to learning.<sup>277</sup> The Court first explained that students have legitimate expectations of privacy in the personal items they bring to school.<sup>278</sup> At the same time, the Court recognized that school officials have an "equally legitimate need to maintain an environment in which learning can take place."<sup>279</sup> To strike a balance, the Court held that school officials were not required to obtain a warrant before searching a student, and a school official's level of suspicion need not rise to the level of "probable cause."<sup>280</sup> The Court reasoned that the warrant and probable cause requirements did not suit the "informality of the student-teacher relationship" because they would unduly burden school officials and interfere with "the swift and informal disciplinary procedures" necessary to maintain an effective and orderly learning climate.<sup>281</sup> Rather, the constitutionality of a search in school depends on its reasonableness under the circumstances.<sup>282</sup> The

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271. See *New Jersey v. T.L.O.*, 469 U.S. 325, 327–28 (1985).

272. *Id.* at 328.

273. *Id.*

274. *Id.* at 328–29.

275. *Id.* at 329.

276. See *id.* at 332–33.

277. *Id.* at 337–39.

278. *Id.* at 338–39. The court reasoned that a "search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337–38. According to the Court, "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." *Id.* at 339.

279. *Id.* at 340.

280. *Id.* at 340–41.

281. *Id.* at 340.

282. *Id.* at 341.

determination of “reasonableness” involves a two-fold inquiry: (1) “whether the . . . action was justified at its inception,” and (2) “whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”<sup>283</sup> Using this framework, the Court concluded that the search was constitutional.<sup>284</sup>

In his concurrence, Justice Powell reiterated his insistence that the government’s interest aligned with the students’ interests, making it “unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting.”<sup>285</sup>

The Court generally maintained this line of reasoning when evaluating students’ Fourth Amendment rights in the context of suspicionless searches in *Vernonia* and *Earls*. As explained above in both *Vernonia* and *Earls*—as in *Tinker*—the Court acknowledged that children “assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’”<sup>286</sup> but reasoned that students’ “Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere.”<sup>287</sup> According to the Court, the “reasonableness” inquiry could not disregard a school’s tutelary and custodial responsibilities; thus, the nature of a student’s Fourth Amendment rights “is what is appropriate for children in school.”<sup>288</sup> Further, in both cases, the Court justified the searches on the ground that the government’s interest and the students’ interest were aligned. For example, in *Vernonia* the Court explained that deterring drug use—especially among student athletes—was important because of the physical, psychological, and addictive effects of drugs, and drug use disrupts the educational process.<sup>289</sup>

283. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

284. *Id.* Although *T.L.O.* has been criticized for not expressly requiring that school officials have an individualized suspicion before searching a student, *see, e.g.*, Gardner, *supra* note 136, at 924, it squarely held that students indeed do possess Fourth Amendment rights at schools. *T.L.O.*, 469 U.S. at 333. This case overturned several lower court decisions that applied the *in loco parentis* doctrine, holding that the Fourth Amendment did not apply to school searches because school administrators acted in the place of parents during school hours. *See* Nance, *supra* note 76, at 377 n.38.

285. *Id.* at 348 (Powell, J., concurring).

286. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 844 (2002) (Ginsburg, J. dissenting) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995)); *accord. Vernonia*, 515 U.S. at 655–56 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

287. *Vernonia*, 515 U.S. at 655–56 (quoting *Tinker*, 393 U.S. at 506); *accord. Earls*, 536 U.S. at 844 (quoting *Vernonia*, 515 U.S. at 655–56).

288. *Vernonia*, 515 U.S. at 656; *accord. Earls*, 536 U.S. at 844 (quoting *Vernonia*, 515 U.S. at 656).

289. *Vernonia*, 515 U.S. at 661–62. *See also Earls*, 536 U.S. at 834.

More recently, the Supreme Court addressed the constitutionality of a student search in *Safford Unified School District v. Redding*.<sup>290</sup> In *Redding*, the Court did not evaluate the constitutionality of a random, suspicionless search as it did in *Vernonia* and *Earls*; instead, the Court evaluated the legality of a strip search performed on a thirteen-year-old female student who was accused of bringing unauthorized prescription and over-the-counter drugs to school.<sup>291</sup> As in *T.L.O.*, the Court again recognized that students' Fourth Amendment rights are abridged in schools, reasoning that searches in the school setting "require[] some modification of the level of suspicion of illicit activity needed to justify a search."<sup>292</sup> Relying on the same two factors the Court delineated in *T.L.O.*, the Court concluded that the search violated the Constitution because it was excessively intrusive in light of the age of the student and the nature of the school violation.<sup>293</sup> Notably, as it had in prior cases, the Court in *Redding* displayed a willingness to rely on pedagogical considerations not only to justify the abridgment of students' rights in schools, but also to make its determination of whether the search itself was constitutional. When evaluating the student's expectation of privacy in the school setting, the Court acknowledged that the strip search was embarrassing, frightening, and humiliating, and that there was empirical evidence indicating that strip searches could "result in serious emotional damage" for students.<sup>294</sup> It further noted that a strip search was so degrading to students that many schools had banned them under all circumstances.<sup>295</sup>

*b. A more balanced approach*

As the above cases demonstrate, the Court has repeatedly held that although students do not lose their constitutional rights upon entering the schoolhouse gates, students in school do not have the same rights they

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290. 557 U.S. 364 (2009).

291. *Id.* at 368.

292. *Id.* at 370 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)).

293. *Id.* at 373–77.

294. *Id.* at 374–75 (citing Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998)).

295. *Id.* at 375. Nevertheless, despite the Court's ruling that the search violated the Fourth Amendment, the Court refused to hold the school officials accountable. *Id.* at 377–79. The Court determined that the school officials were protected under the qualified immunity doctrine because "the very action in question [had not] previously been held unlawful" and there were cases in the lower courts that viewed strip searches differently. *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). As some scholars have noted, this case demonstrates how difficult it is for students to recover from unlawful searches. See Feld, *supra* note 87, at 947–54.

have outside of school. A primary justification that the Court relies on to abridge students' constitutional rights—including their Fourth Amendment rights—is to promote the educational interests of the students.<sup>296</sup> Stated another way, for pedagogical reasons, the Court dilutes students' constitutional rights to provide flexibility for school officials to preserve an orderly environment conducive to learning.<sup>297</sup> Relatedly, the Court also justifies reducing students' constitutional rights on the ground that students' interests are aligned with the government's interest, and thus, heightened constitutional protections are unnecessary because school officials have students' best interests in mind.<sup>298</sup>

This Article maintains that if students can demonstrate that this justification is no longer true—that conducting random, suspicionless searches promotes an environment that is antithetical to learning or does not promote the educational interests of the students—their privacy interests should be given greater consideration against the government's interest to conduct these searches. To make this assessment, a court should consider evidence regarding the effect of the challenged search practices on the learning environment. For example, the court might evaluate evidence assessing school climate; student learning; whether students are fearful and distrustful; whether school crime or disorder decreased or increased as a result of using these search tactics; and how the search practices affect students' attitudes towards the government, school officials, teachers, and other students. In addition, the court might consider whether the use of these strict security measures exacerbates the school-to-prison pipeline by increasing the number of suspensions, expulsions, or referrals of students to the juvenile justice system for infractions that could be handled better internally. The court also might consider whether students attending schools with high minority populations perceive that they are being treated differently than students in other settings. Using such criteria, a court could declare these suspicionless search practices unconstitutional, which would encourage schools to rely on alternative measures to decrease crime and, if necessary, to conduct searches based only on individualized suspicion. Such a test more closely aligns with the overall tenor of cases evaluating

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296. See *supra* note 237 and accompanying text. See also Kim, *supra* note 9, at 861–67.

297. See also Kim, *supra* note 9, at 866–67, 873–74.

298. Kim, *supra* note 9, at 867 (“Central to [the] defense of restrictions on students’ rights is the assumed alignment of interests between students and school officials.”); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 S. CT. REV. 87, 117 (reasoning that in school searches, “[b]oth the investigating authority and the person searched are participants in a shared mission”).

students' constitutional rights in schools and is more consistent with good education policy and practice.<sup>299</sup>

To be clear, I do not propose that school officials should never be permitted to use strict security measures; perhaps there are circumstances where it would be appropriate to use them.<sup>300</sup> Nevertheless, this modified framework would send a clear message to school administrators that strict security measures should be used only when they promote the educational interests of the students rather than as a first response to address school crime and disorder.

A proposed modification to align the constitutional rights of juveniles with good policy grounded in empirical evidence, of course, is not unprecedented in the case law. For example, at one time, adolescents in juvenile court were not entitled to traditional procedural protections provided to adults in criminal court because it was assumed that juvenile courts were nonadversarial institutions with adolescents' best interests in mind.<sup>301</sup> However, in light of the growing body of evidence that juvenile court officials failed to provide adolescents with benevolent protection, the Court in *In re Gault*<sup>302</sup> determined that it was appropriate to extend at least some procedural protections to adolescents.<sup>303</sup> Similarly, in *Miller v. Alabama*,<sup>304</sup> *Graham v. Florida*,<sup>305</sup> and *Roper v. Simmons*,<sup>306</sup> the Court relied on social science to conclude that the Eighth Amendment precluded (1) a sentencing scheme mandating life in prison without the possibility of parole for juveniles who committed homicide, (2) life without parole for juveniles who committed a non-homicide offense, and

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299. See Kim, *supra* note 9, at 892–900 (arguing, in the context of students' due process rights, that courts "should critically evaluate the operation of school discipline to ensure that it actually advances the educational interests that previously justified insulating school discipline from closer judicial scrutiny"); see also Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1495–97 (2009) (arguing that courts would benefit from the review of empirical data).

300. For example, scholars Paul Hirschfield and Katarzyna Celinska acknowledge that failing to appropriately respond to dangerous and disruptive students might also have an adverse effect on fear, trust, and the school climate. See Hirschfield & Celinska, *supra* note 103, at 9. But Hirschfield and Celinska also argue that if school officials decide to implement strict security measures in an effort to respond to prevailing student norms and concerns, they should consider implementing at the same time softer strategies such as mediation, counseling, and conflict resolution that promote orderliness without harming trust. *Id.*

301. Kim, *supra* note 9, at 863.

302. 387 U.S. 1 (1967).

303. *Id.* at 57–59; Kim, *supra* note 9, at 863–64.

304. 132 S. Ct. 2455 (2012).

305. 560 U.S. 48 (2010).

306. 543 U.S. 551 (2005).

(3) the death penalty for juveniles.<sup>307</sup> And, in *Safford Unified School District v. Redding*, the most recent case evaluating students' Fourth Amendment rights in schools, the Court cited social science evidence indicating that strip searches could "result in serious emotional damage" for students because they are so degrading.<sup>308</sup>

Further, this modification is fundamentally consistent with other proposed Fourth Amendment balancing tests in other contexts. For example, Alexander Reinert characterizes the reasonableness balancing test as pitting the government interest against an individual's privacy interest but maintains that the government interest should be construed more broadly to include important collective values, such as pluralist civic participation and the efficient administration of criminal justice.<sup>309</sup> According to Reinert, when searches undermine long-term public interests such as ostracizing subgroups from the political process or hindering future law enforcement efforts by increasing distrust between students and law enforcement, courts might declare suspicionless search practices to be unreasonable under the Fourth Amendment.<sup>310</sup> Shima Baradaran argues that when analyzing suspicionless searches, courts should consider broader societal data, such as potential racial targeting or low hit rates, instead of making less-informed balancing decisions based on only common sense.<sup>311</sup> Fundamentally similar to these proposals, this Article essentially argues that courts should consider school data regarding the short-term and long-term impacts of suspicionless searches on the learning environment to make an informed balancing decision under the Fourth Amendment.<sup>312</sup>

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307. See *Miller* 132 S. Ct. at 2464 (using social science to justify the decision to preclude a sentencing scheme that mandated life in prison without the possibility of parole for juvenile offenders); *Graham*, 560 U.S. at 68, 74 (using social science to justify the decision to preclude life without parole for juveniles who commit crimes other than homicide); *Roper*, 543 U.S. at 573–74 (using social science to justify the decision to preclude the death penalty for a juvenile defender). See also Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 L. & INEQUALITY 263, 264, 277–92 (2013) (analyzing the social science research on which the Court relied in *Roper*, *Graham*, and *Miller*).

308. *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 373–74 (2009) (citing Hyman & Perone, *supra* note 294, at 13).

309. Reinert, *supra* note 235, at 1467.

310. *Id.* at 1464–67, 1484–89.

311. See Baradaran, *supra* note 235, at 39, 43–45.

312. These rebalancing tests are consistent with the social science research that demonstrates social costs associated with rules, policies, and laws that people view as unfair, degrading, and intrusive. See Sunshine & Tyler, *supra* note 142, at 514; Tyler & Rankin, *supra* note 141, at 361; see also *supra* Part II.C.

*c. Criticisms of the reformulated approach*

Some might criticize this reformulated approach by arguing that the justification for abridging students' rights under the Fourth Amendment is distinct from the First and Fourteenth Amendments. They might argue that the Court's justification, especially in *Earls*, is primarily grounded in student safety concerns, not in having an orderly environment conducive to learning.<sup>313</sup> They also might argue that school officials should have the constitutional leeway to use strict security measures to protect students at almost all costs. My response to these arguments is twofold.

First, I maintain that a more complete view of the jurisprudence on students' constitutional rights—and even of the jurisprudence addressing only students' Fourth Amendment rights—is that safety is only one aspect, albeit an important aspect, of an overarching concern for allowing school officials to have the flexibility to fulfill their “custodial” and “tutelary” responsibilities by providing an orderly environment conducive to learning.<sup>314</sup> While student safety is important, it is certainly not the sole—or even the primary—responsibility of public schools.<sup>315</sup> Rather, a more balanced look at the jurisprudence suggests that the Court reduces students' constitutional rights so that school officials can have the flexibility to provide for the well-being of children. The way that school officials primarily go about providing for the well-being of children is to treat them with dignity and to provide them with an appropriate learning environment. If courts permit school officials to treat students like prisoners, students' overall well-being is jeopardized, and the learning environment is compromised. Stated another way, school officials should not be able to hide behind the Constitution when they treat students like prisoners because they are trying to keep students “safe”—especially when there are more effective means for creating safe schools that do not harm the learning environment or impair students'

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313. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831 (2002) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring)) (“Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.”)

314. “Custodial” and “tutelary” both relate to “guardianship” or providing for the care and well-being of another. See *Custodial*, MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/custodial> (last visited Feb. 9, 2014); see also *Tutelary*, MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/tutelary> (last visited Feb. 9, 2014).

315. In fact, in *Vernonia*, the Court hastens to emphasize that public schools do not “have such a degree of control over children as to give rise to a constitutional ‘duty to protect.’” See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (quoting *DeShaney v. Winnebago Cnty. Dep’t of Social Servs.*, 489 U.S. 189, 200 (1989)).



dignity.<sup>316</sup> Furthermore, we must remember that strict security measures do not guarantee students' safety, and, in fact, may even compromise it.<sup>317</sup> Indeed, maintaining an appropriate learning environment is simply a better foundation on which to build the Court's Fourth Amendment analysis.

Second, even if student safety is the sole justification by which the Court abridges students' Fourth Amendment rights, as explained above, many scholars argue that implementing strict security measures increases student behavioral problems and crime by alienating students.<sup>318</sup> Accordingly, I propose that students, at minimum, should have the opportunity to submit evidence demonstrating that the use of strict security measures has not improved student safety. If this can be shown, then students' Fourth Amendment rights should be given greater consideration against the government's interest.

Some might also criticize the reformulated approach because it provides less deference to school officials. They might argue that courts should not second-guess school officials' decision to use strict security measures, nor should courts make assessments regarding the school environment, because school officials are in a better position to make

316. See Nance, *supra* note 10, at 48–55.

317. See *supra* Part II.A. An example from the Chicago Public Schools (CPS) is illustrative. Scholars Matthew Steinberg, Elaine Allensworth, and David Johnson, with the cooperation of the Consortium on Chicago School Research at the University of Chicago Urban Education Institute, conducted an in-depth study of school safety in the CPS and observed the following:

Inside Lake Erie, the physical environment is dominated by crowd-control mechanisms: metal detectors, which are present throughout CPS high schools, greet students upon entering; folding tables corral students at the main entrance and at informal security “checkpoints” throughout hallways; folding metal gates are pulled across entrances to stairwells and padlocked. There is a constant police presence outside and inside the school.

STEINBERG ET AL., *supra* note 112, at 15. Yet, despite all of these strict security measures, substantial violence and disorder abounded in that school. Steinberg, Allensworth, and Johnson continue:

Nearly all teachers at Lake Erie report problems with robbery in the building, gang activity, fights, disorder, and disrespect, and three-quarters of teachers report that students threaten them with violence. Interactions between students and teachers are frequently hostile and mutually disrespectful; students' and teachers' frustration with one another are easily visible. An algebra teacher at Lake Erie complains that constant disruption “impedes the teaching process”; repeated conflicts make it difficult, he continues, for teachers “to reach students who want to learn as deeply as you know [they] could.” Another teacher observes, “I see behavior problems I have never seen before . . . I get cursed out almost daily.” . . . Violence inside and outside the school creates a climate of mistrust, antagonism, and fear.

*Id.*

318. See *supra* Part II.A.

such judgments. My response to this criticism is again twofold. First, courts already make assessments regarding the learning environment under the First Amendment analysis. For example, as *Tinker* explains, school officials may restrict students' free speech rights if speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."<sup>319</sup> Second, courts have the responsibility to limit school officials' actions when those actions impinge upon students' civil rights. In fact, in the current politically charged environment, courts have the responsibility to clarify students' Fourth Amendment rights and should insist that schools preserve students' privacy and dignity by finding alternative ways to deter school crime, especially in light of the fact that minorities are disproportionately subjected to these intrusive measures.

## 2. THE COMBINED EFFECT AMOUNTS TO A SUBSTANTIAL INTRUSION

A second way in which a court can afford more weight to students' privacy interests under the Fourth Amendment is to rethink the concept of "intrusion." As explained above, lower courts routinely justify the use of a variety of random, suspicionless search practices in schools because they deem each individual search in isolation as "minimally intrusive."<sup>320</sup> This Article maintains that a more appropriate analysis of intrusion involves examining the *cumulative* effect of using all these measures together instead of evaluating each measure in isolation. Indeed, it is the cumulative effect of these measures that amounts to a substantial invasion of students' privacy, harming students' educational progress.

The recent testimony from the U.S. Senate Committee Hearing on Ending the School-to-Prison Pipeline provides a sobering illustration of how intrusive using a combination of these surveillance methods can be.<sup>321</sup> Edward Ward, a twenty-year-old honor roll student at DePaul University, attended public schools on the West Side of Chicago, where 90 percent of the students were low-income and 100 percent were minority students.<sup>322</sup> Ward described his school as his "own personal prison."<sup>323</sup> He stated that "[f]rom the moment we stepped through the doors in the morning, we were faced with metal detectors, x-ray

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319. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (2007).

320. See *supra* Part III.A.

321. See Edward Ward Testimony, *supra* note 1, at 1.

322. *Id.* at 2.

323. *Id.* at 1.

machines and uniformed security. Upon entering school, it was like we stepped into a prison.<sup>324</sup> He continues:

My school's environment was very tense; the halls were full with school security officers whose only purpose seemed to be to serve students with detentions or suspensions. Many of the school security officers were very disrespectful to students; some of them spoke to us as if we were animals. They were constantly yelling and antagonizing us from the moment we stepped into the halls until we reached our destination. This was nerve-wracking for me, because although I was an honor student, I felt constantly in a state of alert, afraid to make even the smallest mistake or create a noise that could enable the security officers to serve me with a detention. Instead of feeling like I could trust them, I felt I couldn't go to them for general security issues because I would first be interrogated before anything would get done. . . . The officers don't get any special training to be in the school so they don't treat us like we are misbehaving; they treat us like we are committing crimes. . . . These policies and actions disheartened me. I could slowly see the determination to get an education fade from the faces of my peers because they were convinced that they no longer mattered, . . . the last thing that would work is to place them in institutions of confinement and control.<sup>325</sup>

In another example, Minerva Dickson views her high school as a prison.<sup>326</sup> Every day before being allowed to enter, Minerva waits in a long line as each student is subject to various security checks.<sup>327</sup> When Minerva finally arrives to the front of the line, she first swipes an identification card through a machine.<sup>328</sup> Then she walks to the metal detectors that are monitored by several police officers.<sup>329</sup> While the police officers stand watching, Minerva removes her jewelry, hairpins, and shoes, then puts her personal bags on a conveyor belt to be scanned.<sup>330</sup> Finally, Minerva stands with her arms out and legs spread as an officer runs a security wand around her body.<sup>331</sup> Minerva then collects

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324. *Id.*

325. *Id.* at 3–4.

326. *See Khan, supra* note 167.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

her things, puts on her shoes, and hurries to her first class.<sup>332</sup> When asked how she feels about school security, she responds, “They treat[] us like criminals. It ma[kes] me hate school. When you cage up students like that it doesn’t make us safe, it makes things worse.”<sup>333</sup>

In these examples, and probably thousands of others, it is clear that something fundamentally wrong is happening. While being treated like a criminal may involve more than a privacy violation and intrudes on one’s dignity, it also seems clear that the cumulative effect of using all of these measures together amounts to a significant intrusion of students’ privacy interests and can and should be evaluated as such.

#### CONCLUSION

After several highly publicized incidents of school violence, the public school environment—just like the public environment—is changing. The use of surveillance methods, which was uncommon decades ago, is now commonplace among schools. Yet, empirical evidence demonstrates that not all schools rely on surveillance methods in the same manner. A recent empirical study shows that low-income and minority students are much more likely to experience intense, prison-like conditions than other students, even after accounting for conditions that plausibly would lead school officials to adopt strict security measures such as neighborhood crime, school crime, and school disorder.

While the appropriate response to these findings must be multi-faceted, courts have an important role to play. This Article offers a reformulated balancing test under the Fourth Amendment to address these conditions that is rooted in the Court’s analysis of students’ rights under the First, Fourth, and Fourteenth Amendments. A modified Fourth Amendment framework has the advantage of safeguarding all students’ Fourth Amendment rights and rectifying the deleterious environment that intense surveillance conditions create in schools. Further, because students of color are more often subjected to such intense environments, applying this test will help address the disproportionate use of strict security measures on minorities. While addressing this problem is only one aspect of the inequalities that minority students experience in schools, it is a key component to addressing the school-to-prison pipeline and creating quality educational experiences that most white students enjoy and all students deserve.

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332. *Id.*

333. *Id.*