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IMPLICIT RACIAL BIAS AND STUDENTS' FOURTH AMENDMENT RIGHTS

JASON P. NANCE*

Tragic acts of school violence such as what occurred in Columbine, Newtown, and, more recently, in Parkland and Santa Fe, provoke intense feelings of anger, fear, sadness, and helplessness. Understandably, in response to these incidents (and for other reasons), many schools have intensified the manner in which they monitor and control students. Some schools rely on combinations of security measures such as metal detectors; surveillance cameras; drug-sniffing dogs; locked and monitored gates; random searches of students' belongings, lockers, and persons; and law enforcement officers. Not only is there little empirical evidence that these measures actually make schools safer, but overreliance on extreme security measures can create prisonlike environments that are inconsistent with students' best interests. Specifically, overreliance on intense surveillance measures often engenders distrust and discord among members of the school community in the long term, leading to increased disorder and dysfunction. Extreme security measures also play a role in pushing more students out of school and into the criminal justice system, which can have devastating consequences on students and their families.

Although all schools do and should monitor students to some extent, empirical evidence demonstrates that not all students experience these intense, prisonlike conditions. Rather, schools serving higher concentrations of students of color are more likely to rely on coercive surveillance measures than schools serving primarily white students. Furthermore, the evidence suggests that legitimate safety concerns do not fully explain these racial disparities, but that implicit racial bias influences school officials' decisions to rely on intense surveillance methods to some degree. Indeed, empirical studies repeatedly document that many people unconsciously and unfairly associate minorities, particularly African Americans, with aggression, violence, crime, and danger.

Recognizing that our current constitutional jurisprudence establishes prime conditions for these racial disparities to develop, this Article proposes a reformulated legal framework to evaluate the constitutionality of coercive surveillance methods that is firmly grounded in the U.S. Supreme Court's current Fourth Amendment jurisprudence. Applying this reformulated framework in connection with other strategies will ameliorate the effects of implicit racial bias,

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help address the disproportionate application of coercive security measures on students of color, and motivate school officials working in majority-minority schools to rely on alternative, evidence-based methods to enhance school safety without harming the learning climate.

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INTRODUCTION¹

Deadly acts of school violence such as those that occurred in Columbine, Newtown, and, most recently, in Parkland and Santa Fe cause strong feelings of

1. This Article builds upon my prior works on student surveillance, racial inequalities, and implicit racial bias, particularly Jason P. Nance, *Random, Suspicionless Searches of Students’ Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367 (2013) [hereinafter Nance, *Random, Suspicionless Searches*]; Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79 (2014) [hereinafter Nance, *School Surveillance and the Fourth Amendment*]; Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013) [hereinafter Nance, *Students, Security, and Race*]; and Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017) [hereinafter Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*]. To fully understand the significance of the empirical analyses, theories, and proposals

outrage, fear, sadness, perplexity, and helplessness.² In response to these tragedies, and for other reasons,³ many schools have attempted to create a more orderly and safe environment by intensifying the manner in which they monitor and control students.⁴ It is not uncommon for school authorities to require students to regularly pass through metal detectors,⁵ have fully uniformed police officers run metal-detector wands around students' frames,⁶ install surveillance cameras,⁷ rely on drug-sniffing dogs,⁸ require students to wear identification badges,⁹ control access to school campuses by locking or monitoring gates,¹⁰ conduct random searches of students' personal belongings, lockers, and persons,¹¹ and have police officers patrol school hallways and grounds.¹² School officials should ensure that students are monitored to some degree to promote a safe learning environment. However, not only is there very little empirical evidence that these measures actually make schools safer,¹³ there comes a point when monitoring and controlling students no longer fosters a positive learning climate but instead significantly impairs it.¹⁴ This is

for reform I provide in this Article, I summarize, highlight, and draw upon certain material discussed in my prior works for the reader's convenience.

2. See Jennifer Agiesta & Tom Raum, *Poll: Rage over Newtown School Shooting Tops 9/11*, POST-STAR (Jan 16, 2013), https://poststar.com/news/poll-rage-over-newtown-school-shooting-tops/article_52b10ff6-6061-11e2-936d-001a4bcf887a.html [https://perma.cc/BDF4-QKBV]; Britt Kennerly, *How To Talk to Your Kids About Mass Shootings*, USA TODAY (Feb. 15, 2018), <https://www.usatoday.com/story/news/nation-now/2018/02/15/tips-talk-kids-shootings/341735002/> [https://perma.cc/3TLK-JNR5].

3. See *infra* Part IV.

4. See Paul Hirschfield, *School Surveillance in America: Disparate and Unequal*, in SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 38, 39 (Torin Monahan & Rodolfo D. Torres eds., 2010); AARON KUPCHIK, THE REAL SCHOOL SAFETY PROBLEM: THE LONG-TERM CONSEQUENCES OF HARSH SCHOOL PUNISHMENT 11–12 (2016); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 929–36 (2016).

5. See INSTITUTE OF EDUCATION SCIENCES, PUBLIC SCHOOL SAFETY AND DISCIPLINE: 2013–14, at 5 (2015).

6. See *id.*

7. *Id.*; see also Nance, *Random, Suspicionless Searches of Students' Belongings*, *supra* note 1, at 409.

8. Institute of Education Sciences, *supra* note 5, at 5.

9. *Id.* at 6.

10. *Id.* at 5.

11. See, e.g., *id.* (documenting nationally the percentage of schools that have conducted “random sweeps for contraband”); *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 351–53 (8th Cir. 2004) (describing a school district's practice of searching through students' belongings); *Hough v. Shakopee Pub. Sch.*, 608 F. Supp. 2d 1087, 1103–04 (D. Minn. 2009) (describing a school's practice of conducting random suspicionless searches through students' belongings and persons); *In re T.A.S.*, 713 S.E.2d 211, 212 (N.C. Ct. App. 2011) (explaining that students were required to pass through metal detectors during which time their backpacks, purses, and coats were also searched).

12. Institute of Education Sciences, *supra* note 5, at 5.

13. See *infra* Section III.B.

14. See Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 768–69.

particularly true when school officials rely on a combination of these coercive measures to monitor students, which can result in the creation of a prisonlike environment for students.

For example, a large school district in Los Angeles has a search policy mandating that teachers and school staff members at each of its 900 schools conduct suspicionless searches of their students at various points of the day, including during class time.¹⁵ A student described his experience with this policy in the following manner.¹⁶ He said that while he and his classmates were taking notes in his middle school English class, police officers interrupted the class and announced that they were conducting a random search for drugs.¹⁷ The police officers looked around the classroom and said that they wanted to search the “three black kids back there.”¹⁸ The officers pulled these students out into the hallway, forced them to spread their arms out, and began conducting the searches.¹⁹ A police officer asked one student to open up his backpack. As the student began to comply, the police officer grabbed the backpack out of his hands and dumped its contents onto the ground. A police officer told another student to take off his shirt and his shoes. At first this student simply lifted his shirt up because he was uncomfortable with the police officer’s demands. But then the police officer forcibly pulled up this student’s shirt and conducted his search. When asked how this ordeal made him feel, the student who was interviewed replied, “[I]t made me not care about school . . . I didn’t want to feel or be the person they try to make me be, and that’s a criminal. . . . We are students, not suspects.”²⁰

Another student, Elizabeth Perea, a high school junior, described her experience this way.²¹ In the middle of class, a school official entered the classroom to randomly select students to be searched in front of all the other students.²² Elizabeth continued:

We were told to face the blackboard. [The school official] told us to lift up our arms and open our legs. She patted down our pockets, ankles, and pant legs. She told us to untuck our shirts and to turn around. Nobody found anything on any of the students. Nobody explained why they were searching us. Instead, we each received a note afterwards explaining that we had been searched.²³

15. LOS ANGELES UNIFIED SCHOOL DISTRICT POLICY BULLETIN, ADMINISTRATIVE SEARCHES TO ENSURE SCHOOL SAFETY 2 (2015), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/07/BUL-5424.2-ADMINISTRATIVE-SEARCHES-TO-ENSURE-SCHOOL-SAFETY-w-attach.pdf> [<https://perma.cc/HK7U-WYB2>].

16. *See Students Not Suspects*, ACLU S. CAL., <https://www.aclusocal.org/en/campaigns/students-not-suspects> [<https://perma.cc/78PJ-VZ92>].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *ACLU of Southern California Sues To Stop Intrusive Searches at High School*, ACLU (June 19, 2001), <https://www.aclu.org/news/aclu-southern-california-sues-stop-intrusive-searches-high-school> [<https://perma.cc/P9PZ-TKC2>].

22. *Id.*

23. *Id.*

According to Elizabeth, these searches humiliate and embarrass the students.²⁴ “It is absurd. We try to stay away from violence and gangs, and either way we are treated like gangbangers. They should not search us during our education time. Plus, girls have private things in our bags . . . and that shouldn’t be shown for everyone to see.”²⁵ Even worse, according to the American Civil Liberties Union, these policies are not applied uniformly.²⁶ Rather, the ACLU’s review of the school district’s search logs shows that schools with higher concentrations of low-income students or students of color implement the search policy much more frequently than schools with lower concentrations of low-income students or students of color.²⁷

Minerva Dickson, a student attending high school in New York City, lamented that the first time she saw her high school, it reminded her of a prison.²⁸ Each day when she arrived at school, she waited in a long line to slide her identification card through a machine.²⁹ Then she would head to the metal detectors, where she would find several police officers with handcuffs dangling from their belts waiting for her.³⁰ While the police officers were watching, Minerva would remove her shoes, hairpins, and jewelry; put her backpack and purse on the conveyer belt to be scanned; and wait for a police officer to signal her to come forward.³¹ Another police officer then would run a metal detector scanner around her tiny frame as she stood with her arms and legs spread out.³² When the police officer finished, she would hurriedly gather her belongings, put her shoes back on, and rush to her first class.³³ When asked about how these experiences made her feel, she replied, “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.”³⁴

Edward Ward, who attended high school in the west side of Chicago, also described his school experience as prisonlike.³⁵ Ninety percent of the students attending Edward’s school were low-income students, and all of the students were students of color.³⁶ Edward recalled:

24. *Id.*

25. *Id.*

26. Letter from Victor Leung, ACLU of S. Cal. & Ruth Cusick, Public Council, to Michelle King, Superintendent of L.A. Unified Sch. Dist. 6 (Feb. 24, 2016), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/07/2016-02-23-ACLU-PC-Re-Metal-Detector-Search.pdf> [<https://perma.cc/72M9-WRLA>].

27. *Id.*

28. *Perps or Pupils? Safety Policy Creates Prison-like New York City Schools*, JUVENILE JUSTICE INFO. EXCH. (Sept. 20, 2012), <http://jjie.org/york-story/93676/> [<https://perma.cc/8AH7-H7YS>].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Ending the School-to-Prison Pipeline: Hearing Before the S. Comm. on the Judiciary Subcomm. on the Const., Civil Rights & Human Rights*, 112th Cong. 1 (2012) (testimony of Edward Ward), <https://www.judiciary.senate.gov/imo/media/doc/12-12-12WardTestimony.pdf> [<https://perma.cc/4WEH-2V3S>].

36. *Id.* at 1–2.

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. . . . [T]he halls were full with school security officers whose only purpose seemed to be to serve students with detentions or suspensions.³⁷

Edward observed that attending school in this tense surveillance environment that focused primarily on confinement and control had a profound negative effect on him and his classmates. He stated that he “could slowly see the determination to get an education fade from the faces of [his] peers because they were convinced that they no longer mattered.”³⁸

Overreliance on extreme surveillance measures can harm students’ interests in at least two ways. First, coercive security measures contribute to the formation of dysfunctional learning environments that lead to poor student outcomes.³⁹ Substantial research indicates that coercive security measures often engender distrust, discord, and disunity among members of the school community, which often leads to higher levels of dissatisfaction, disorder, and dysfunction in the long term.⁴⁰ Second, the use of extreme surveillance measures often leads to higher levels of student exclusion and student involvement with the criminal justice system.⁴¹ When schools rely on intense surveillance tactics in connection with other extreme disciplinary measures, such as zero tolerance policies, to control school environments, schools end up pushing more students out of school and into the criminal justice system, which has devastating consequences on students, their families, and our nation.⁴²

Intense surveillance climates can exist in all types of schools, but this normally is not the case. Critically, substantial empirical evidence demonstrates that schools serving higher concentrations of students of color are more likely to rely on coercive surveillance measures than schools serving primarily white students.⁴³ Furthermore,

37. *Id.* at 1–3.

38. *Id.* at 3.

39. See Thomas Mowen, John Brent & Aaron Kupchik, *School Crime and Safety*, in THE HANDBOOK OF MEASUREMENT ISSUES IN CRIMINOLOGY AND CRIMINAL JUSTICE 434, 443 (Beth M. Huebner & Timothy S. Bynum eds., 2016).

40. See Randall R. Beger, *The “Worst of Both Worlds”: School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003); Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT CHILD. 333, 350, 352 (1999).

41. See Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 788–92.

42. *Id.* “Zero tolerance” policies require the application of certain consequences, usually severe in nature, for engaging in certain type of activities regardless of the surrounding circumstances or seriousness of the behavior. See Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852 (2008); see also *infra* Section III.A.

43. See Nance, *Students, Security, and Race*, *supra* note 1, at 27–41; Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 805–11; Jeremy D. Finn & Timothy J. Servoss, *Security Measures and Discipline in American High Schools*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 44,

these racial disparities remain even after accounting for other factors that might explain why some school officials choose to rely on intense surveillance measures and others do not, including the level of crime that occurs on school grounds, the amount of student misbehavior and school disorder, and the level of crime that exists in the neighborhood in which the school resides.⁴⁴

These empirical findings suggest that legitimate safety concerns do not fully explain the disparate use of intense surveillance measures among students of color, but that implicit racial bias influences school officials' decisions to some degree. Empirical studies repeatedly confirm that many individuals unconsciously and unfairly associate minorities, particularly African Americans, with violence, crime, aggression, and danger.⁴⁵ In fact, the science of implicit racial bias provides a compelling explanation for how some school officials can seemingly act in good faith and without a conscious intent to racially discriminate, yet unknowingly create and perpetuate racial inequalities by making decisions that harm students of color based on unconscious stereotypes and attitudes.⁴⁶

Educators and policymakers themselves can and should lead the reform movement to address the unequal application of coercive security measures on students of color. Indeed, there are much more effective methods to create safe, orderly learning environments than relying on oppressive surveillance measures.⁴⁷ The judiciary also has a critical role to play, especially when school officials are unaware of, apathetic towards, or even resistant to the need for change.

This Article goes beyond the current literature by proposing a new legal framework for evaluating intense surveillance methods in schools. Importantly, this framework seeks to ameliorate the pernicious effects of implicit racial bias in school officials' decision-making where the majority of students they serve are students of color. This proposed test does not rely on the Fourteenth Amendment's Equal Protection Clause, which requires independent evidence, other than disproportionate impact, that government officials acted with a discriminatory racial intent when making a decision.⁴⁸ Instead, this framework centers on the U.S. Supreme Court's current jurisprudence evaluating students' Fourth Amendment rights.

It is important to emphasize that this reformulated framework does not require a complete overhaul of current Fourth Amendment case law. Rather, this framework

49 (Daniel J. Losen ed., 2015).

44. See Nance, *Students, Security, and Race*, *supra* note 1, at 27–41; Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 823–31.

45. See *infra* Part I.

46. See Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1267 (2012) (observing that many theorists maintain the implicit racial bias explains the paradox behind persistent racial inequalities amid a general improvement of racial attitudes); Sarah Redfield, *Can New Thinking Help Reverse the School-to-Prison Pipeline?*, 5 A.B.A. DIVERSITY VOICE, Summer 2014, at 4.

47. See Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 345–71 (2016).

48. See *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 266 (1977) (stating that although disparate impact “may provide an important starting point . . . impact alone is not determinative”).

is firmly grounded within the U.S. Supreme Court's Fourth Amendment jurisprudence. It is only a matter of expanding lower courts' understanding of the current factors that the U.S. Supreme Court has established to evaluate students' Fourth Amendment rights in light of current realities that many students face. Said another way, this framework requires only a modest recalibration, but one necessary to correct for the illegitimate role that implicit racial bias can play in school officials' decisions to adopt harsh surveillance measures. And while lawmakers, courts, educators, community members, parents, and the students themselves must do much more to create equitable and inclusive school environments for students of all races, ethnicities, and backgrounds, this proposed framework will help move our nation closer to achieving this important goal.

This Article proceeds in five parts. Part I discusses the science of implicit racial bias and how this cognitive bias can influence school officials' decisions to adopt extreme surveillance measures based on the concentration of minority students at school. Part II presents the results of several empirical analyses revealing the disparate use of coercive security measures along racial lines, even after accounting for other factors that might explain these disparities, such as neighborhood crime, school crime, and overall levels of disorder within the school, suggesting that implicit racial bias influences school officials' decisions to employ intense surveillance measures to some degree. Part III discusses the social and pedagogical harms that result from the overreliance of coercive surveillance measures in schools. It also discusses the particular harms associated with the disproportionate use of these measures on students of color. Part IV discusses the development of Fourth Amendment law that courts currently employ to evaluate surveillance measures in schools. It demonstrates that the current Fourth Amendment jurisprudence provides school officials with almost unbounded discretion to employ a variety of intense security measures, even when schools do not face legitimate safety concerns, and thereby establishes prime conditions for implicit racial bias to unduly influence school officials' decision-making. Part V proposes a reformulated framework to evaluate the constitutionality of suspicionless searches of students that is rooted in the U.S. Supreme Court's current Fourth Amendment jurisprudence. Applying this new framework will help counteract the ill effects of implicit racial bias, ameliorate the disproportionate application of intense surveillance measures on students of color, and foster more equitable and inclusive school environments for all students.

I. IMPLICIT RACIAL BIAS

Several decades of scientific research shows that human judgment can be deeply affected by a multitude of biases.⁴⁹ This is particularly true when a person lacks sufficient information to make a sound judgment, is inundated with information, is under time pressure to make a decision, or has substantial discretion.⁵⁰ This Part will describe the science of implicit racial bias, discuss a sophisticated technique for measuring implicit racial bias called the implicit association test, and present

49. *See infra* Section I.A.

50. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626, 2628 (2013).

empirical evidence of the pernicious effects of implicit racial bias, including in school settings. It will also explain how “racial spaces,” where not all individuals are minorities, but the majority are, can trigger implicit racial biases and unduly influence decision-making.

A. *The Science of Implicit Bias*

Our understanding of human cognitive processes has increased significantly over the last three decades, particularly in the area of implicit social cognition.⁵¹ Implicit social cognition science, which underpins the theory of implicit racial bias, examines cognitive processes that operate outside of our conscious awareness and volitional control.⁵² Substantial empirical research demonstrates that human attitudes, perceptions, decision-making, and behaviors are influenced by factors beyond human conscious awareness or intention.⁵³

Nobel Prize winner Daniel Kahneman established a widely accepted and useful framework for understanding human cognition.⁵⁴ Kahneman divided human cognition processing systems into two categories: System 1 and System 2.⁵⁵ System 2 processing is best described as conscious processing.⁵⁶ It requires substantial working memory and is reflective, slow, controlled, deliberate, rule-based, and

51. See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE (1999); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 144 (2004) (describing the development of implicit bias theory).

52. Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 35 (2014); Brian A. Nosek, Carlee Beth Hawkins & Rebecca S. Frazier, *Implicit Social Cognition: From Measures to Mechanisms*, 15 TRENDS COGNITIVE SCI. 152, 152 (2011); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1146 (2012).

53. See KUNDA, *supra* note 51, at 266; Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 428 (2007).

54. See KAHNEMAN, *supra* note 51, at 3–105.

55. See *id.* at 20–21. Other scientists and researchers have described the dual system of information processing. See, e.g., Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSPECTIVES ON PSYCHOL. SCI. 223 (2013). Some scientists and researchers refer to the dual system of information processing using other terms. See, e.g., Matthew D. Lieberman, *Reflexive and Reflective Judgment Processes: A Social Cognitive Neuroscience Approach*, in SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES 44, 46–47 (Joseph P. Forgas, Kipling D. Williams & William Von Hippel eds., 2003) (describing reflexive processes and reflective processes). Not all dual process theories are alike, see Evans & Stanovich, *supra*, at 226–27, and scientists are still trying to identify whether there are indeed two cognitive systems, more than two systems, or simply one system with multiple processes, see Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 5 INT’L J. FOR CT. ADMIN., Feb. 2013, at 1 n.6.

56. KAHNEMAN, *supra* note 51, at 21.

correlated with cognitive ability.⁵⁷ In contrast, System 1 processing is quick, automatic, contextualized, associative, independent of cognitive ability, involuntary, and operates mostly outside of a person's conscious awareness.⁵⁸ This type of processing is critical for humans because it helps a person process information quickly in a fast-paced, complex world without expending valuable mental resources.⁵⁹

System 1 processing helps humans quickly understand their environment and make decisions through automatic associations between objects and concepts.⁶⁰ For example, individuals often associate concepts and objects such as "menu," "prices," "food," and "restaurant" quickly, automatically, and effortlessly because they are frequently linked together.⁶¹ Importantly, not only do humans rely on System 1 processing to make automatic associations between objects and concepts but they also use it to make automatic associations between people and concepts.⁶² These associations may occur along with a number of identities that one perceives in another person, such as race, gender, age, or disability status.⁶³

Implicit racial biases are subconscious associations made about a racial group using System 1 processing.⁶⁴ Specifically, implicit racial bias theory posits that humans make implicit racial associations (1) involuntarily, as they occur automatically in response to various environmental factors and cues; (2) unintentionally, as they are not deliberate responses to perceptions or information that humans confront; and (3) effortlessly, as this cognitive processing does not affect humans' ability to consciously process information.⁶⁵ Essentially, these implicit racial associations help humans to "manage information overload and make decisions more efficiently and easily" by "filtering information, filling in missing data, and automatically categorizing people according to cultural stereotypes."⁶⁶

57. *See id.* ("System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration."); *see also* Evans & Stanovich, *supra* note 55, at 223–25.

58. *See* KAHNEMAN, *supra* note 51, at 20 ("System 1 operates automatically and quickly, with little or no effort and no sense of voluntary control."); Evans & Stanovich, *supra* note 55, at 223–25.

59. Casey et al., *supra* note 55, at 5–6; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005); Kent McIntosh, Erik J. Girvan, Robert H. Horner & Keith Smolkowski, *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. ON CHILD., Issue 2, Article 4, 2014, at 7.

60. *See* Richardson & Goff, *supra* note 50, at 2629.

61. *Id.* at 2629.

62. *See id.* at 2630; Kang, *supra* note 59, at 1499.

63. *See* Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, 39 AM. EDUCATOR, Winter 2015–2016, at 30.

64. *See* Richardson & Goff, *supra* note 50, at 2629.

65. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 485 (2004).

66. Richardson & Goff, *supra* note 50, at 2629 (quoting Graham and Lowery, *supra* note 65, at 485).

Unconscious stereotypes and attitudes towards certain racial groups are the driving forces behind implicit racial bias.⁶⁷ A stereotype is defined as “a socially shared set of beliefs about traits that are characteristic of members of a social category.”⁶⁸ A stereotype can encompass views and beliefs with “widely diverging evaluative implications” and may unduly and unfairly influence actions and decisions to the degree that an individual behaves towards another person as if that person possesses the traits embodied in the stereotype.⁶⁹ Attitudes, on the other hand, are favorable or unfavorable dispositions towards concepts (such as a social group).⁷⁰ A person develops attitudes from past experiences, and those experiences inform and influence future preferences and behavior.⁷¹ Stereotypes and attitudes are related, but distinct.⁷² For example, one may associate Asian Americans with high achievement in mathematics but still feel negatively towards this racial group.⁷³ Likewise, one can feel positively towards African Americans but still associate them with weapons.⁷⁴

Humans develop unconscious attitudes and stereotypes from repeated exposure to associations between certain racial groups and various concepts and traits.⁷⁵ For example, those living in the United States are repeatedly exposed to associations between African Americans and danger, violence, and aggression.⁷⁶ In fact, some scholars posit that because African Americans are so commonly associated with negative traits, we unconsciously tend to associate African Americans with anything negative.⁷⁷

Critically, empirical research confirms that individuals often harbor implicit attitudes and stereotypes about certain racial groups that are inconsistent with their explicitly endorsed attitudes, beliefs, and principles.⁷⁸ Accordingly, implicit attitudes and stereotypes can negatively influence judgment and decision-making in ways that individuals are unaware of, unable to control, or disagree with explicitly, even when individuals strive to be fair minded.⁷⁹ This poses challenging problems under our current legal discrimination frameworks because although implicit racial bias often leads to observable, measurable discriminatory behavior, discrimination doctrine is

67. See Greenwald & Krieger, *supra* note 53, at 951.

68. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 14 (1995).

69. *Id.*

70. *Id.* at 7; see also Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012).

71. Hutchinson, *supra* note 52, at 35.

72. Kang et al., *supra* note 70, at 1128–29.

73. *Id.* at 1129.

74. *Id.*

75. Richardson & Goff, *supra* note 50, at 2630.

76. *Id.*

77. *Id.* at 2630; Kelly Welch, *The Effect of Minority Threat on Risk Management and the “New Disciplinology” in Schools*, J. CRIM. JUST., 2017, at 3.

78. Greenwald & Krieger, *supra* note 53, at 951; Hutchinson, *supra* note 52, at 316; Jeffery J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).

79. See Casey et al., *supra* note 55, at 10; Kang, *supra* note 59, at 1514.

based on assumptions that individuals make decisions according to their explicit attitudes, beliefs, and intentions.⁸⁰

Importantly, implicit biases, including implicit racial biases, tend to manifest themselves most acutely in certain situations. For example, as Jerry Kang and his colleagues explained, “the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability.”⁸¹ They also tend to manifest themselves more acutely when structural demands exceed capacity to make reasoned decisions, such as when situations are unclear, ambiguous, and difficult to fully understand, and when individuals’ cognitive resources are strained or limited, such as when individuals are operating under stress or feeling fatigued.⁸²

B. The Implicit Association Test

Cognitive psychologists have developed sophisticated methods for measuring implicit biases. The most established and widely recognized measure is the Implicit Association Test (IAT).⁸³ The IAT measures the strength of association between concepts that underlie implicit attitudes and stereotypes.⁸⁴ The Race IAT, which is the most widely used IAT, measures implicit racial bias towards African Americans.⁸⁵ It asks participants to perform a series of tasks. First, it asks participants to sort white faces and African American faces by pressing computer keys on the right side and left side of the keyboard as they appear on the computer screen.⁸⁶ Second, it asks participants to distinguish between unpleasant and pleasant words, again by pressing keys on the left side and right side of the keyboard.⁸⁷ The next two tasks, in random order, involve faces of African Americans and whites and pleasant

80. Greenwald & Krieger, *supra* note 53, at 951.

81. Kang et al., *supra* note 70, at 1142; Richardson & Goff, *supra* note 50, at 2628.

82. See McIntosh et al., *supra* note 59, at 6 (“[I]ndividuals’ implicit biases are more likely to affect their decisions when the structural demands of a situation exceed the available information (e.g. judgments that are inherently difficult, subjective, or ambiguous), or when cognitive resources are limited (e.g. when decisions must be made quickly or individuals are physically or mentally fatigued).” (footnotes omitted)); Richardson & Goff, *supra* note 50, at 2628.

83. See Kang, *supra* note 59, at 1509 (“The Implicit Association Test (IAT) has become the state-of-the-art measurement tool.”); Kristen A. Lane, Mahzarin R. Banaji, Brian A. Nosek & Anthony G. Greenwald, *Understanding and Using the Implicit Association Test: IV, in IMPLICIT MEASURES OF ATTITUDES* 59, 65 (Bernd Wittenbrink & Norbert Schwarz eds., 2007) (discussing how the IAT test has been employed in social cognition, clinical settings, marketing, developmental settings, health, law, disorders, and to measures attitudes toward death, nature, celebrities, foods, cities, geography, public opinion issues, and politics).

84. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 39 (2013); Greenwald & Krieger, *supra* note 53, at 952.

85. Greenwald & Krieger, *supra* note 53, at 952. Other IAT tests measure biases towards Native Americans, age, disability, religion, sexuality, gender, weight, Asians, skin tone, and Arab-Muslims, among others. See *Take a Test, PROJECT IMPLICIT*, <https://implicit.harvard.edu/implicit/selectatest.html> [<https://perma.cc/XY5C-7C52>].

86. Greenwald & Krieger, *supra* note 53, at 952.

87. *Id.*

and unpleasant words.⁸⁸ In one of these tasks, the Race IAT asks participants to press one key when they view a white face or an unpleasant word and another key when they view an African American face or a pleasant word.⁸⁹ In the next task, it requests participants to press one key when they view an African American face or an unpleasant word and another key when they view a white face or a pleasant word.⁹⁰ The implicit attitude measure is determined by the comparative accuracy and speed of completing these tasks.⁹¹

Two important findings have emerged from the IAT.⁹² First, based on the responses of millions of individuals who have taken the Race IAT,⁹³ almost seventy-five percent of the test takers, which includes African American test takers, have an implicit bias against African Americans.⁹⁴ Second, although some have criticized implicit bias theory and the IAT,⁹⁵ empirical evidence repeatedly confirms that white preference measured by the Race IAT successfully predicts discriminatory behavior, even among persons who claim to be egalitarians.⁹⁶ Anthony Greenwald and his colleagues performed a meta-analysis of 122 research studies of implicit bias that included 184 independent samples and 14,900 research subjects.⁹⁷ Their study substantiated considerable support for the predictive validity of the IAT.⁹⁸

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 953; *see also* BANAJI & GREENWALD, *supra* note 84, at 42.

92. BANAJI & GREENWALD, *supra* note 84, at 47.

93. *See The IAT*, BLINDSPOT, <http://blindspot.fas.harvard.edu/IAT> [<https://perma.cc/5YZN-RB8T>].

94. BANAJI & GREENWALD, *supra* note 84, at 47; *see also* Rachlinski et al., *supra* note 78, at 1199. African Americans' pattern of preferences differs from other racial groups. Overall, they exhibit slight implicit preferences for whites, but they have more variability in their responses. Furthermore, some African Americans express moderate to strong preferences for African Americans, a preference rarely exhibited by whites. *See* Rachlinski et al., *supra* note 78, at 1199–2000.

95. *See* Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?"*, 15 *PSYCHOL. INQUIRY* 257, 266–67 (2004); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 *OHIO ST. L.J.* 1023, 1033–34 (2006); Frederick L. Oswald, Gregory Mitchell, Hart Blanton, James Jaccard & Philip E. Tetlock, *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 *J. PERSONALITY & SOC. PSYCHOL.* 171, 175 (2013).

96. BANAJI & GREENWALD, *supra* note 84, at 47.

97. Anthony Greenwald, T. Andrew Poehlman, Eric Lewis Uhlmann & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 *J. PERSONALITY & SOC. PSYCHOL.* 17 (2009).

98. *See also* Rachlinski et al., *supra* note 78, at 1201 ("The prevailing wisdom is that IAT scores reveal implicit or unconscious bias."); Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination* 30–34 (Nat'l Bureau of Econ. Research, Working Paper No. 22014, 2016) (discussing the utility of the IAT after reviewing the literature on the predictive value of the IAT). *See generally* Greenwald et al., *supra* note 97.

C. Evidence of Implicit Racial Bias and Its Effects

Empirical studies repeatedly document that many people unconsciously and unfairly associate minorities, particularly African Americans, with aggression, violence, criminality, and danger.⁹⁹ In fact, scholars observe that the association between African Americans and crime and violence is so strong and common that it is essentially bidirectional.¹⁰⁰ That is, thoughts of crime and violence unconsciously trigger thoughts of African Americans, and thoughts of African Americans unconsciously trigger thoughts of crime and violence.¹⁰¹ Critically, empirical research also confirms that once implicit racial biases are triggered, they influence human judgment, decisions, and actions in measurable ways.¹⁰² Furthermore, empirical research demonstrates that racial cues, such as skin color or even names that are associated with certain racial groups, activate implicit racial biases and affect decision-making.¹⁰³

For example, Joshua Correll and his colleagues created a videogame where African Americans and whites appeared in several different backgrounds holding a gun or a different object such as a cell phone, camera, wallet, or aluminum can.¹⁰⁴ The researchers discovered that both white participants and African American participants fired more quickly at armed African American targets and determined more quickly not to shoot unarmed white targets.¹⁰⁵ When the researchers imposed a time limit and offered financial incentives for correct responses, they found that both white and African American participants were more likely to exhibit “shooter bias” towards African American targets by more often erroneously (1) shooting at unarmed African American targets than at unarmed white targets and (2) refraining from shooting at armed white targets than at armed African American targets.¹⁰⁶ The researchers also asked a series of questions to gauge participants’ awareness of various stereotypes of African Americans in American culture and their personal endorsement of those stereotypes.¹⁰⁷ They discovered that shooter biases were not

99. Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (“The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.”); see also Richardson, *supra* note 52, at 1147; Kelly Welch, Allison Ann Payne, Ted Chiricos & Marc Gertz, *The Typification of Hispanics As Criminals and Support for Punitive Crime Control Policies*, 40 SOC. SCI. RES. 822, 823 (2011) (describing the close association that Americans make between Hispanics and criminality); Kelly Welch & Allison Ann Payne, *Latino/a Student Threat and School Disciplinary Policies and Practices*, 91 SOC. EDUC. 91, 93 (2018) (explaining that crime, threat, and punishment are closely associated with race and ethnicity, including Latinos).

100. Richardson & Goff, *supra* note 50, at 2630.

101. *Id.*

102. *Id.* at 2631.

103. *Id.* at 2630–31.

104. Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315 (2002).

105. *Id.* at 1317.

106. *Id.* at 1319.

107. *Id.* at 1321.

associated with personally held stereotypes but were strongly associated with awareness of cultural stereotypes.¹⁰⁸

In another example, Sandra Graham and Brian Lowery conducted experiments assessing police officers' and juvenile probation officers' reactions to stories about hypothetical youth who allegedly committed crimes.¹⁰⁹ Before any questions were asked, participants were subliminally exposed to words on a screen relating either to African Americans or to words neutral to ethnicity and race.¹¹⁰ The experimenters did not disclose the race of the youth who allegedly committed a crime, and the causes of the crime were unclear.¹¹¹ The experimenters then asked the participants to assess the youth's level of culpability, expected recidivism, deserved punishment, hostility, and age.¹¹² They found that racial priming influenced the officers' judgments about offenders' negative traits, deserved punishment, culpability, age, and likely recidivism of the hypothetical offender, yet their consciously held beliefs and attitudes about race were not related to their judgments.¹¹³

In yet another example, Frank Gilliam and Shanto Iyengar asked one group of participants to watch a news story featuring an alleged perpetrator who was an African American male and another group to watch the exact same news story except that the alleged perpetrator was a white male.¹¹⁴ The pictures of the alleged perpetrators were equivalent in every respect except for skin color.¹¹⁵ Strikingly, the experimenters found that when the alleged perpetrator was African American, participants more strongly favored punitive policies to address the situation that unfolded before them.¹¹⁶

108. *Id.* at 1322; *see also* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185, 188 (2001) (finding that participants identified guns faster when they were primed by seeing African American faces, identified tools faster when primed by seeing a white face, and more often falsely identified tools as guns when primed by seeing African American faces).

109. Graham & Lowery, *supra* note 65, at 487.

110. *Id.* at 489.

111. *Id.* at 487.

112. *Id.* at 487, 496.

113. *Id.* at 494, 497, 499.

114. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563 (2000).

115. *Id.*

116. *Id.* at 567–68. The studies discussed here represent only a small sample of the robust research demonstrating individuals unconsciously associate African Americans with aggression, violence, criminality, and danger. *See, e.g.*, Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 595 (1976) (finding that when, following a script, one white man shoved another white man, only thirteen percent of viewers thought that this act was aggressive; but when both men were black, following the same script, that number rose to sixty-nine percent); Eberhardt et al., *supra* note 99, at 876 (showing that participants who were subliminally primed with crime-relevant objects induced attentional biases towards African American faces); Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342 (2004) (demonstrating that implicit bias towards African Americans, not explicit bias,

Not only have researchers measured implicit biases against minorities among police officers,¹¹⁷ physicians,¹¹⁸ judges,¹¹⁹ and the general public,¹²⁰ but controlled experiments confirm the existence and effects of educators' implicit biases against minorities in school settings as well. For example, Jason Okonofua and Jennifer Eberhardt conducted several controlled experiments to evaluate how race influences teachers' responses to student misbehavior.¹²¹ The experimenters displayed to teachers a fictitious record of a student who misbehaved twice—once for “insubordination” and the other for a “class disturbance.”¹²² The researchers manipulated student race by using stereotypical white names (Jake or Greg) or African American names (Deshawn or Darnell).¹²³ The experimenters then asked several questions to assess the influence of race on teachers' responses to the student's minor infractions.¹²⁴ The questions evaluated teachers' irritation towards the student, teachers' perceptions of severity of the student's misbehavior, how likely teachers were to label the student as a “troublemaker,” and how severely teachers believed that the student should be punished.¹²⁵ The experimenters found that the teachers were “significantly more troubled” by the second school rule violation when the student was African American than when the student was white.¹²⁶ In addition, after the second infraction, teachers felt that the African American student should be disciplined more harshly than the white student.¹²⁷ Furthermore, after the second infraction by the African American student, teachers were more likely to label him as a “troublemaker,” believe that the misbehavior was indicative of a negative

was more strongly related with a tendency to categorize racially ambiguous faces of African Americans as hostile).

117. See, e.g., Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink & Melody S. Sadler, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision To Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020–22 (2007) (empirically finding when the targets were African Americans, police officers manifested “robust racial bias in the speed with which they made shoot/don't-shoot decisions”).

118. See, e.g., Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235–37 (2007); Janice A. Sabin, Brian A. Nosek, Anthony G. Greenwald & Frederick P. Rivara, *Physicians' Implicit and Explicit Attitudes About Race by MD Race, Ethnicity, and Gender*, 20 J. HEALTH CARE POOR & UNDERSERVED 896, 901 (2009) (empirically demonstrating that the medical doctors participating in the study exhibited an overall strong implicit preference for whites over African Americans).

119. See, e.g., Rachlinski et al., *supra* note 78, at 1210 (empirically finding “strong white preference among the white judges”).

120. See BANAJI & GREENWALD, *supra* note 84, at 47.

121. Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617, 617 (2015).

122. *Id.* at 618. The researchers counterbalanced the order in which they displayed the infractions across participants. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 619.

127. *Id.*

pattern, and imagine suspending this student in the future.¹²⁸ This study is consistent with other empirical studies, though not controlled, which demonstrate that students of color often receive more frequent and harsher punishment than similarly situated white students.¹²⁹

D. Implicit Racial Bias and Racial Spaces

The empirical research discussed above documents the existence of implicit racial biases and their detrimental effects on minorities in a variety of contexts, including schools. While certainly not the only factor causing racial disparities in the education context, implicit racial bias may contribute to some extent to the racial disparities that persist across the areas of academic achievement, discipline, grade retention, and placement in special education.¹³⁰ Importantly, implicit racial bias may also contribute to some degree to racial disparities relating to the use of intense surveillance measures,¹³¹ even when not all of the students at a school are students of color.

Robert Sampson and Stephen Raudenbush conducted an important empirical study that illuminates the connection between implicit racial biases and “racial spaces” such as neighborhoods or schools.¹³² Sampson and Raudenbush measured how individuals perceive disorder in neighborhoods, then compared those perceptions with “independent assessments of disorder that are reliable and ecologically valid.”¹³³ They theorized that the racial composition of the neighborhood would influence individuals’ subjective perceptions of disorder in that neighborhood.¹³⁴ Evaluating census data, police data recording violent crimes, data from personal interviews of neighborhood residents, and observations of city streets,¹³⁵ the researchers learned that the neighborhoods’ racial compositions of African Americans and Latinos were stronger predictors of subjective disorder perceived by neighborhood residents, including by African American residents, than careful, actual observations of disorder.¹³⁶ Importantly, the researchers replicated these findings on an independent data set from community leaders who did not live in the communities in which they worked, concluding that the racial composition of

128. *Id.* at 621; *cf.* Clifton A. Casteel, *Teacher-Student Interactions and Race in Integrated Classrooms*, 92 J. EDUC. RES. 115, 119 (2001) (empirically finding that African American students had more negative interactions with white teachers than white students did, and white students had more positive interactions with teachers than African American students did); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–406 (2007) (demonstrating empirically that participants misremembered more facts when listening to a story about “Tyronne” than listening to the same story about “William”).

129. *See infra* notes 193–197 and accompanying text.

130. *See infra* notes 198–200 and accompanying text.

131. *See infra* Part II.

132. *See* Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows”*, 67 SOC. PSYCHOL. Q. 319 (2004).

133. *Id.* at 324.

134. *Id.* at 322–24.

135. *Id.* at 324–27.

136. *Id.* at 336.

the neighborhoods more strongly predicted community leaders' subjective perceptions of disorder than careful, actual observations of disorder.¹³⁷

Sampson and Raudenbush's study was consistent with findings from two prior studies. In the first study, Lincoln Quillian and Devah Pager examined Chicago, Seattle, and Baltimore survey data, census data, and police crime statistics and found that a neighborhood's concentration of young, male African Americans was "one of the best predictors of the perceived severity of neighborhood crime," even after controlling for other variables such as neighborhood deterioration, crime rates, and victimization rates.¹³⁸ They concluded that their findings "suggest that the strong mental association between race and crime ha[ve] a powerful influence on perceptions of neighborhood crime levels, beyond any actual association between race and crime."¹³⁹ In the second study, researcher Joshua Correll and his colleagues examined police officers' inclinations to shoot or not shoot African American and white targets.¹⁴⁰ They found that implicit racial biases increased among police officers serving in urban environments working with higher concentrations of African American residents.¹⁴¹ As L. Song Richardson observes, "[O]fficers whose primary experience is based on proactive policing in urban, poor, and majority-black neighborhoods may have higher levels of implicit bias which can result in them being less accurate than officers whose primary experience consists of work in other neighborhoods."¹⁴²

These studies demonstrate that not only can the race of an individual person trigger implicit biases but so can "racial spaces"—such as neighborhoods and schools—where a significant number of minorities are present. Thus, even if not all of the students in the school are minority students, working in a school serving high concentrations of students of color still may unconsciously influence school officials' perceptions, actions, behaviors, and decision-making regarding how to create orderly learning environments, especially when school officials' may unconsciously associate minority students with danger, crime, aggression, disorder, and violence.¹⁴³

137. *Id.*

138. Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 747 (2001).

139. *Id.* at 748.

140. Correll et al., *supra* note 117, at 1006.

141. *Id.* at 1014.

142. Richardson, *supra* note 52, at 1160; *cf.* Timothy J. Servoss, *School Security and Student Misbehavior: A Multi-Level Examination*, 49 YOUTH & SOC. 755, 772 (2014) (demonstrating that teachers in high-security schools rated African American students as more disruptive relative to their white peers and suggesting that teachers' biases may be exacerbated against African American students in higher security environments).

143. *See* Timothy J. Servoss & Jeremy D. Finn, *School Security: For Whom and with What Results?*, 13 LEADERSHIP & POL'Y SCH. 61, 64 (2014) (explaining that as the proportion of minorities in a school rises, school officials are more prone to rely on punitive discipline methods to combat crime-related threats and to maintain dominance); Welch, *supra* note 77, at 2 ("Because of the stereotype of blacks as criminals, school policymakers may sense a greater risk that needs managing when schools are populated by proportionally larger numbers of black students.").

II. EMPIRICAL EVIDENCE DEMONSTRATING THE UNEQUAL APPLICATION OF INTENSE SURVEILLANCE MEASURES

The disparate treatment of minority students has been documented repeatedly in almost all areas of public education,¹⁴⁴ and this appalling trend also pervades the area of surveillance measures in schools. This Part will discuss several empirical studies that demonstrate the disproportionate use of coercive surveillance measures on minority students and highlight the role that implicit racial bias may play in school officials' decisions to implement such measures.

A. 2009–2010 SSOCS Study

In 2013, I empirically tested the hypothesis that schools with higher concentrations of minority students were associated with greater odds of relying on coercive surveillance measures than schools with lower concentrations of minority students, even after controlling for other factors that might influence school officials' decisions to implement these measures.¹⁴⁵ To test this hypothesis, I analyzed restricted data from the National Center for Educational Statistics' (NCES)¹⁴⁶ 2009–2010 School Survey on Crime and Safety (2009–2010 SSOCS).¹⁴⁷ The 2009–2010 SSOCS is a national dataset that contains information about school security practices, school crime, school disorder, neighborhood crime, and student demographics from approximately 2650 schools.¹⁴⁸

144. See, e.g., GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 29–31 (2006); Linda Darling-Hammond, *Inequality and School Resources: What It Will Take To Close the Opportunity Gap*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 77, 77–91 (Prudence L. Carter & Kevin G. Welner eds., 2013) (describing the inequalities present in our education system); Jason P. Nance, *The Need and Justifications for a Stronger Federal Response To Address Educational Inequalities*, in THE ROAD TO PROGRESS: THE CASE FOR A U.S. EDUCATION AMENDMENT (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., forthcoming).

145. See Nance, *Students, Security and Race*, *supra* note 1, at 27–43, for a full description of the study's dataset, variables, results, as well as its limitations.

146. The NCES “is the primary federal entity for collecting and analyzing data related to education in the U.S. and other nations. NCES is located within the U.S. Department of Education and the Institute of Education Sciences.” *About Us*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/about/> [<https://perma.cc/5VJY-NPNB>].

147. See U.S. DEP'T OF EDUC. NAT'L CTR. FOR EDUC. STATISTICS, SCHOOL SURVEY ON CRIME AND SAFETY PRINCIPAL QUESTIONNAIRE: 2009–2010 SCHOOL YEAR [hereinafter 2009–2010 SSOCS QUESTIONNAIRE], http://nces.ed.gov/surveys/ssocs/pdf/SSOCS_2010_Questionnaire.pdf [<https://perma.cc/YGL4-4QZ7>]; see also Nance, *Students, Security, and Race*, *supra* note 1, at 28. The dataset I analyzed was the restricted-access version. Although restricted datasets are available only to researchers who meet certain conditions, datasets containing less sensitive data are available to the public. See *School Survey on Crime and Safety (SSOCS)*, NAT'L CTR. EDUC. STAT., http://nces.ed.gov/surveys/ssocs/data_products.asp [<https://perma.cc/WRL2-VJ3U>].

148. 2009–10 SSOCS QUESTIONNAIRE, *supra* note 147.

The 2009–2010 SSOCS asked school principals to answer several questions relating to their school security practices. Principals responded whether “[d]uring the 2009–2010 school year . . . it [was] a practice of [their] school to”: “[r]equire students to pass through metal detectors each day;” “[p]erform one or more random metal detector checks on students;” “[p]erform one or more random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs;” “[c]ontrol access to school grounds during school hours (e.g., locked or monitored gates);” “[u]se one or more security cameras to monitor the school;” and “have any security guards, security personnel, or sworn law enforcement officers present at [the] school at least once a week.”¹⁴⁹ The dependent variables for my study represented the odds that a school principal responded affirmatively to using various combinations of these surveillance practices.¹⁵⁰

To measure the effect of race and ethnicity, I included in my model the percentage of minority students attending the schools.¹⁵¹ I also included other student demographic and characteristic information, such as student poverty, the percentage of students with limited English proficiency, the percentage of students who scored in the bottom fifteen percent on state standardized exams, and the percentage of students enrolled in special education.¹⁵²

To account for other factors that might influence school officials’ decisions to rely on intense surveillance measures, I controlled for school crime, school disorder, and crime in the neighborhood in which the school resides.¹⁵³ Regarding school crime, the 2009–2010 SSOCS asked school principals to report the number of incidents of school crime by type that occurred at school or on school property during the school year.¹⁵⁴ To control for school disorder, I created an index based on responses to various questions about student disciplinary problems.¹⁵⁵ With respect to

149. *Id.* at 5, 8.

150. I examined four different combinations of security practices: (1) metal detectors and guards/school police; (2) metal detectors, guards/school police, and random sweeps for contraband; (3) metal detectors, guards/school police, random sweeps for contraband, and security cameras; and (4) metal detectors, guards/school police, random sweeps for contraband, security cameras, and locked gates. Nance, *Students, Security, and Race*, *supra* note 1, at 31.

151. *Id.* at 31. A school’s student minority population included students who were African American, Hispanic, Asian/Pacific Islanders, and American Indian/Alaska native students. See SIMONE ROBERS, JIJUN ZHANG, JENNIFER TRUMAN & THOMAS D. SNYDER, NAT’L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2011, at 112 (2012).

152. Nance, *Students, Security, and Race*, *supra* note 1, at 32–33.

153. *Id.*; see also Aaron Kupchik & Geoff Ward, *Race, Poverty, and Exclusionary School Security: An Empirical Analysis of U.S. Elementary, Middle, and High Schools*, 12 YOUTH VIOLENCE & JUV. JUST. 332, 341–42 (2014); Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 27 (2010). These incidents included violent incidents; threats of violence; possession of a firearm, explosive device, knife, or other sharp object; possession, distribution, or use of illegal drugs, inappropriate prescription drugs, or alcohol; incidents of theft over ten dollars; and incidents of vandalism. See 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 147, at 15.

154. 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 147, at 15.

155. The 2009–2010 SSOCS asked school principals to rate on a scale of one to five the frequency of occurrences with respect to “[s]tudent racial/ethnic tensions,” “[s]tudent

neighborhood crime, the 2009–2010 SSOCs asked school officials to assess the level of crime in the area of their school on a scale of one to three (high, moderate, or low).¹⁵⁶ I also controlled for community and external groups' involvement in the school's efforts to promote school safety;¹⁵⁷ the geographic region of the state in which the school was located;¹⁵⁸ whether the school was located in a city, suburb, town, or rural area;¹⁵⁹ the school's total student enrollment;¹⁶⁰ building level;¹⁶¹ whether the school was a traditional school or nontraditional school (charter school or magnet school);¹⁶² and the school's student attendance rate.¹⁶³

In all of the empirical models, higher concentrations of minority students were predictive of greater odds that schools relied on the designated combinations of security measures.¹⁶⁴ Furthermore, student race and ethnicity remained statistically significant after controlling for the other factors described above, including school crime, neighborhood crime, school disorder, school location, and the total number of students enrolled at school.¹⁶⁵ Stated another way, the analyses indicated that schools with higher concentrations of students of color were more inclined to rely on intense surveillance measures to maintain order and control than schools with lower concentrations of students of color facing similar crime, discipline, and neighborhood crime issues.¹⁶⁶

bullying,” “[s]tudent sexual harassment of other students,” “[s]tudent harassment of other students based on sexual orientation or gender identity (i.e., lesbian, gay, bisexual, transgender, questioning),” “[w]idespread disorder in the classroom,” “[s]tudent verbal abuse of teachers,” “[s]tudent acts of disrespect for teachers other than verbal abuse,” “[g]ang activities,” and “[c]ult or extremist group activities.” *Id.* at 13.

156. *Id.* at 17.

157. These groups included parent groups, social services agencies, juvenile justice agencies, law enforcement agencies, mental health agencies, civic organizations/service clubs, private corporations/businesses, and religious organizations. Nance, *Students, Security, and Race*, *supra* note 1, at 34.

158. The NCES divided up states into four categories: Northeastern State, Southern State, Western State, or Midwestern State. *Id.* at 35.

159. *Id.*

160. *Id.*

161. *Id.* I examined only secondary schools. Accordingly, I controlled for whether the school was a middle school, defined as schools in which the lowest grade is not lower than grade four and the highest grade is not higher than grade nine; a high school, defined as schools in which the lowest grade is not lower than grade nine and the highest grade is not higher than grade twelve; or a combined school, defined as other combinations of grades, including K–12 schools. Nance, *Students, Security, and Race*, *supra* note 1, at 35; Institute of Education Sciences, *Crime, Violence, Discipline, and Safety in U.S. Public Schools: Findings from the School Survey on Crime and Safety: 2009–10*, at 7 (2011).

162. Nance, *Students, Security, and Race*, *supra* note 1, at 35.

163. *Id.* at 35–36.

164. *Id.* at 40–41.

165. *Id.*

166. *Id.*

B. 2013–2014 SSOCS Study

In 2017, I again tested the hypothesis that schools with higher concentrations of minority students were associated with greater odds of relying on intense surveillance methods than schools with lower concentrations of minority students, even after taking into account other factors that might influence school officials' decisions to implement such measures.¹⁶⁷ In 2015, the U.S. Department of Education released a new set of data on the security practices of public schools throughout the United States: the 2013–2014 School Survey on Crime and Safety (2013–2014 SSOCS).¹⁶⁸ Because of funding reductions,¹⁶⁹ NCES selected fewer schools to participate in the study (approximately 1600 schools) and designed a smaller questionnaire than it had in prior years.¹⁷⁰ Thus, I was not able to control for exactly the same factors I did in the 2009–2010 SSOCS study. Nevertheless, the 2013–2014 SSOCS asked principals to respond to the same questions relating to school security practices as the 2009–2010 SSOCS,¹⁷¹ allowing me to construct several combinations of security measures.¹⁷²

Similar to the 2009–2010 SSOCS study, even after controlling for school crime, school disorder, geographic region, urbanicity, building level, and total student enrollment,¹⁷³ all of the empirical models showed that higher concentrations of minority students were predictive of greater odds that schools relied on the designated combinations of security measures.¹⁷⁴

C. Other Empirical Studies

Other empirical studies also demonstrate the strong connection between race and the use of intense surveillance measures. For example, Jeremy Finn and Timothy

167. See Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 805–11, for a detailed description of the study's dataset, variables, results, as well as its limitations.

168. See Institute of Education Sciences, *supra* note 5.

169. See e-mail from Kathryn A. Chandler, Dir., El/Sec Sample Surveys Program, Nat'l Ctr. for Educ. Statistics to Jason P. Nance, Assoc. Professor of Law, Univ. of Fla. Levin Coll. of Law (May 21, 2013, 2:41 PM) (unpublished e-mail on file with the *Indiana Law Journal*).

170. Institute of Education Sciences, *supra* note 5, at 1.

171. See *id.* at C-4 to C-5.

172. See Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 806 n.247.

173. I constructed these variables largely in the same manner as I did in the 2009–2010 SSOCS study except for school crime. See *id.* at 807–08. Because the 2013–2014 SSOCS asked school officials to report fewer incidents than the 2009–2010 SSOCS, I created only two categories of crimes: (1) incidents involving weapons or sexual battery and (2) incidents not involving weapons or sexual battery (robbery without a weapon, physical attack without a weapon, and threat of a physical attack without a weapon). *Id.* at 807 & nn.250–51.

174. *Id.* at 809–11. I note that the 2013–2014 SSOCS did not include the percentage of minority students attending schools. Rather, it contained only a categorical variable for student race (0–19% minority, 20–49% minority, and over 50% minority). *Id.* at 806–07. While this categorical variable is less robust than a continuous variable, it still provides useful information regarding the relationship between race and the use of security measures. *Id.* at 806.

Servoss examined the relationship between the use of security measures and race by examining data from the Common Core of Data, the Civil Rights Data Collection, and the Educational Longitudinal Study of 2002.¹⁷⁵ Finn and Servoss found that of all of the factors they examined, “[t]he strongest correlation was with the percentage of Black students in the school. That is, the percentage of Black students enrolled was more highly related to security levels than was any other characteristic,”¹⁷⁶ including the percentage of socioeconomically disadvantaged students, neighborhood crime, building level, the number of students enrolled, and urbanicity.¹⁷⁷ Furthermore, the percentage of African American students was still strongly connected to school security levels after controlling for other school and student characteristics.¹⁷⁸

Katarzyna T. Steinka-Fry and her colleagues also examined the relationship between race and the use of security measures by analyzing four years of SSOCS data and the School Crime Supplement to the National Crime Victimization Study.¹⁷⁹ They also discovered that, even after accounting for school structural features, school disorder, urbanicity, neighborhood crime, and geographic region, higher concentrations of low-income and African American students were associated with using intense security measures.¹⁸⁰ Furthermore, they found that African American and Hispanic students were more likely to report attending a school that relied on intense security measures.¹⁸¹

Karen DeAngelis and her colleagues examined Texas financial data to examine how much school districts spend on school security and the extent to which spending differed according to school district characteristics.¹⁸² The state of Texas mandates

175. See Finn & Servoss, *supra* note 43, at 46.

176. *Id.* at 49; see also Servoss & Finn, *supra* note 143, at 80 (“In sum, a high proportion of Black students in a school is related to the degree of security the school implements above and beyond all other characteristics we studied.”).

177. Finn & Servoss, *supra* note 43, at 46–49; see also Servoss & Finn, *supra* note 143, at 79–80.

178. In another study that Timothy Servoss conducted, again examining the Education Longitudinal Study of 2002, he found that “students in high security schools are 11.78 times more likely to be African American than White . . . and 1.56 times more likely to be Hispanic/Latino than White.” Servoss, *supra* note 142, at 767; see also IVORY A. TOLDSON, BREAKING BARRIERS 2: PLOTTING THE PATH AWAY FROM JUVENILE DETENTION AND TOWARD ACADEMIC SUCCESS FOR SCHOOL-AGE AFRICAN AMERICAN MALES 7 (2011) (finding that black students were approximately 4.8 times more likely to report passing through a metal detector when entering school than white students, and Latino students were approximately 2.65 times as likely to report passing through metal detectors when entering school than white students); Thomas J. Mowen & Karen F. Parker, *Minority Threat and School Security: Assessing the Impact of Black and Hispanic Student Representation on School Security Measures*, 30 SECURITY J. 504, 514–19 (2016) (finding that the percentage of African American students at a school was positively related to the use of strict security measures).

179. Katarzyna T. Steinka-Fry, Benjamin W. Fisher & Emily E. Tanner-Smith, *Visible School Security Measures Across Diverse Middle and High School Settings: Typologies and Predictors*, 11 J. APPLIED SECURITY RES. 422, 424 (2016).

180. *Id.* at 431.

181. *Id.*

182. Karen J. DeAngelis, Brian O. Brent & Danielle Ianni, *The Hidden Cost of School*

that all districts report expenses relating to security equipment, such as metal detectors and surveillance cameras, security guards, hall monitors for security, and security vehicles.¹⁸³ Their study revealed that even after accounting for school district characteristics such as urbanicity, student enrollment, wealth of the district per average daily attendance, and student poverty, school districts serving higher concentrations of minority students spent more on average on security measures than other school districts.¹⁸⁴ Furthermore, their analysis demonstrated that poorer school districts serving higher concentrations of low-income and minority students on average spent disproportionately more on school security than other school districts.¹⁸⁵

In 2013, I conducted an empirical study¹⁸⁶ on a particularly intrusive and intense surveillance measure defined in the SSOCS questionnaires as “random sweeps for contraband (e.g., drugs or weapons), but not including dog sniffs.”¹⁸⁷ While it is not entirely clear how school officials interpreted this question, one reasonably envisions that “random sweeps for contraband” encompasses practices similar to the measures employed on students described in this Article’s introduction, such as random, suspicionless searches of students’ belongings and pat downs.¹⁸⁸ Examining only data from schools that reported no incidents whatsoever relating to weapons, alcohol, or illegal drugs during the school year, I found that schools serving higher concentrations of minority students had greater odds of relying on this particularly intrusive surveillance practice, even after taking into account factors such as school officials’ perceptions of crime where students reside, school officials’ perceptions of crime where the school is located, student poverty, school level, school enrollment size, urbanicity, and geographic location.¹⁸⁹

Still other empirical studies, though not directly related to the disparate use of security measures along racial and ethnic lines, demonstrate that student race and ethnicity are strongly associated with the use of punitive disciplinary measures. Kelly Welch and Allison Payne observed that schools serving higher concentrations of African American students were more likely to impose harsher punishments for student misbehavior, such as suspensions, expulsions, and referring students to law enforcement.¹⁹⁰ They also discovered that schools with higher concentrations of African American students were (1) less likely to use softer disciplinary measures such as oral reprimands or referrals to visit with the school counselor, and (2) less supportive of restorative justice programs and alternative forms of discipline, such as assigning students to perform community service.¹⁹¹ In a very recent empirical

Security, 36 J. EDUC. FIN. 312 (2011).

183. *Id.* at 318–19.

184. *Id.* at 329.

185. *Id.* at 329–31.

186. Nance, *Random, Suspicionless Searches*, *supra* note 1, at 418–23.

187. 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 147, at 5; *see also* Nance, *Random, Suspicionless Searches*, *supra* note 1, at 418–23.

188. *See* 2009–2010 SSOCS QUESTIONNAIRE, *supra* note 147, at 3–6.

189. *See* Nance, *Random, Suspicionless Searches*, *supra* note 1, at 418–23.

190. Welch & Payne, *supra* note 153, at 36.

191. *Id.* at 36–37; *see also* Welch & Payne, *supra* note 99, at 3–4 (“A growing body of research indicates that racial threat may be operating in schools, with high black student body

study, Welch and Payne also found that schools serving more Latino students implemented harsher disciplinary policies and practices than other schools, even after controlling for other student, school, and community characteristics.¹⁹² As Kelly Welch explains, “[S]ome policymakers and administrators perceive there to be a greater risk that needs managing *because* certain schools are disproportionately composed of racial and ethnic minority students, and this perception is responsible for the production of more intense disciplinary policies and practices.”¹⁹³

Tellingly, racial disparities in suspensions, expulsions, student referrals to law enforcement, and school-based arrests have been documented repeatedly at the local, state, and national levels for years.¹⁹⁴ While some may believe that these racial disparities exist because of differences in behavior with respect to these student groups, the U.S. Department of Education’s Office of Civil Rights (OCR) refutes this point, observing that more frequent or serious misbehavior by minority students does not adequately explain these disparities.¹⁹⁵ Rather, the OCR disturbingly confirmed that it has found “cases where African Americans students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem.”¹⁹⁶ Indeed, there are several empirical studies that corroborate the OCR’s findings.¹⁹⁷

In addition, it is important to observe that the empirical studies discussed above do not even begin to fully illuminate the problem of racial inequalities in our public school system overall. For example, minority students are disproportionately retained from grade to grade,¹⁹⁸ suffer from lower academic expectations from

composition associated with more punitive and less mild practices . . .”).

192. Welch & Payne, *supra* note 99, at 10–16.

193. Welch, *supra* note 77, at 2 (emphasis in original).

194. Russell J. Skiba, Mariella I. Arredondo & Natasha T. Williams, *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE EDUC. 546, 550 (2014); *see also* U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 2, 6 (2014); U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, 2013–2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016); Nance, *supra* note 47, at 331–32.

195. *See* U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3 (Jan. 8, 2014) [hereinafter DEAR COLLEAGUE LETTER].

196. *Id.* at 4.

197. *See, e.g.*, Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the “School-to-Jail” Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 653–54 (2011); Russell J. Skiba, Robert H. Horner, Choong-Geun Chung, M. Karega Rausch, Seth L. May & Tary Tobin, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 95–101 (2011); *see also* Welch & Payne, *supra* note 99, at 92 (“[O]ne of the strongest and most consistent predictors of discipline is student race and ethnicity: Black and Latino/a students experience more frequent and intense school punishments for the same or lesser offenses than their white peers . . .”).

198. *See, e.g.*, Institute of Education Sciences, Status and Trends in the Education of Racial and Ethnic Groups 92 tbl. 17a (2010); Catherine E. Lhamon, *Five New Facts from the Civil Rights Data Collection*, HOMEROOM: OFFICIAL BLOG U.S. DEP’T EDUC. (Mar. 21, 2014), <https://blog.ed.gov/2014/03/five-new-facts-from-the-civil-rights-data-collection/>

teachers,¹⁹⁹ and are overrepresented in restrictive special education programs.²⁰⁰ The above studies also do not convey the inequalities that youth of color experience in areas outside of public education, such as in the juvenile justice system. Empirical studies reveal that minority youth, particularly African Americans, are much more likely to be involved in and treated more harshly by the criminal justice system than similarly situated white youth.²⁰¹ They are disproportionately arrested, referred to juvenile justice court, adjudicated by juvenile court, detained, and sentenced to adult state prisons.²⁰²

All of these empirical studies lead to the same conclusion: youth of color, especially African Americans, are treated more harshly than similarly-situated white youth in many contexts, including with respect to decisions of whether to employ intense surveillance measures. It is likely that many factors contribute to racial disparities in public education,²⁰³ including in the area of security measures. Nevertheless, these empirical studies also strongly suggest that student race in and of itself illegitimately influences school officials' decisions to implement harsher surveillance measures among the student body.²⁰⁴

Although a few school officials and teachers may be motivated by racial animus in their decision-making, it is much more likely that the vast majority of school officials and teachers are committed to serving students in good faith.²⁰⁵ The science

[<https://perma.cc/7AMR-NEM5>].

199. See, e.g., SARAH E. REDFIELD, DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE LEGAL PROFESSION 72–76 (2009); Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, 38 URB. EDUC. 460, 477–78 (2003).

200. See CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 53–54 (2010); PEDRO A. NOGUERA, THE TROUBLE WITH BLACK BOYS AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION, at xvii (2008).

201. See *Juvenile Arrests 2008–2011*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, <https://www.ojjdp.gov/ojstatbb/crime/qa05104.asp?qaDate=2008> [<https://perma.cc/57VJ-SC8W>]; Nancy E. Dowd, *What Men?: The Essentialist Error of the “End of Men”*, 93 B.U. L. REV. 1205, 1226–27 (2013) (providing evidence that African American youth are overrepresented in the juvenile justice system and receive disparate and harsher treatment).

202. See Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 530–31 (2009).

203. See, e.g., Daniel Losen, Cheri Hodson, Jongyeon Ee & Tia Martinez, *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 43, at 91–92 (explaining that minority students are more likely to have inexperienced teachers); Nance, *supra* note 144, at 2–7 (discussing vast resource and student integration inequalities that lead to education outcome inequalities).

204. See Welch, *supra* note 77, at 5 (“Research has made it overwhelmingly clear that students are not at equal risk for experiencing the punitive school control measures that contribute to the school-to-prison pipeline. . . . Racial and ethnic composition influences the degree to which schools implement harsh disciplinary policies and use harsh practices.”).

205. See *id.*; Staats, *supra* note 63, at 29 (“As a profession, teaching is full of well-intentioned individuals deeply committed to seeing all children succeed.”); cf. Richardson, *supra* note 52, at 1148 (“The typical arguments that the disproportionate policing of Blacks

of implicit racial bias provides a compelling explanation for how some school authorities can seemingly act in good faith and without a conscious intent to racially discriminate, yet unknowingly create and perpetuate racial inequalities by making decisions that harm students of color based on unconscious stereotypes and attitudes.²⁰⁶ As discussed above, working in a school serving a high concentration of students of color may unconsciously affect school officials' perceptions, actions, behaviors, and decision-making regarding how to create orderly learning environments, especially when school officials may unconsciously associate minority students with danger, aggression, crime, disorder, and violence.²⁰⁷ Indeed, most researchers conclude that one of the causes of racial disparities in public education generally is the unconscious racial biases of teachers and school officials.²⁰⁸ Given the empirical evidence discussed above, it is logical to conclude that implicit racial bias also influences school officials' decisions to employ intense surveillance measures as well.

III. HARMS OF INTENSE SURVEILLANCE MEASURES

Few will maintain that relying on coercive surveillance measures that limit students' privacy is ideal. However, the rationale behind surveillance measures is not difficult to understand. Certain activities and items that students bring to school can threaten the well-being and safety of other students and themselves, and students may hide such items and activities from school authorities.²⁰⁹ Accordingly, school officials and others claim that school authorities need access to students' belongings and private activities so that they can expose contraband and deter wrongful, unsafe behavior.²¹⁰ Indeed, many will argue that our children's safety is paramount and overrides any concerns the use of these measures creates. The problem with this rationale, however, is that, as Aaron Kupchik astutely observes, "Instead of *asking* whether tighter security measures and harsher punishments are a good idea for schools, the public, school administrators, politicians, and others simply *assume* that

can be explained either by conscious racial bias on the part of the police or by the assumption that Blacks engage in more ambiguously criminal behavior does not withstand scrutiny.").

206. See Devine et al., *supra* note 46, at 1267; Redfield, *supra* note 46, at 4.

207. See Servoss & Finn, *supra* note 143, at 64 (explaining that as the proportion of minorities in a school rises, school officials are more prone to rely on punitive discipline methods to combat crime-related threats and to maintain dominance).

208. See, e.g., DEREK BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 147 (2013) ("[T]oday racial discrimination is more likely to be the result of subtle or unconscious biases, on which a state actor may not even realize it is acting."); Jamilia J. Blake, Bettie Ray Butler & Danielle Smith, *Challenging Middle-Class Notions of Femininity: The Causes of Black Females' Disproportionate Suspension Rates*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 43, at 76 ("Although a number of factors are believed to contribute to disproportionate disciplinary practices, racial/ethnic bias has been implicated most frequently . . .").

209. See BRYAN R. WARNICK, UNDERSTANDING STUDENT RIGHTS IN SCHOOLS: SPEECH, RELIGION, AND PRIVACY IN EDUCATIONAL SETTINGS 136 (2013).

210. *Id.*

they are. Rather than engaging with the problem of school safety and seeking information, these groups more often respond out of fear.”²¹¹

This Part discusses the harms that result from the overreliance of extreme surveillance measures in schools, particularly on students of color when these measures are applied disproportionately. It also evaluates the effectiveness of these measures in schools, concluding that, at best, the evidence suggests that their effectiveness is far from clear and, at worst, that they may lead to more disorder, destabilization, and dysfunction in the long term.

A. Overreliance on Intense Surveillance Measures Harms Students’ Interests

Empirical evidence suggests that overreliance on intense surveillance measures may harm students’ interests in at least two major ways. First, they may contribute to dysfunctional learning environments that lead to poor student outcomes. Education policy experts understand that cooperation and trust among members of the school community are fundamental to healthy learning climates, positive learning outcomes, and school safety.²¹² Optimal learning conditions for students include experiencing positive relationships with teachers and other students, being treated fairly, feeling a sense of belonging in the school community, and having a positive self-image.²¹³ When students distrust teachers or doubt that they belong in school, they are prone to disengage academically and misbehave.²¹⁴

Many scholars observe that intense surveillance environments in schools disrupt feelings of cooperation, trust, and respect among members of the community by sending a clear signal to students that they are prone to illegal activity, dangerous, and violent.²¹⁵ Paul Hirschfield maintains that intense surveillance measures create

211. KUPCHIK, *supra* note 4, at 2 (emphasis in original).

212. See WARNICK, *supra* note 209, at 146–50; 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 *ELEMENTARY SCH. J.* 3, 3–4 (2001) (observing that trust is an important element of the teaching and learning process).

213. *Over-Policing in Schools on Students’ Education and Privacy Rights*, N.Y. CIV. LIBERTIES UNION (June 14, 2006), <http://www.nyclu.org/content/over-policing-schools-students-education-and-privacy-rights> [<https://perma.cc/CF3X-VEQU>] (featuring the June 14, 2006, testimony of Donna Lieberman, N.Y. Civil Liberties Union, 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); see also LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 65 (2010).

214. See Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 *J. SCH. PSYCHOL.* 455, 458, 469–70 (2008); Jason A. Okonofua, Gregory M. Walton & Jennifer L. Eberhardt, *A Vicious Cycle: A Social-Psychological Account of Extreme Racial Disparities in School Discipline*, 11 *PERSPECTIVES ON PSYCHOL. SCI.* 381, 385 (2016).

215. See WARNICK, *supra* note 209, at 148 (“One of the moral problems with constant surveillance is that it says to students that teachers do not trust them as responsible human beings . . . and is therefore a barrier to accomplishing the educational mission of the school.”); Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 *HARV. EDUC. REV.* 189, 190–91 (1995).

disunity, discord, and social barriers among students, teachers, and school officials.²¹⁶ Martin Gardner observes that suspicionless searches convey to students a message that each is a suspect, which is problematic because of the special relationship that should exist between educators and their students.²¹⁷ In her dissent in *Vernonia School District 47J v. Acton*, Justice Sandra Day O'Connor also argued that suspicionless searches send harmful messages to students.²¹⁸ She explained:

[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."²¹⁹

In an ethnographic study, Jen Weiss observed that intense surveillance measures caused students to avoid and distrust school officials.²²⁰ Instead of providing a greater sense of safety, students felt a heightened sense of disillusion and danger.²²¹ Donna Liebermann testified that intense surveillance measures do not foster educational environments that promote learning and social growth in youth.²²² Instead, these measures create 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."²²³ Timothy Servoss maintains that intense surveillance measures require "passivity and compliance" from students, but they often cause conflict because many students are not passive and blindly compliant.²²⁴ When students feel powerless and stifled, they

216. Hirschfield, *supra* note 4, at 46.

217. 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).

218. 515 U.S. 646, 682 (O'Connor, J., dissenting)

219. *Id.* at 682 (O'Connor, J., dissenting) (all but the first alteration in original).

220. Jen Weiss, *Scan This: Examining Student Resistance to School Surveillance*, in SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION, *supra* note 4, at 213, 277.

221. *Id.* at 213–14; *see also* KIM BROOKS, VINCENT SCHIRALDI & JASON ZIEDENBERG, SCHOOL HOUSE HYPE: TWO YEARS LATER 3 (2000) ("Parents and school boards continue to call for more metal detectors, locker searches and student identification badges, even as students say they feel less safe and report more crime in schools that use these 'secure' school procedures.").

222. *See Over-Policing in Schools on Students' Education and Privacy Rights*, *supra* note 213.

223. *Id.*; *see also* BROOKS ET AL., *supra* note 221, at 3 (quoting a student saying "[w]hen I get up to go to school in the morning, I don't want to feel like I'm going to a correctional facility"); Finn & Servoss, *supra* note 43, at 44 (maintaining that prisonlike conditions make "students feel defensive and contribute to their emotional and physical disengagement from school").

224. *See* Servoss, *supra* note 142, at 757.

become frustrated and lose motivation to follow school norms and exhibit positive social behavior.²²⁵

Importantly, there are parallel findings in studies that examine the social costs incurred in communities whose members are subject to intense surveillance and the threat of government punishment.²²⁶ According to Tom Tyler, intense surveillance measures in communities signal distrust, which decreases community members' capacity to feel positively about themselves and their communities.²²⁷ He observes that intense surveillance environments cause community members to perceive unjustified intrusions into their privacy as unfair, making them resentful and less willing to comply with the law.²²⁸ Accordingly, regardless of whether intense surveillance methods are effective in the short term, they incur unintended social costs—such as paranoia, distrust, and loss of respect for governmental authority—and weaken individuals' resolve to willingly obey laws, cooperate with government officials, and participate in political processes over the long term.²²⁹

In addition to contributing to poor learning climates, overreliance on intense surveillance measures harm students' interests in a second significant way. Intense surveillance methods often are a component of involving more students in the criminal justice system, a phenomenon frequently referred to as the “school-to-prison pipeline.”²³⁰ Many school officials rely on intense surveillance methods in connection with zero tolerance policies and other punitive disciplinary measures in their efforts to control students.²³¹ When schools use intense surveillance methods in conjunction with extreme discipline measures, such as zero-tolerance policies, school officials automatically suspend, expel, or refer students to law enforcement when they identify students with items they are not permitted to bring to school, regardless of the seriousness of the offense or the surrounding circumstances.²³²

For example, in *In re Expulsion of A.D.*, a student was expelled from school pursuant to a school district's zero tolerance weapons policy for accidentally carrying a three-inch folding pocketknife to school in her purse.²³³ A school police officer discovered the pocketknife when he searched through A.D.'s locker and personal belongings during a planned, random, suspicionless search for controlled substances.²³⁴ When the school police officer and principal confronted A.D., A.D.

225. *Id.*

226. See Tom R. Tyler & Lindsay 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).

227. *Id.*; 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).

228. See Tyler & Rankin, *supra* note 226, at 361; Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *L. & SOC'Y REV.* 513, 514 (2003).

229. See Tyler & Rankin, *supra* note 226, at 361–62.

230. See Nance, *supra* note 47, at 343.

231. Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 *MISS. L.J.* 847, 952–53 (2011).

232. See Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 42, at 852.

233. 883 N.W.2d 251, 253 (Minn. 2016).

234. *Id.* at 254.

explained that she had used the pocketknife at her boyfriend's family farm to cut twine on hay bales the previous weekend and had forgotten to remove it from her purse.²³⁵ Even though the school principal believed that A.D. was telling the truth, she expelled A.D. for the remainder of the school year pursuant to the zero tolerance policy.²³⁶ Empirical evidence reveals the association between surveillance measures and student exclusion. Timothy Servoss and Jeremy Finn analyzed data from several national databases and found that higher levels of security and surveillance in schools were connected with higher student suspension rates.²³⁷ Even more troubling, these researchers discovered that school security levels are associated with larger disparities in suspension rates among similarly situated African American and white students.²³⁸ In high-security schools, the odds of suspending an African American student were 2.7 times greater than for a white student.²³⁹

Exclusionary practices, such as suspension and expulsion, often lead to poor student outcomes.²⁴⁰ For example, not only do excluded students miss classroom instruction and often fall behind academically, but exclusion also may stigmatize them, promote disengagement and school avoidance, and inhibit access to needed resources.²⁴¹ Empirical evidence shows that exclusion significantly decreases the likelihood that students will graduate from high school.²⁴² Not graduating from high school leads to many other social problems, including unemployment, poverty, increased reliance on welfare programs, decreased participation in democratic processes, bad health, and future involvement in the criminal justice system.²⁴³ Empirical evidence also shows that exclusion is strongly connected to immediate involvement in the juvenile justice system.²⁴⁴ When students are not in school and are left unsupervised, they are more likely to engage in delinquent acts.²⁴⁵

235. *Id.*

236. *Id.*

237. Servoss & Finn, *supra* note 143, at 82–83.

238. Finn & Servoss, *supra* note 43, at 53.

239. *Id.*

240. Nance, *supra* note 47, at 321–24.

241. See DEAR COLLEAGUE LETTER, *supra* note 195, at 4; Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRACTICE 341, 345–46 (2003).

242. See, e.g., Robert Balfanz, Vaughan Byrnes & Joanna Hornig Fox, *Sent Home and Put Off Track*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 43, at 17, 22–29; Miner P. Marchbanks III, Jamilia J. Blake, Eric A. Booth, Dottie Carmichael, Allison L. Seibert & Tony Fabelo, *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 43, at 59, 64.

243. Nance, *supra* note 47, at 322; see also CLIVE R. BELFIELD, HENRY M. LEVIN & RACHEL ROSEN, *THE ECONOMIC VALUE OF OPPORTUNITY YOUTH 20* (2012).

244. TONY FABELO, MICHAEL D. THOMPSON, MARTHA PLOTKIN, DOTTIE CARMICHAEL, MINER P. MARCHBANKS III & ERIC A. BOOTH, *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 43 (2011).

245. American Acad. of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003); see KUPCHIK, *supra* note 4, at 23–24.

Notably, empirical data suggest that overreliance on exclusionary discipline also may not lead to safer school environments in the long-term.²⁴⁶ Matthew Steinberg and his colleagues found that teachers and students reported lower levels of perceived safety in schools with higher suspension rates, even after taking into account other community and school contextual variables that might explain those perceptions.²⁴⁷ They warned that “schools with high suspension rates are still less safe than others that serve students with similar backgrounds in similar neighborhoods Through their disciplinary practices, schools serving students from high-crime/high-poverty neighborhoods might unwittingly be exacerbating their low levels of safety.”²⁴⁸

B. The Effectiveness of Intense Surveillance Measures is Unclear

The safety of our children at school is critical. Violence in schools—such as what occurred in Columbine, Newtown, Parkland, and Santa Fe—is heart-wrenching and provokes intense feelings of anger, fear, confusion, and sadness. When the media provides broad coverage of violence in schools, many respond by calling for increased school security measures and surveillance to prevent it from happening again.²⁴⁹ Indeed, implementing strict security measures is something tangible that school authorities can do to demonstrate to concerned parents and community members that they are trying to make schools safer for children. But there is much to consider when deciding how to create safe learning environments for youth.

A difficult truth we must all accept is that it is impossible to protect all students at all times and in all places, including while they are in school classrooms and hallways, school courtyards, school playgrounds, school parking lots, and attending extracurricular events.²⁵⁰ Furthermore, it is important to acknowledge that although highly publicized acts of school violence often distort our perceptions of the realities

246. The U.S. Department of Education recently cautioned schools to “avoid overuse of exclusionary discipline, . . . reserv[ing] the use of out-of-school suspensions, expulsions, and alternative placements for the most egregious disciplinary infractions that threaten school safety and when mandated by federal or state law.” U.S. DEP’T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 15 (2014) [hereinafter GUIDING PRINCIPLES].

247. Matthew P. Steinberg, Elaine Allensworth & David W. Johnson, *What Conditions Support Safety in Urban Schools?: The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 43, at 118, 127–29.

248. *Id.* at 128–29.

249. Cheryl Lero Jonson, *Preventing School Shootings: The Effectiveness of Safety Measures*, 12 VICTIMS & OFFENDERS 956, 960 (2017).

250. See Arne Duncan, *Resources for Schools to Prepare for and Recover from Crisis*, U.S. DEP’T EDUC.: HOMEROOM; OFFICIAL BLOG U.S. DEP’T EDUC. (Dec. 17, 2012), <https://blog.ed.gov/2012/12/resources-for-schools-to-prepare-for-and-recover-from-crisis/> [<https://perma.cc/4JNX-4FG6>] (explaining that not all tragedies that happen at school can be prevented).

of school safety,²⁵¹ schools are actually among the safest places for children to be.²⁵² Of course, we need to do more to ensure the safety of all students while they are at school, and this does not imply that security measures should never be used. But there are serious questions regarding whether intense surveillance tactics actually make schools safer, provide only a false perception of security, or lead to more disorder.²⁵³

Emily Tanner-Smith and her colleagues analyzed nationally representative data to examine the relationship between the use of multiple forms of security measures and students' exposure to drugs, violence, crime, and firearms at school.²⁵⁴ They found that “[d]espite the intuitive appeal and increased federal funding for visible school security measures in recent decades, [there was] no evidence that school security measures—either alone or in combination with others—consistently reduced exposure to crime and violence at school.”²⁵⁵ Instead, their empirical findings suggested that intense security measures were associated with unstable school environments, observing that “some patterns of school security utilization were associated with increased exposure to crime and violence at school.”²⁵⁶ These scholars concluded that intense security measures “may ultimately erode student trust, create negative expectancy effects, and create jail-like learning environments

251. Beger, *supra* note 40, at 338 (“Widely publicized incidents of juvenile violence in public schools have created the public misconception that such behavior is commonplace.”); 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.”).

252. BARBARA FEDDERS, JASON LANGBERG & JENNIFER STORY, *SCHOOL SAFETY IN NORTH CAROLINA: REALITIES, RECOMMENDATIONS & RESOURCES* 4 (2013) (“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.” (footnote omitted)); KUPCHIK, *supra* note 4, at 11 (explaining that the “data are clear and convincing that schools are safer, nationally,” than in decades); Duncan, *supra* note 250 (“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.”).

253. ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 8* (2005) (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 detrimental behaviors”); Mowen et al., *supra* note 39, at 474 (“[T]here is no clear evidence that the criminalization of school discipline is effective at preventing school violence.”); 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) (explaining that “[i]t is hard to find anything better than anecdotal evidence” showing that strict security measures such as metal detectors and guards reduce violence in schools).

254. Emily E. Tanner-Smith, Benjamin W. Fisher, Lynn A. Addington & Joseph H. Gardella, *Adding Security, but Subtracting Safety? Exploring Schools’ Use of Multiple Visible Security Measures*, 43 AM. J. CRIM. JUST. 102, 105 (2017).

255. *Id.* at 115.

256. *Id.* at 113.

that fail to provide the safe and supportive learning environments that all students deserve.”²⁵⁷

Abigail Hankin and her colleagues reviewed the scholarly literature examining whether metal detectors create safer school environments.²⁵⁸ 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.”²⁵⁹ They also reported that some of the research suggested that metal detector use was positively related to lower levels of students’ perceptions of school safety and higher levels of school disorder.²⁶⁰ The Congressional Research Service recently evaluated the body of research on the effectiveness of school police officers programs for promoting school safety and concluded that the research “draws conflicting conclusions about whether [school police officer programs] are effective at reducing school violence.”²⁶¹ Cheryl Lero Jonson also reviewed the scholarly literature on school police officer programs in schools and concluded that evaluations of these programs “show that they often have little to no effect on crime occurring at school and at times can increase fear and anxiety within the school setting.”²⁶² Crystal Garcia reported that only thirty-two percent of school safety officers she interviewed believed that weapon detection systems effectively minimized or prevented violence in schools.²⁶³ After reviewing the literature, Aaron Kupchik concluded that “there is no compelling evidence that increases in policing, surveillance, suspensions, and the like have made schools safer.”²⁶⁴

In fact, violent incidents continue to occur in schools that rely on surveillance measures, demonstrating that these measures cannot fully prevent individuals from

257. *Id.* at 115.

258. 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).

259. *Id.*

260. *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 (2011) (finding that school security measures did not reduce violent behaviors related to bullying); Mayer & Leone, *supra* note 40, at 350, 352 (finding that student victimization and school disorder were higher in schools using strict security measures). *But see* Ctrs. for Disease Control & Prevention, *Violence-Related Attitudes and Behaviors of High School Students — New York City, 1992*, 42 MORBIDITY & MORTALITY WKLY. REP. 773, 774 (1993) (reporting that students who attended schools using metal detectors “were less likely to have carried a weapon inside the school building (7.8% versus 13.6%),” 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).

261. NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 10–11 (2013).

262. Jonson, *supra* note 249, at 961.

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

264. KUPCHIK, *supra* note 4, at 13.

harming others when they are determined to do so. For example, the acts of school violence at Columbine High School occurred notwithstanding the presence of an armed police officer and an unarmed school security guard.²⁶⁵ The recent school shootings in Parkland, Florida, occurred even though there was an armed school police officer on scene at Marjory Stoneman Douglas High School.²⁶⁶ Similarly, in 2005, a student shot another student in a high school that had security guards, metal detectors, and perimeter fencing.²⁶⁷ In Jonesboro, Arkansas, the shooters “pull[ed] the fire alarm, r[an] to a nearby wooded area, and shot[] their classmates and teachers as they left the school.”²⁶⁸ Scholars and other commentators recognize that students know how to bring weapons into schools without being detected, even in schools where intense surveillance measures are present.²⁶⁹ Ronald Stevens, an executive director of the National School Safety Center, acknowledges that strict security measures provide merely a false sense of security because “rule-followers will follow the rules,” and “[r]ule-breakers will break the rules.”²⁷⁰ As Cheryl Lero Jonson observes, “[l]ocks can be broken, metal detectors can fail, and officers cannot be present everywhere at all times.”²⁷¹

Many scholars maintain that instead of creating safe learning environments, extreme surveillance measures hinder educators’ efforts because these measures can engender alienation, resentment, mistrust, and resistance among students, which may lead to even more disorder, dysfunction, and destabilization in schools.²⁷² Matthew

265. Jonson, *supra* note 249, at 962; see Marcus Wright, *Experts Say Intrusive Security at Public Schools Reproduces Social Inequality*, MICH. CITIZEN (Nov. 21, 2012), <https://truthout.org/articles/experts-say-intrusive-security-at-public-schools-reproduces-social-inequality> [<https://perma.cc/X9DP-9CYT>].

266. Chuck Johnston, Jamiel Lynch & Dakin Andone, *Armed School Resource Officer Stayed Outside as Florida Shooting Unfolded, Sherriff Says*, CNN (Feb. 22, 2018), <https://www.cnn.com/2018/02/22/us/florida-school-shooting/index.html> [<https://perma.cc/5JV8-E6WK>].

267. Sara Neufeld & Sumathi Reddy, *Violent Week Renews Metal Detector Debate*, BALTIMORE SUN (Oct. 14, 2006), http://articles.baltimoresun.com/2006-10-14/news/0610140131_1_metal-detectors-school-students-park-elementary-school [<https://perma.cc/5WJ9-BM3R>].

268. Jonson, *supra* note 249, at 964.

269. Noguera, *supra* note 215, at 193 (reporting that the students he spoke with understood how to bring a weapon, undetected, into a school that used strict security measures); see also Carol Ascher, *Gaining Control of Violence in the Schools: A View from the Field*, 100 ERIC DIG. 5 (1994) (“[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.”); Neufeld & Reddy, *supra* note 267, at 151 (reporting that students interviewed claimed that it was “easy to get around” metal detectors).

270. Neufeld & Reddy, *supra* note 267.

271. Jonson, *supra* note 249, at 988.

272. See Beger, *supra* note 40, at 340 (“[A]ggressive 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); Amanda B. Nickerson & Matthew P. Martens, *School Violence: Associations with Control, Security/Enforcement, Educational/Therapeutic Approaches, and Demographic Factors*, 37 SCH. PSYCHOL. REV. 228, 238–39 (2008) (finding that strict security measures and punitive measures were positively associated with more school disorder and school crime); Christopher J. Schreck, J. Mitchell Miller & Chris L. Gibson, *Trouble in the School Yard: A Study of the*

Mayer and Peter Leone conducted an empirical study that involved almost 7000 students examining schools' use of metal detectors, locked doors, locker searches, and security guards.²⁷³ Rather than finding that these measures fostered safe learning climates, they concluded 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."²⁷⁴ They continued, "Viewed in the context of a reciprocal relationship, the data may suggest that disorder and restrictive management of the school premises may go hand in hand and may feed off each other."²⁷⁵

Importantly, intense surveillance measures do not address the underlying problems associated with student misbehavior and crime or support long-term solutions to effectively prevent school violence.²⁷⁶ The U.S. Department of Education and the U.S. Secret Service conducted a joint study to understand how to more effectively prevent violent acts from occurring in schools.²⁷⁷ They discovered that in safe schools, "students develop the capacity to talk and openly share their concerns without fear of shame and reprisal"; "students experience a sense of emotional 'fit' and of respect"; there are "positive personal role models in its faculty" and "place[s] for open discussion where diversity and differences are respected"; "communication between adults and students is encouraged and supported"; "adults and students respect each other"; and "conflict is managed and mediated constructively."²⁷⁸ They concluded that school climates that provide emotional support, cultivate respect, and pay attention to students' academic, social, and emotional needs can best reduce the possibility of targeted violence.²⁷⁹

In another study, Matthew Steinberg and his colleagues analyzed school safety in the Chicago Public School System and discovered that even in schools serving high concentrations of students from high-poverty and crime areas, "it is the quality of relationships between staff and students and between staff and parents that most strongly defines safe schools. Indeed, disadvantaged schools with high-quality relationships actually feel safer than advantaged schools with low-quality relationships."²⁸⁰ However, as explained above, intense surveillance measures may

Risk Factors of Victimization at School, 49 CRIME & DELINQ. 460, 471 (2003) (empirically finding that students attending schools that undertake locker searches report more student victimization).

273. Mayer & Leone, *supra* note 40, at 345.

274. *Id.* at 351.

275. *Id.*

276. See AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 6 (2010) (observing that schools do not often address the underlying issues associated with student misbehavior).

277. ROBERT A. FEIN, BRYAN VOSSEKUIL, WILLIAM S. POLLACK, RANDY BORUM, WILLIAM MODZELESKI & MARISA REDDY, 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, at ii (2004).

278. *Id.* at 5–6, 11–12; see also FEDDERS, ET AL., *supra* note 252, at 6 ("Positive relationships among students, families, teachers, administrators, and staff are the most effective tools in creating a safe school environment.").

279. FEIN ET AL., *supra* note 277, at 5–6.

280. MATTHEW P. STEINBERG, ELAINE ALLENSWORTH & DAVID W. JOHNSON, STUDENT AND

inhibit the quality of relationships among members of the school community, development of respect, and sense of emotional fit by creating feelings of mistrust, resentment, alienation, adversity, and resistance among students.²⁸¹

Disturbingly, the millions of dollars spent on intense surveillance measures diverts scarce funding that could be used to hire more behavioral specialists, counselors, and mental health experts. The money could also be used to support other evidence-based programs that reduce school violence without harming the learning environment.²⁸² As I discuss at length elsewhere,²⁸³ there are several initiatives, such as restorative justice,²⁸⁴ Schoolwide Positive Behavioral Interventions and Supports,²⁸⁵ social and emotional learning,²⁸⁶ and improving classroom instruction and management skills of teachers²⁸⁷ that more effectively promote safe learning environments than intense surveillance measures.

Indeed, there are many schools serving at-risk students that have successfully created safe learning environments without relying on harsh surveillance measures.²⁸⁸ Common characteristics of these schools include promoting dignity and respect among members of the school community, compassionate and strong leadership, open lines of communication, and establishing clear, fair, and consistent disciplinary procedures and rules.²⁸⁹ Notably, schools focusing on these values enjoy

TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND SCHOOL SOCIAL ORGANIZATIONS 1 (2011); *see also* Mark T. Greenberg, Roger P. Weissberg, Mary Utne O'Brien, Joseph E. Zins, Linda Fredericks, Hank Resnik & Maurice J. Elias, *Enhancing School-Based Prevention and Youth Development Through Coordinated Social, Emotional, and Academic Learning*, 58 AM. PSYCHOL. 466, 468, 470 (2003) (finding that schools can successfully improve student behavior by creating caring communities, enhancing the school climate, and building trust among school staff, families, and students); Steinberg et al., *supra* note 247, at 126 (reporting that school leadership, teacher collaboration, school-family interactions, and student-teacher relationships explained eighty percent of the variance associated with school safety as reported by students and teachers).

281. *See supra* notes 215–25 and accompanying text.

282. *See* Hankin et al., *supra* note 258, 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.”).

283. *See* Nance, *supra* note 47, at 345–60.

284. *See, e.g.*, Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 43, at 151, 151–53.

285. *See, e.g.*, Catherine P. Bradshaw, Mary M. Mitchell & Philip J. Leaf, *Examining the Effects of Schoolwide Positive Behavioral Interventions and Supports on Student Outcomes*, 12 J. POSITIVE BEHAV. INTERVENTIONS 133, 133 (2010).

286. *See, e.g.*, Joseph A. Durlak, Roger P. Weissberg, Allison B. Dymnicki, Rebecca D. Taylor & Kriston B. Schellinger, *The Impact of Enhancing Students' Social and Emotional Learning: A Meta-Analysis of School-Based Universal Interventions*, 82 CHILD DEV. 405, 406 (2001).

287. *See, e.g.*, David Osher, George G. Bear, Jeffrey R. Sprague & Walter Doyle, *How Can We Improve School Discipline?*, 39 EDUC. RESEARCHER 48, 49 (2010).

288. *See* N.Y. CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 7–8 (2009).

289. *Id.* at 7.

above-average graduation rates, attendance rates, and significantly lower crime and suspension rates.²⁹⁰ These initiatives may take time and concerted effort to implement effectively, but the empirical evidence demonstrates that educators who do so more effectively foster safe environments, enhance the learning climate, improve student behavior, and promote academic achievement more than they ever could by relying on intense surveillance measures.²⁹¹

*C. The Unequal Use of Intense Surveillance Measures on
Students of Color Is Particularly Harmful*

That students of color are more likely to be subjected to intense school surveillance measures is socially unjust and troubling for many reasons. First, this trend may weaken minorities' trust in government institutions and authority.²⁹² Institutional trust is fostered when individuals perceive that institutional authorities have fair decision-making processes, are respectful, and have all individuals' best interests in mind.²⁹³ As David Yeager and his colleagues observe, by middle school, minority students are "more likely than White peers to be *racially and ethnically aware*—that is, to have conscious appraisals about how different racial and ethnic groups are evaluated and treated by the larger society."²⁹⁴ When students of color perceive that government institutions are treating them unfairly, they often refuse to comply with institutional rules and policies, accelerating a self-reinforcing cycle of punishment and distrust.²⁹⁵ This may also cause them to be cynical towards other government authorities and institutions.²⁹⁶

Furthermore, for minority adolescents, distrust of institutions can amplify quickly.²⁹⁷ When students of color perceive institutional unfairness, they tend to expect it more in the future; when they expect it more, they perceive it more, and

290. *Id.*

291. See Nance, *Students, Security, and Race*, *supra* note 1, at 30–44.

292. See VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS*, at xiv, 74–75, 133–38 (2011) (observing that students of color experience disproportionate surveillance because "schools, police, probation officers, families, community centers, the media, businesses, and other institutions systematically treat young people's everyday behaviors as criminal activity," making them "feel criminalized from a young age"); JUVENILE JUSTICE INFO. EXCH., *supra* note 28 (reporting that students of color often perceive their school simply as an extension of a "police state" because they are subject to intense surveillance environments both in their neighborhoods and in their schools); Noguera, *supra* note 241, at 343–44.

293. David S. Yeager, Valerie Purdie-Vaughns, Sophia Yang Hooper & Geoffrey L. Cohen, *Loss of Institutional Trust Among Racial and Ethnic Minority Adolescents: A Consequence of Procedural Injustice and a Cause of Life-Span Outcomes*, 88 *CHILD DEV.* 658, 659 (2017).

294. *Id.* at 660 (emphasis in original); see also DARLING-HAMMOND, *supra* note 213, at 65 (maintaining that young students of color are very observant of inequitable patterns along racial lines).

295. Yeager et al., *supra* note 293, at 659–60.

296. *Id.*

297. *Id.* at 661.

thus the cycle continues and is amplified.²⁹⁸ The trust between many students of color and educators already is strained,²⁹⁹ and the disproportionate use of security measures may further impair the trust needed to establish positive, safe learning environments.³⁰⁰ Minerva Dickson's experience exemplifies a troubling trend. When Minerva learned that a student attending another school was not subject to the intense surveillance conditions she encountered each day, she was dismayed.³⁰¹ She said, "I thought all schools were like mine I couldn't believe a student could just walk into their school without dealing with all of that."³⁰²

Second, the disproportionate use of intense surveillance methods on students of color may exacerbate inequalities already present within our education system.³⁰³ Schools that focus on custody and control above everything else deprive minority students of quality educational experiences, inhibiting their ability to pursue future educational and employment opportunities.³⁰⁴ Furthermore, as discussed above, intense surveillance measures, especially when used in connection with other punitive disciplinary measures such as zero tolerance policies, are a component of the larger "school-to-prison pipeline" phenomenon.³⁰⁵ Accordingly, disproportionate exposure to intense surveillance measures also contributes to racial inequalities in school discipline, academic achievement, high school graduation rates, and involvement in the criminal justice system.³⁰⁶

298. *Id.*

299. *See, e.g.,* Constance A. Flanagan, Patricio Cumsille, Sukhdeep Gill & Leslie S. Galloway, *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"); Rosa Hernández Sheets, *Urban 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).

300. Kupchik & Ward, *supra* note 153, at 333; *see supra* notes 265–67 and accompanying text.

301. *See* JUVENILE JUSTICE INFO. EXCH., *supra* note 28.

302. *Id.*; *cf.* Nance, *supra* note 144, at 8 (reporting that when low-income minority students who attended low-resourced schools were shown photos of high-resourced schools, they responded with comments such as, "Those must be schools for white kids. They wouldn't give those materials to us.>").

303. *See* Kupchik & Ward, *supra* note 153, at 337–38; Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 108 (2001) (arguing that inner-city, majority-minority schools operate not as institutions of education, but as institutions of confinement and control).

304. *See* Hirschfield, *supra* note 4, at 40 (arguing that the disproportionate use of intense surveillance methods prepares urban minority students to become "prisoners, soldiers, or service sector workers"); Kupchik & Ward, *supra* note 153, at 338 ("[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").

305. *See supra* Section III.A.

306. *See* Finn & Servoss, *supra* note 43, at 53 (finding that security levels were positively associated with greater racial disparities in suspensions); Edward W. Morris & Brea L. Perry,

Third, the disproportionate use of coercive surveillance measures skews minority students' perceptions of their current and future standing in our society. Youth advocates and scholars alike observe that how we treat students affects how students act and who they eventually will become.³⁰⁷ Pedro Noguera maintains that when we label students as “defiant, maladjusted, and difficult to deal with . . . they are more likely to internalize these labels and act out in ways that match the expectations that have been set for them.”³⁰⁸ Henry Leonardatos, an experienced school administrator in urban schools, observes that by subjecting students to pat downs, metal detectors, and other coercive surveillance measures, the students begin to “play the role that is expected of them—they will play the role of the criminal and victimizer You end [up] putting the idea in the kid’s head that this is what he’s supposed to be doing.”³⁰⁹

Fourth, the disparate use of intense surveillance measures contributes to the racial divide in this nation by sending socially harmful messages to both students of color and white students. The disproportionate use of coercive security measures signals to everyone that white students are privileged and have greater privacy rights, while students of color cannot be trusted. This is precisely the wrong message to send to children, and it is inconsistent with values that public education should strive to uphold.³¹⁰ Rather, schools can and should play a vital role in mending racial divisions by teaching students in word and by example that all students are entitled to equal respect, privacy, and dignity.³¹¹

IV. THE CURRENT FOURTH AMENDMENT DOCTRINE GOVERNING THE EVALUATION OF SURVEILLANCE MEASURES IN SCHOOLS

Why some schools, particularly those serving high concentrations of minority students, have increasingly relied on intense surveillance measures to monitor and control students is a complex question. As I have explained elsewhere, increased reliance on coercive surveillance measures is a response to highly publicized acts of school violence;³¹² part of a broader social movement towards the criminalization of school discipline, which has included extensive federal and state funding for security

The Punishment Gap: School Suspension and Racial Disparities in Achievement, 63 SOC. PROBS. 68, 81–84 (2016) (providing empirical evidence that school suspensions contribute to racial inequalities in academic achievement).

307. See, e.g., RONNIE CASELLA, BEING DOWN: CHALLENGING VIOLENCE IN PUBLIC SCHOOLS 71–72 (2001) (arguing that as “[s]tudents are deemed deviant, they are treated as deviants, and therefore deviate as is expected of them”); J. Alleyne Johnson, *Life After Death: Critical Pedagogy in an Urban Classroom*, 65 HARV. EDUC. REV. 213, 220–21 (1995) (observing how students’ self-perceptions changed for the worse upon being assigned to a special class once the students learned that the general perception of the class was that it was for students who were “at risk,” “learning disabled,” and “disruptive”).

308. Noguera, *supra* note 241, at 343.

309. JUVENILE JUSTICE INFO. EXCH., *supra* note 28.

310. Cf. Nance, *supra* note 144, at 14–15 (arguing that tolerating inequalities with respect to school resources along racial lines sends minority students a message inconsistent with the values that public education should uphold).

311. See Nance, *supra* note 47, at 351–52.

312. Nance, *School Surveillance and the Fourth Amendment*, *supra* note 1, at 92–94.

equipment and law enforcement officers in schools;³¹³ driven by high-stakes testing laws, which may motivate some school officials to push low-performing students out of school to avoid having their low scores count against their schools;³¹⁴ and a result of schools' lack of adequate resources to address students' needs.³¹⁵ Yet the proliferation of extreme surveillance measures, as well as their disparate use among minority students, has been feasible due to a permissive legal backdrop. Indeed, the U.S. Supreme Court has provided school officials with wide constitutional discretion to freely employ a variety of intense surveillance methods, even in combination, with almost no legal accountability. This is especially troublesome because, as discussed above, implicit racial biases tend to translate into unjust and discriminatory behavior when individuals have wide discretion with little accountability.³¹⁶

In this Part, I describe the current state of the Fourth Amendment doctrine in schools. This doctrinal description will also provide the foundation for my proposed, reformulated legal framework to evaluate the constitutionality of coercive surveillance measures on students. However, before discussing the current state of the Fourth Amendment doctrine in schools, it is important to point out that school officials generally perform two types of searches: (1) searches based on individualized suspicion to uncover evidence of wrongdoing and (2) random, suspicionless searches on the general student body or a segment of the student population to prevent or deter wrongdoing. This Article is concerned primarily with intense surveillance practices designed to deter and prevent wrongdoing by routinely subjecting a group of students—the vast majority of whom are innocent and have no intention to commit wrongdoing—to random, suspicionless searches.³¹⁷

The Court addressed students' Fourth Amendment rights in schools for the first time in *New Jersey v. T.L.O.*³¹⁸ Although *T.L.O.* is an individualized suspicion case, many of the doctrinal principles the Court discussed there are important to having a more complete understanding of the current framework the Court utilizes to evaluate suspicionless searches of students.

In *T.L.O.*, a teacher observed two students smoking in the bathroom in violation of school rules and took them to the principal's office.³¹⁹ One of the students admitted to the vice principal that she had been smoking, but the other student, T.L.O., denied

313. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 780–81.

314. *Id.* at 781–82.

315. *Id.* at 783–84.

316. See Kang et al., *supra* note 70, at 1142; see Richardson & Goff, *supra* note 50, at 2628.

317. In the Fourth Amendment case law and scholarship, sometimes these searches are called government dragnets, special needs searches, or administrative searches. See Eve Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 275–78 (2011); Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 110, 118–19 (2010). Further, I emphasize here that my proposed legal analysis should not necessarily apply to contexts where there is an immediate, credible threat of harm to members of the school community.

318. 469 U.S. 325 (1985).

319. *Id.* at 328.

the allegations.³²⁰ When the vice principal opened T.L.O.'s purse to search for evidence of wrongdoing, he discovered a pack of cigarettes and other evidence of illegal drug use and trafficking, such as cigarette rolling papers, marijuana, a pipe, empty plastic bags, a substantial amount of money, and an index card containing a list of students who appeared to owe T.L.O. money.³²¹ T.L.O. moved to suppress this evidence in a criminal proceeding by arguing that her Fourth Amendment rights were violated, but the Court upheld the constitutionality of the search.³²²

The Court's decision is significant for several reasons. The Court unequivocally held that the Fourth Amendment protects students from unreasonable searches by school officials, overruling several lower courts' holdings that the Fourth Amendment did not apply to school officials because of "the special nature of their authority over schoolchildren."³²³ Furthermore, the Court acknowledged that (1) "even a limited search of [a child's] person is a substantial invasion of privacy,"³²⁴ (2) a search of a closed purse or bag "is undoubtedly a severe violation of subjective expectations of privacy,"³²⁵ and (3) although it may be challenging for school officials to maintain environments conducive to learning, "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy."³²⁶ The Court explained that schools and prisons are not equivalent for Fourth Amendment purposes because "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."³²⁷

Nevertheless, while recognizing that students do enjoy protections afforded by the Fourth Amendment, the Court also held that students' privacy rights must be balanced against the teachers and school officials' equally legitimate interest in creating an orderly environment in which students can learn.³²⁸ Accordingly, to empower school officials with greater flexibility to maintain order and control, the Court relaxed the restrictions to which public authorities normally are subject.³²⁹ Specifically, the Court determined that it is not necessary for school officials to obtain a warrant before searching a child suspected of violating a criminal law or school rule.³³⁰ The Court also held that a school official's level of suspicion of wrongful behavior need not reach the level of probable cause.³³¹ Rather, in determining whether a search of a student comports with the Fourth Amendment,

320. *Id.*

321. *Id.*

322. *Id.* at 329.

323. *Id.* at 325. Prior to *T.L.O.*, several lower courts applied the *in loco parentis* doctrine when analyzing searches conducted by school officials, concluding that the Fourth Amendment did not apply to school officials because their authority was similar to that of a parent, not the State. *Id.* at 332 n.2, 336.

324. *Id.* at 337.

325. *Id.* at 338.

326. *Id.*

327. *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 669 (1977)).

328. *Id.* at 339.

329. *Id.* at 340.

330. *Id.*

331. *Id.*

courts should examine whether the search was reasonable “[i]n the context within which [the] search takes place.”³³² Accordingly, the Court established a twofold inquiry to determine the reasonableness of a search: (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.’”³³³ Applying that framework, the Court determined that the vice principal’s search of the student’s purse did not violate the Fourth Amendment.³³⁴

Ten years after *T.L.O.*, the Court evaluated, for the first time, a school district’s suspicionless search practice in *Vernonia School District 47J v. Acton*.³³⁵ There, Vernonia School District implemented a random drug-testing program on students participating in interscholastic sports in response to educators’ observations of a sharp increase in student drug use led by student athletes.³³⁶ James Acton, a well-behaved seventh grader who did not have a drug problem, signed up to play football at his school.³³⁷ School officials refused to allow James to participate because his parents would not sign the drug-testing consent forms.³³⁸ The Actons sought to enjoin enforcement of the school district’s random drug-testing policy on the grounds that it violated the Fourth Amendment.³³⁹ In a 6–3 decision, the Court upheld the constitutionality of the school district’s policy.³⁴⁰

To determine whether the school district’s suspicionless search policy was “reasonable” and comported with the Fourth Amendment, the Court balanced the search’s “intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”³⁴¹ Accordingly, it established the following three-factor framework, balancing (1) “the scope of the legitimate expectation of privacy at issue” and (2) “the character of the intrusion that is complained of” against (3) “the nature and immediacy of the governmental concern at issue . . . and the efficacy of this means for meeting it.”³⁴²

Applying these factors, the Court first acknowledged that students retain an expectation of privacy while at school but explained that the scope of those rights are “different” because of the schools’ custodial and tutelary responsibilities.³⁴³ The Court reasoned that students’ expectation of privacy is reduced because they must submit to various physical examinations, including vision, hearing, dental, dermatological, and scoliosis screenings.³⁴⁴ The Court further explained that student

332. *Id.* at 337.

333. *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

334. *Id.* at 343.

335. 515 U.S. 646, 646 (1995).

336. *Id.* at 648–50.

337. 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).

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

339. *Id.*

340. *Id.* at 651, 664–65.

341. *Id.* at 652–53.

342. *Id.* at 660.

343. *Id.* at 656.

344. *Id.*

athletes have even lower expectations of privacy because they choose to participate in athletic programs and commonly encounter conditions that provide less privacy such as locker rooms.³⁴⁵

Second, the Court concluded that the “invasion of privacy” that the school district’s random drug-testing policy imposed on students “was not significant.”³⁴⁶ It explained that these searches were minimally intrusive because the drug testing resembled conditions that students often face when using public restrooms, their purpose was limited only to ascertain whether the student athlete was using drugs, and the test results were disclosed only to a limited number of school officials, not law enforcement officers.³⁴⁷

Third, the Court examined the “nature and immediacy of the governmental concern” and the “the efficacy of th[e] means for meeting it.”³⁴⁸ The Court concluded that the school district’s interest in deterring student drug use, especially among student athletes, was important in light of the drugs’ physical, psychological, and addictive effects.³⁴⁹ The Court also concluded that school district’s concern was immediate, because “a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion . . . [which] was being fueled by alcohol and drug abuse.”³⁵⁰ According to the Court, these considerations outweighed any privacy rights the students possessed.³⁵¹

It is important to recognize the pronounced role that the school district’s immediate and rampant drug problem played in the Court’s decision. Indeed, the Court seemed to leave open the possibility that only a mere concern of students potentially bringing drugs or weapons to campus would not justify intense surveillance measures deemed to be highly intrusive, especially when school authorities employ those measures on students who have greater expectations of privacy than student athletes. Seven years later, however, the Court held otherwise.

In *Board of Education v. Earls*, a school district implemented a policy that required middle and high school students to consent to random drug testing to be eligible to participate in any extracurricular activities.³⁵² Following *Vernonia*, the United States Court of Appeals for the Tenth Circuit held that because the school district had not demonstrated that there was an identifiable drug abuse problem among students who participated in extracurricular activities, its policy violated the Fourth Amendment.³⁵³ The U.S. Supreme Court, however, reversed the Tenth Circuit in a 5–4 decision.³⁵⁴

345. *Id.* at 657.

346. *Id.* at 660.

347. *Id.* at 658.

348. *Id.* at 660.

349. *Id.* at 661.

350. *Id.* at 662–63.

351. *Id.* at 661–62.

352. 536 U.S. 822, 826 (2002).

353. *Earl ex rel. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1278 (10th Cir. 2001).

354. *Earls*, 536 U.S. at 824–25.

The Court balanced the same three factors that it did in *Vernonia* and largely reached the same conclusions.³⁵⁵ While the Court noted that the school district “presented specific evidence of drug use,”³⁵⁶ it held that the school district was not required to provide evidence of a drug abuse problem before imposing a suspicionless drug-testing policy.³⁵⁷ The Court upheld the program because “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”³⁵⁸

This broad holding provided ample constitutional leeway for school authorities to conduct a sweeping array of suspicionless search practices without first having to provide evidence of a drug or weapons problem. As a result of this movement in the law, lower courts have upheld the use of a variety of random, suspicionless search practices in schools such as using metal detectors,³⁵⁹ searching students’ lockers,³⁶⁰ conducting random sweeps for contraband,³⁶¹ using drug-sniffing dogs,³⁶² and monitoring students with surveillance cameras.³⁶³ Moreover, there are no protections against school officials’ use of a combination of these surveillance measures, even when their cumulative use creates an intense, prisonlike environment inconsistent with a healthy learning atmosphere.

Furthermore, this broad constitutional discretion with little accountability has provided fertile conditions for implicit racial biases to unduly influence school officials’ decision-making on whether to employ intense surveillance measures in schools. Indeed, as demonstrated above, not all school officials choose to employ

355. *Id.* at 830–38.

356. *Id.* at 834.

357. *Id.*

358. *Id.*

359. *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 (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).

360. *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.*, 500 N.W.2d 637, 641 (Wis. 1993). Nevertheless, there is disagreement among courts regarding whether students retain an expectation of privacy in their lockers. *See Nance, Random, Suspicionless Searches, supra* note 1, at 411–12.

361. *See, e.g.*, *In re Daniel A.*, No. B232404, 2012 WL 2126539, at *4 (Cal. Ct. App. June 13, 2012).

362. *See, e.g.*, *Sims v. Bracken Cty. Sch. Dist.*, No. 10-33-DLB, 2010 WL 4103167, at *13–19 (E.D. Ky. Oct. 18, 2010); *Doran v. Contoocook Valley Sch. Dist.*, 616 F. Supp. 2d 184, 192 (D.N.H. 2009). However, dog sniffs on students’ persons has caused a sharp division among courts. *Compare Doe v. Renfrow*, 475 F. Supp. 1012, 1022 (N.D. Ind. 1979) (upholding random, suspicionless dog sniffs on students’ persons), *aff’d in part and rev’d in part on other grounds*, 631 F.2d 91 (7th Cir. 1980), *with B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1267 (9th Cir. 1999) (holding that a suspicionless dog sniff on a student was unconstitutional because, as “the body and its odors are highly personal,” dog sniffs on a person’s body are “highly intrusive”).

363. *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 uphold surreptitious video surveillance of students in locations such as bathrooms or locker rooms. *See Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 499–500 (6th Cir. 2008).

such harsh monitoring tactics to induce order and control.³⁶⁴ Rather, the empirical evidence demonstrates that schools with higher concentrations of minority students more often rely on these intense measures, and the evidence suggests that these decisions are not justified by immediate safety concerns.³⁶⁵

V. A REFORMULATED FOURTH AMENDMENT FRAMEWORK

The use of extreme surveillance measures, especially when applied disproportionately to minority students, delegitimizes the educational process, harms students' interests, furthers racial inequalities, weakens trust in government institutions, skews minorities' perceptions of their standing in our society, and sends harmful messages to everyone that students attending majority-white schools have greater privileges and superior privacy rights.³⁶⁶ In addition, while one might try to justify these disparities on the basis that majority-minority schools often confront greater safety concerns, the empirical evidence demonstrates that racial disparities exist after accounting for factors such as school crime, neighborhood crime, and school disorder, suggesting that other factors—such as implicit racial bias—also influence decision-making.³⁶⁷ This is a problem our nation needs to address.

I have argued at length elsewhere that school-led reform is the most effective way to address the overreliance on intense surveillance measures and their disproportionate use on students of color.³⁶⁸ It is critical to recognize that there are more effective, pedagogically sound measures to address school violence and promote safe learning environments than intense surveillance measures.³⁶⁹ I have also argued that federal and state agencies should stop providing money for coercive security measures and instead support and establish incentives for schools to implement these alternative initiatives.³⁷⁰ In addition, I have recommended that the U.S. Department of Education's Office of Civil Rights become more active in addressing the disproportionate use of coercive security measures in majority-minority schools.³⁷¹ Further, I have argued that schools should provide, and federal and state agencies should support, training to help school officials and teachers address their implicit racial biases.³⁷² Such training will help educators make more

364. See *supra* notes 282–90.

365. See *supra* Part II.

366. See *supra* Part III.

367. See *supra* Part II.

368. Nance, *Students, Security, and Race*, *supra* note 1, at 48–55; see also Jason P. Nance, *School Security Considerations after Newtown*, 65 STAN. L. REV. ONLINE 103, 108–09 (2013).

369. See *supra* notes 283–287 and accompanying text; see also Nance, *supra* note 47 at 345–60.

370. Nance, *Students, Security, and Race*, *supra* note 1, at 55. Importantly, the U.S. Department of Education's Office of Civil Rights recently recommended that schools use these approaches to create safe school climates. See GUIDING PRINCIPLES, *supra* note 246, at 5–7; see also DEAR COLLEAGUE LETTER, *supra* note 195, at app. 2.

371. See Nance, *Students, Security, and Race*, *supra* note 1, at 55.

372. See Nance, *supra* note 47, at 367–69; Jason P. Nance, *Over-Disciplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063, 1072 (2016); Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, *supra* note 1, at 831–37.

equitable decisions and interact with all student groups in more equitable manners. I continue to support these recommendations.

However, courts also have an important and unique role to play in addressing this problem. In fact, courts are uniquely situated to address this issue in a way that school authorities cannot. When political trends or emotionally charged events cause government actors to make decisions that threaten core constitutional rights and values, courts have a responsibility to establish clear constitutional guidelines for government officials to follow. This is particularly important in the context of public education because, as Kevin Brown observes, “public schools are social institutions that cultivate America’s youth.”³⁷³ In fact, courts repeatedly have held that schools are charged with the responsibility of inculcating our children with the constitutional values that undergird our nation.³⁷⁴ Accordingly, once courts delineate a clear standard for schools to follow—one that will shore up students’ Fourth Amendment rights and better protect them against the consequences of implicit racial bias—school officials will be more motivated to address school safety in a more pedagogically sound manner.

Before discussing the reformulated Fourth Amendment test in the school context, 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 students with adequate recourse to address this problem. In *Washington v. Davis* and the cases that follow that decision, the U.S. Supreme Court made clear that to establish a violation under the Equal Protection Clause, one cannot rely solely on the fact that a government law or policy has a racially disproportionate impact.³⁷⁵ Rather, plaintiffs must have independent evidence that government officials acted with discriminatory intent.³⁷⁶ Furthermore, as Darren Hutchinson has explained, even if implicit racial bias influences school officials’ acts, implicit racial bias “takes place outside of the conscious intent of the actor.”³⁷⁷ Thus, “even if the defendant’s conduct is intentional . . . [t]he discriminatory intent rule . . . makes arguments regarding nonconscious bias irrelevant.”³⁷⁸ While many scholars have argued that courts should take implicit

373. Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 7 (1992).

374. See, e.g., *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) (“[T]hat [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.”).

375. See *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (concluding that disparate impact may be an “important starting point,” disparate impact by itself “is not determinative”).

376. *Vill. of Arlington Heights*, 429 U.S. at 265 (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

377. Hutchinson, *supra* note 52, at 43.

378. *Id.*

racial biases into account when deciding Equal Protection claims,³⁷⁹ establishing conscious discriminatory intent is still the standard plaintiffs must meet.³⁸⁰

Likewise, Title VI and its administrative regulations may provide students with little recourse in this context. Title VI and its accompanying regulations provide the U.S. Department of Education's Office of Civil Rights (OCR) with the authority to prohibit public schools from implementing facially neutral policies that have a disparate impact on students of color.³⁸¹ However, in *Alexander v. Sandoval*, the Court held that individuals may not bring a private right of action to enforce the OCR's regulations.³⁸² Although the OCR continues to investigate and enforce disparate impact claims,³⁸³ one significant enforcement challenge in this context is that despite the fact that, overall, students of color are disproportionately subjected to extreme surveillance measures, a potential complainant may not be able to identify a district or school policy that has a disparate impact on an identifiable racial group because many times all of the students in the classroom, school, or district are subject to the same harsh conditions.³⁸⁴

Thus, I turn to a solution under the Fourth Amendment. The current framework for evaluating the constitutionality of random, suspicionless searches of students is a balancing test. On one side of the scale are the students' Fourth Amendment interests, expressed specifically by the U.S. Supreme Court as (1) "the scope of the legitimate expectation of privacy at issue" and (2) "the character of the intrusion that is complained of." On the other side of the scale are the governmental interests, specifically expressed by the Court as (3) "the nature and immediacy of the governmental concern at issue . . . and the efficacy of this means for meeting it."³⁸⁵

379. *E.g.*, Elise C. Boddie, *Racial Territoriality*, 48 UCLA L. REV. 401, 442–46 (2010) (arguing that the Equal Protection Clause should take into account the racial identifiability and culture meaning of spaces); Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 333 (2014) ("[M]any of our municipal and other boundaries are subject to Equal Protection challenge, contra the intent requirement . . . because they support [racial] stigma . . . by propping up . . . inequalities."); Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works.").

380. Hutchinson, *supra* note 52, at 43 n.122.

381. See 34 C.F.R. § 100.3(b)(2) (2013) (stating that recipient 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").

382. 532 U.S. 275, 293 (2001).

383. See DEAR COLLEAGUE LETTER, *supra* note 195, 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.'").

384. 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 TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS; A HANDBOOK FOR PARENTS, STUDENTS, EDUCATORS, AND CITIZENS 237 (2001).

385. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 558, 660 (1995).

Critically, my reformulated framework does not call for a complete overhaul of this balancing test. Rather, I seek to expand courts' understanding of the factors established by the U.S. Supreme Court, thus recalibrating the balancing test in light of the current realities that many students face. Further, by adopting this test, courts will ameliorate the pernicious effects of implicit racial bias and be instrumental in promoting more just and inclusive educational environments for all students.

*A. Rethink the Concept of "Nature and Immediacy
of the Governmental Concern"*

First, I propose that courts rethink how they evaluate "the nature and immediacy of the governmental concern" prong in light of what the empirical and scientific evidence teaches us about how school officials may make decisions about school security.³⁸⁶ In *Vernonia*, the Court held that the governmental interest must be "important enough" to justify the search practice,³⁸⁷ and it concluded that deterring drug use by students was indeed important.³⁸⁸ The Court reaffirmed this holding in *Earls*.³⁸⁹ What the implicit social cognition science reveals, however, is that working in a school with a high concentration of students of color can trigger implicit racial biases, which affect school officials' perceptions, behaviors, actions, and decisions regarding how to create orderly environments.³⁹⁰ This is because school officials may unconsciously associate students of color with danger, crime, aggression, disorder, and violence.³⁹¹ Empirical studies examining the use of school security measures bear this out. Specifically, the empirical studies reveal that even after controlling for school characteristic and student demographic variables such as school crime, school

386. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1002–03 (2006); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2035–36 (2011) ("Behavioral realist scholars argue that judges should not base their theories of human behavior on a purely conceptual, *a priori* process, but rather on the best empirical scientific evidence that exists."). A modification to align the constitutional rights of youth with our current understanding of social science is not unprecedented in the case law. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (using social science to justify the decision to prohibit a sentence that mandated life in prison without parole for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (using social science to justify the decision to prohibit a sentence of life without parole for juvenile offenders who commit crimes other than homicide); *Roper v. Simmons*, 543 U.S. 551, 573–74 (2005) (using social science to justify prohibiting the death penalty for a juvenile offender); *In re Gault*, 377 U.S. 1, 57–59 (1967) (deciding to extend additional procedural protections to juveniles in light of the evidence that courts failed to provide juveniles with benevolent protection); Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 L. & INEQ. 263, 264, 277–92 (2013); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 863 (2012).

387. *Vernonia*, 515 U.S. at 661 (emphasis omitted).

388. *Id.* at 661–62.

389. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 882, 834 (2002).

390. See *supra* Part I.

391. See *supra* Part I.

disorder, and neighborhood crime, the percentage of minority students attending the school is still positively related to school officials' decisions to implement tighter security measures.³⁹² And the race of the students, in and of itself, should never be the basis for sustaining a legitimate governmental interest for invading students' Fourth Amendment privacy rights.

Accordingly, to ameliorate the pernicious effects of implicit bias, I propose that courts conduct a more rigorous review of the "nature and immediacy of the governmental concern" prong by requiring school districts to provide objective, tangible evidence of safety concerns to justify their reliance on intense surveillance measures.³⁹³ This will compel school officials to ensure that their decisions to rely on intense security measures are not based on the illegitimate criteria of race (consciously or unconsciously), but on objective, measurable criteria such as evidence that students are actually bringing contraband to school.

Importantly, this approach is consistent with the Court's analysis in *Vernonia*. There, the Court upheld the school district's suspicionless drug policy, at least in part, because "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion . . . [and] the rebellion was being fueled by alcohol and drug abuse."³⁹⁴ This also was the approach the U.S. Court of Appeals for the Eighth Circuit followed in *Doe v. Little Rock School District*.³⁹⁵ In *Little Rock*, as part of Little Rock School District's routine practice of subjecting students to random, suspicionless searches, school officials ordered Jane Doe and her classmates to remove everything from their pockets, put their purses and backpacks on their desks, and leave the classroom.³⁹⁶ While the students waited in the hallway, school officials used metal detectors to scan students' bodies, then searched by hand through students' belongings left behind in the classroom.³⁹⁷ The Eighth Circuit held

392. See *supra* Part II.

393. Notably, several courts have considered the effects of implicit racial bias, especially in the selection of jurors. See, e.g., *G.M.M. ex rel. Hernandez-Adams v. Kimpson* 116 F. Supp. 3d 126, 148 (E.D.N.Y. 2015) ("The intersection of [conscious, unconscious, or implicit] bias in civil rights and criminal cases exacerbates common stereotypes and reinforces long-held prejudices."); *Ohio v. Sherman*, No. 97840, 2012 WL 3765041, at *9 (Ohio Ct. App. 2012) (Steward, P.J., concurring) ("I would be remiss if I did not take this opportunity to call attention to the role that implicit associations might play in sentencing disparities . . ."). Additionally, a District of Arizona judge ordered a sheriff's department to revise its training protocol to include debiasing techniques. *Melendres v. Arpaio*, No. CV-07-02513-PHX-GMS, 2013 WL 5498218, at *14-15 (D. Ariz. 2013), *aff'd in part, rev'd in part*, 784 F.3d 1254 (9th Cir. 2015) ("The Training . . . shall address or include, at a minimum: . . . the existence of arbitrary classifications, stereotypes, and implicit bias . . ."). U.S. District Court Judge Mark Bennett routinely explains to jury members the concept of implicit racial bias and admonishes jurors not to rely on those biases. Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias*, in *ENHANCING JUSTICE: REDUCING BIAS* 289, 291-92 (Sarah Redfield ed., 2017).

394. *Vernonia Sch. Dist.* 47J v. Acton, 515 U.S. 646, 662-63 (1995).

395. 380 F.3d 349 (8th Cir. 2004).

396. *Id.* at 351.

397. *Doe ex rel. Doe v. Little Rock Sch. Dist.*, No. 4:99CV00386, 2003 U.S. Dist. LEXIS 26439, at *4 (E.D. Ark. Sept. 3, 2003).

that the school district's practice violated the Fourth Amendment.³⁹⁸ It reasoned that these search practices amounted to a significant invasion of students' privacy interests, and the school district had not demonstrated that its concerns were "immediate" because the school district had failed to provide evidence that drugs and weapons were an actual problem in the school.³⁹⁹ The school district merely relied on the fact that students could possibly bring contraband to school.

This approach also is consistent with frameworks proposed by scholars who study the effects of implicit racial bias on law enforcement searches of the general public. For example, for years L. Song Richardson has studied the effects of implicit racial bias on police officers' decisions to conduct stop-and-frisk searches on disproportionate numbers of African Americans,⁴⁰⁰ despite the fact that stop-and-frisk searches on whites more often yield incriminating evidence.⁴⁰¹ Richardson argues that we should return to the probable cause standard as the only justification for stop-and-frisk searches, which would require police "to gather more information and to observe more unambiguous behavior before seizing individuals."⁴⁰² Richardson further argues that courts should not automatically defer to police officers' judgments about criminality to determine whether a reasonable suspicion exists.⁴⁰³ Rather, courts should require police officers to produce empirically validated evidence in support of their inferences instead of relying solely "upon an officer's personal experiences or common-sense conclusions, which the science demonstrates are often incorrect."⁴⁰⁴ In other words, similar to my proposed framework, Richardson's modifications would compel government officials to produce objective, measurable evidence to support their decisions instead of simply assuming that government officials are acting in an objective, unbiased way that is in the students' best interests.

In addition, this approach is more consistent with sound educational policy and pedagogy. As explained more fully above, schools' overreliance on intense

398. *Little Rock*, 380 F.3d at 356–57.

399. *Id.*; see also *Hough v. Shakopee Pub. Sch.*, 608 F. Supp. 2d 1087, 1100, 1109 (D. Minn. 2009) (holding that random, suspicionless searches of students' belongings violated the Fourth Amendment because the school could not demonstrate that these searches were necessary to maintain an orderly, safe environment). It bears noting that most of the students attending Little Rock School District in Little Rock, Arkansas, are students of color. See *Little Rock School District Directory Information*, NAT'L CTR. FOR EDUC. STATS., http://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=0509000 [https://perma.cc/Z72Z-ZB7L].

400. See Richardson, *supra* note 386, at 2035; L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267 (2012); Richardson, *supra* note 52, at 1143.

401. Richardson, *supra* note 386, at 2037, 2040.

402. *Id.* at 2076.

403. *Id.* at 2077.

404. *Id.* at 2079; see also Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 31–32 (2010) (proposing that courts should not defer to "officer hunches, instincts, and bare reliance on generalizations" to uphold stop-and-frisk searches, but require officers to produce "suspect-specific evidence of individual wrongdoing" because of cognitive biases).

surveillance measures does not foster positive learning climates, but can lead to distrust, discord, dysfunction, and destabilization.⁴⁰⁵ This is especially true when students perceive intrusions into their privacy as unfair and unfounded.⁴⁰⁶ Furthermore, this approach is consistent with the pedagogical principle that surveillance measures should be as minimal as the circumstances call for. Bryan Warnick cogently explains that intense surveillance measures “should only be used when there is evidence of a clear and immediate danger to student safety or to the conditions necessary for student learning.”⁴⁰⁷ He further maintains that school authorities should rely on these measures only after other measures have failed, and that school authorities should discontinue their use once the problem that led to their usage has been addressed.⁴⁰⁸ By following these principles, “violations of privacy are limited to protecting against real problems and existing threats.”⁴⁰⁹

B. Rethink the Concept of “Intrusion”

Second, with respect to the other side of the Court’s balancing equation, I propose that courts rethink the concepts of “intrusion” when evaluating random, suspicionless searches in schools in a manner that is more consistent with how courts evaluate violations of constitutional rights in other areas, including Fourth Amendment rights outside of the school context. As of now, courts routinely uphold, as a matter of law, the use of metal detectors, surveillance cameras, and random searches of students’ lockers and personal belongings on the basis that these searches are “minimally intrusive” to students’ expectations of privacy.⁴¹⁰ However, when reaching this conclusion, courts tend to evaluate these practices *in isolation* and fail to take into account the broader context of the surveillance environment, which can amount to a significant intrusion of students’ privacy and dignity interests, both of which are safeguarded by the Fourth Amendment.⁴¹¹

For example, in *In re Daniel A.*, a campus supervisor entered a classroom and demanded that all students stand and empty the contents of their bags on their desks, pursuant to the school’s random search policy.⁴¹² Daniel argued that the suspicionless

405. See *supra* Section III.A.

406. See *supra* Section III.A (explaining that when individuals perceive intrusions into their privacy as unfair and unjustified, they become resentful and less willing to comply with laws and policies).

407. WARNICK, *supra* note 209, at 162.

408. *Id.*

409. *Id.*

410. *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); *In re F.B.*, 726 A.2d 361, 366 (Pa. 1999); *see, e.g.*, *State v. J.A.*, 679 So. 2d 316, 319–20 (Fla. Dist. Ct. App. 1996); *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.*, 500 N.W.2d 637, 641 (Wis. 1993).

411. See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 613 (1989) (observing that the Fourth Amendment “guarantees the privacy, dignity, and security of persons”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”).

412. No. B232404, 2012 WL 2126539, at *4 (Cal. Ct. App. June 13, 2012).

search of his backpack was a violation of his Fourth Amendment rights.⁴¹³ The California Appeals Court concluded that the school official did not violate the Fourth Amendment, focusing exclusively on the single search of Daniel's backpack and concluding that this intrusion of Daniel's privacy interest was "minimal."⁴¹⁴ However, the California Appeals Court failed to fully appreciate or take into account altogether that Daniel's high school *regularly* searched students' belongings, even when they were not suspected of engaging in wrongdoing, *regularly* relied on metal detectors, *regularly* relied on harsh zero tolerance policies, and *regularly* relied on police officers to monitor and maintain control of students.⁴¹⁵ If the court had viewed the broader context of the surveillance environment (or permitted the factfinder to take the broader context into consideration), it very well could have (and should have) determined that the school's cumulative surveillance practices amounted to much more than a "minimal" intrusion of students' privacy and dignity rights.

Indeed, a far more appropriate, fair, and accurate approach to evaluate the character of the intrusion is to examine the cumulative effect that all of the security measures have on students' privacy and dignity interests, rather than evaluating each measure in isolation. In other words, when students routinely, even daily, are subjected to a combination of surveillance measures that include metal detectors, locked gates, police officers, surveillance cameras, random locker searches, drug sniffing dogs, random pat downs, and random searches through their personal belongings,⁴¹⁶ the cumulative effect of these intense, coercive measures can amount to a significant intrusion of students' privacy and personal dignity interests, even when an individual practice, when viewed in isolation, might be considered "minimally intrusive."⁴¹⁷ Such a test more closely aligns with how students actually experience these privacy and dignity intrusions. This approach also more closely aligns with the "totality of the circumstances" evaluation the Court applies in so many other areas of the law.⁴¹⁸

Surely Edward Ward, who attended a school where all of his classmates were students of color and almost all were poor, would not consider the privacy and dignity intrusions that he and his classmates faced each day to be "minimal." As described above, he compared his daily school experience to what one experiences in a prison.⁴¹⁹ Edward recalled that "[f]rom 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."⁴²⁰ He observed that the "halls were full with school security officers whose only purpose seemed to be to serve students with detentions or suspensions."⁴²¹ The affront to

413. *Id.*

414. *Id.*

415. See *Guidelines and Policies: Conduct at School Activities*, MORNINGSID HIGH SCHOOL, <http://mhs.myiusd.net/students-parents/guide-lines/> [<https://perma.cc/M24Y-SDU5>].

416. See *supra* notes 15–38 and accompanying text for examples of such schools.

417. See *supra* note 411.

418. See *infra* notes 427–37 and accompanying text.

419. See *supra* notes 35–38 and accompanying text.

420. *Ending the School-to-Prison Pipeline*, *supra* note 35, at 1.

421. *Id.* at 3.

personal dignity is even more egregious when one considers that, more often than not, it is students attending majority-minority schools in impoverished areas who are routinely treated in this manner.⁴²²

Or consider the daily experiences of students attending a New Orleans high school, where each morning students passed through metal detectors monitored by police officers, and security guards rummaged through students' personal bags.⁴²³ If the guards discovered cell phones, belts with certain buckles, or oversized jewelry, they confiscated them.⁴²⁴ Students who triggered the metal detectors three times were sometimes sent home, even when the guards could not discover any contraband.⁴²⁵ Certain days, students who were not in the classrooms by 9 a.m. were locked out, pushed into an auditorium by guards, and then suspended.⁴²⁶ Certainly those students would not consider these intrusions into their privacy and dignity as "minimal."

This broader, holistic approach to evaluating the "totality of the circumstances" or the "cumulative effect" of certain conditions is pervasive within Fourth Amendment jurisprudence. For example, to decide whether consent to a search was voluntary or the result of coercion or duress, the Court in *Schneckloth v. Bustamonte* observed that this was "a question of fact to be determined from the totality of all the circumstances," taking various factors into consideration that include age, education, intelligence level, length of detention, the nature of the questioning, and use of physical punishment.⁴²⁷ The Court emphasized that the case should not be determined by "the presence or absence of a single controlling criterion"; rather, the result of the case should reflect "a careful scrutiny of all the surrounding circumstances."⁴²⁸ Similarly, when evaluating whether a police officer had probable cause to conduct a search, the U.S. Supreme Court in *Florida v. Harris* explained, "we have consistently looked to the totality of the circumstances. We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."⁴²⁹ Indeed, even in the seminal student search case of *T.L.O. v. New Jersey*, the Court observed that "what is reasonable depends on the context within which a search takes place."⁴³⁰

This holistic approach of evaluating the "totality of the circumstances" or the "cumulative effect" of certain conditions is common in other areas of constitutional

422. One must also not forget that, as opposed to other places the public frequents that have high security, such as airports, youth are *compelled* to attend school, see *Table 5.1. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/statereform/tab5_1.asp [<https://perma.cc/8X3N-JKZZ>], and oftentimes students, because of their family's circumstances, do not have a realistic option to attend another school that does not rely on intense surveillance measures.

423. See Ellen Tuzzolo & Damon T. Hewitt, *Rebuilding Inequity: The Re-Emergency of the School-to-Prison Pipeline in New Orleans*, 90 HIGH SCH. J. (SPECIAL ISSUE) 59, 66 (2007).

424. *Id.*

425. *Id.*

426. *Id.*

427. 412 U.S. 218, 226–28 (1973).

428. *Id.* at 226.

429. 568 U.S. 237, 243 (2017) (citation omitted).

430. 469 U.S. 325, 337 (1985) (emphasis added).

jurisprudence as well. For example, in *Whole Women's Health v. Hellerstedt*, the Court determined that a Texas statute requiring doctors who performed abortions to have active admitting privileges at a hospital within thirty miles of the site of the abortion posed an undue burden on a woman's right to an abortion.⁴³¹ That regulation led to the closing of half of Texas' abortion clinics.⁴³² In its holding, the Court reasoned that the increased driving distances, in and of itself, did not always amount to an "undue burden."⁴³³ However, that burden, "when taken together with others that the closings brought about," such as "fewer doctors, longer waiting time, and increased crowding," led the Court to conclude that the Texas regulation created an undue burden on women's rights.⁴³⁴ Likewise, in the Fifth Amendment context, in order to determine whether a person is "in police custody," such that the person would be entitled to receive *Miranda* warnings before being questioned by the police, the Court examines "'all of the circumstances surrounding the interrogation,' including any circumstances that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'"⁴³⁵ Courts further apply the "cumulative effect" or "totality of the circumstances" analyses when evaluating whether there was an unfair trial that amounted to a denial of due process,⁴³⁶ and whether detention following an arrest constituted a violation of substantive due process.⁴³⁷

Indeed, the pervasiveness of this approach in other areas of constitutional jurisprudence, including in other areas of Fourth Amendment jurisprudence, causes one to question why courts do not undertake a broader evaluation of the entire surveillance environment when examining the "intrusiveness" of a search conducted by school authorities. This is especially troublesome because such an analysis would be more closely aligned with how students actually experience these privacy and dignity intrusions. Appropriately considering the severity and intensity of the entire surveillance environment would place more weight in favor of a constitutional violation under the current Fourth Amendment framework in many cases and would more effectively safeguard students' right to be free from unjustified invasions of their privacy interests.

431. 136 S.Ct. 2292, 2310, 2313 (2016).

432. *Id.* at 2313.

433. *Id.*

434. *Id.* (emphasis added).

435. *J.D.B. v. North Carolina*, 564 U.S. 261, 270–71 (2011) (quoting *Stansbury v. California*, 511 U.S. 218, 322, 325 (1994)); see also *Wyrick v. Fields*, 459 U.S. 42, 46 (1982); *Edwards v. Arizona*, 451 U.S. 477, 483 (1981); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

436. *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) ("[T]he failure to give a requested instruction on the presumption of innocence does not in and of itself violation the Constitution [S]uch a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors").

437. *Luckes v. Cty. of Hennipin*, 415 F.3d 936, 939 (8th Cir. 2005) ("In determining whether extended detention following an arrest pursuant to a valid warrant violates substantive due process . . . we look to the totality of the circumstances.").

CONCLUSION

The proposed recalibration of the current legal framework for evaluating suspicionless search practices in schools is an important step forward to creating more equitable and inclusive academic environments for all of our nation's youth. It would help ameliorate the pernicious effects of implicit racial bias, address the unequal use of intense surveillance measures on students of color, and motivate school officials to rely on alternative, evidence-based measures that more effectively foster safe environments without harming the learning climate.⁴³⁸ The reformulated test also is more consistent with the broader purposes of Fourth Amendment doctrine and good educational policy and practice.

Over one hundred years ago, the wise philosopher and reformer John Dewey astutely observed that “[w]hat the best and wisest parent wants for his own child, that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon it destroys our democracy.”⁴³⁹ In some of our nation's schools, including schools serving children living in challenging environments, students view their experiences to be too important to risk suspension and expulsion and too precious to be spoiled by crime and violence.⁴⁴⁰ These schools have an ethos of belonging and trust.⁴⁴¹ Children desire to attend these schools because they feel part of a special community—a community that cares for one another and desires the best for one another.⁴⁴² These are the types of schools that make real differences in children's lives and prepare them to be happy and productive. We owe it to our nation's children to strive to create these types of learning environments for all students. They deserve nothing less.

438. See Nance, *supra* note 47, at 345–62.

439. JOHN DEWEY, *THE SCHOOL AND SOCIETY* 19 (1900).

440. See Michael Powell, *In a School Built on Trust, Metal Detectors Inject Fear*, N.Y. TIMES (Sept. 17, 2012), <http://www.nytimes.com/2012/09/18/nyregion/in-a-brooklyn-school-metal-detectors-inject-fear.html> [https://perma.cc/3N8H-L527].

441. *Id.*

442. *Id.*