CHAPTER TWO

POLICING STUDENTS

Jason Shade was a student at the Apple Valley Alternative Learning Center,[1] an alternative high school in Minnesota.[2] On the way to an off-campus shop class, Shade's teacher stopped at Burger King so the students could buy breakfast.[3] Back on the bus, Shade had trouble opening the orange juice that he bought to have with his breakfast, so he asked the other students if anyone had something he could use to open it.[4] A nearby student handed Shade his folding knife, which Shade used to open his orange juice before passing it back.[5] Shade's teacher, who was also driving the bus, saw Shade with the knife in his hand, but did not see the surrounding events.[6] Three police officers, two of whom served as school resource officers (SROs),[7] were contacted and came to search the bus and the students.[8] The knife's owner admitted to the police that he had a knife and turned it over.[9] For his brief use of the knife on the bus, Shade was charged with and pled guilty to felony possession of a dangerous weapon on school property.[10]

Shade's story is not particularly unusual. In recent years, the connection between schools and police departments has become ever closer. As a result, not only are children "being treated like criminals in school, but many are being shunted into the criminal justice system as schools have begun to rely heavily upon law enforcement officials to punish students."[11] While the Supreme Court has extended limited

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[1] Shade v. City of Farmington, No. CIV. 99-2067, 2001 WL 501197, at *1 (D. Minn. May 9, 2001), *aff'd*, 309 F.3d 1054 (8th Cir. 2002).

[2] *About Us,* DISTRICT 196 AREA LEARNING CENTER, http://www.district196.org/alc/aboutus.html (last visited Mar. 1, 2015) [http://perma.cc/WA2V-CPYZ].

[3] *Shade*, 2001 WL 501197, at *1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] This Chapter uses SRO, school police, school officer, or school liaison officer to refer to any police officer employed in a school, regardless of the particulars of the program.

[8] *Shade*, 2001 WL 501197, at *1–2.

[9] *Id.* at *2. The officers proceeded to search all of the students despite the admission. *Id.*

[10] *Id.*

[11] ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARV. UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 2 (2000) [hereinafter OPPORTUNITIES SUSPENDED]; *see also* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 862 (2012) ("Today, police officers routinely patrol public school hallways on a full-time basis . . . and school officials refer a growing number of youth to the juvenile and criminal justice systems for school-based misconduct."). Two extreme examples include five high school students getting arrested for felony assault when they accidentally hit their school bus driver while playfully throwing peanuts at each other and a student being incarcerated in a local juvenile detention center for wearing the wrong color socks.

Fourth Amendment rights to students in public schools, it has yet to acknowledge the rise of heavy-handed policing in schools, the costs of such a system, and how either factor might impact the determination of the scope of students' rights. In trying to follow the Supreme Court's limited precedent in this context, most courts hold that reasonable suspicion that a student is violating a law or school rule is constitutionally sufficient to search. This is true even if the search involves a police officer, so long as the officer doesn't initiate the search independently from school officials or a concern for school safety. This Chapter argues that such a standard ignores the current criminalization of student behavior in public schools and allows for discretion that may exacerbate the unequal distribution of the costs of such criminalization. A better standard would require all police officers to have probable cause to believe that a law has been violated before searching students, and would require the same of school officials where the officials are required to report evidence found to law enforcement.

Section A of this Chapter describes the Court's handling of Fourth Amendment rights in schools and how lower courts have filled the gaps left in the doctrine. Section B reports on the rising criminalization of student behavior in schools, and how that rise has led to increasingly severe outcomes for misbehaving students. Section C explains why the current reasonable suspicion standard for school searches, which is used even when police are closely involved, is doctrinally problematic. Section D evaluates proposed alternate standards for school searches and suggests that all school searches involving the police or school officials obligated to report to police should be subject to a probable cause standard.

A. Students' Fourth Amendment Rights After T.L.O.

1. The Supreme Court's School Search Doctrine. — Until 1985, it was not clear that students had any Fourth Amendment rights in school. Although it was evident that the Fourth Amendment applied to civil authorities,[12] some courts had relied on the common law doctrine of *in loco parentis* to hold "that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren."[13] The Supreme Court in *New Jersey v. T.L.O.*[14] rejected this rationale as "in tension with contempo-

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ADVANCEMENT PROJECT ET AL., HANDCUFFS ON SUCCESS: THE EXTREME SCHOOL DISCIPLINE CRISIS IN MISSISSIPPI PUBLIC SCHOOLS 3–4 (2013).

[12] *See* New Jersey v. T.L.O., 469 U.S. 325, 335–36 (1985); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) ("The Fourth Amendment['s] . . . protection applies to governmental action.").

[13] *T.L.O.*, 469 U.S. at 336.

[14] 469 U.S. 325.

rary reality."[15] Courts applying the doctrine of *in loco parentis* had understood school officials to be exercising the parents' power, rather than the state's,[16] meaning they could "claim the parents' immunity" from the Fourth Amendment.[17] The Court found that this reasoning conflicted with the reality of laws compelling minors to go to school.[18] That school officials were subject to Fourth Amendment constraints also better aligned with precedent extending some First Amendment and due process protections to students.[19]

The *T.L.O.* Court, however, also found that the special concerns of educators justified limiting students' Fourth Amendment protections. In order to "strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place,"[20] the Court found that school officials could search students without a warrant or probable cause,[21] needing instead only reasonable suspicion "that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[22]

The Court believed that violence and drugs in schools had led to disorder[23] and that schools had a corresponding interest in having "freedom to maintain order."[24] This interest has since become an example of what the court has termed "special needs."[25] Where there are

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[15] *Id.* at 336.

[16] *See id.*

[17] *Id.* at 337.

[18] *Id.* at 336 ("Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.").

[19] *See id.* (citing Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[20] *Id.* at 340.

[21] *Id.* at 340–41. Probable cause "requires a particularized, articulable basis for" suspicion "before a search can be undertaken." Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 THE SCHOLAR 301, 369 (2011).

[22] *T.L.O.*, 469 U.S. at 342. The Court noted that the scope of the search must also be reasonable, which will be true where "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*

[23] *See id.* at 339.

[24] *Id.* at 341.

[25] *See id.* at 351 (Blackmun, J., concurring in the judgment) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."); *id.* at 353 ("The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement . . . ."); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001) (noting the Court's adoption of Justice Blackmun's terminology).

needs other than ordinary law enforcement,[26] the Constitution may require less than a warrant supported by probable cause for a search.[27] If a court finds that there is a special need, its inquiry becomes simply whether the search was reasonable, as determined by weighing the government interest in executing the search against the individual's legitimate expectation of privacy.[28] In *Vernonia School District 47J v. Acton*,[29] the Court explicitly incorporated the special needs test into the public school setting.[30] The Court reaffirmed this standard in *Board of Education v. Earls*.[31] Finally, in *Safford Unified School District No. 1 v. Redding*,[32] the Court explained that the standard of reasonable suspicion applies to a school administrator's search of a student.[33]

*2. Lower Courts' Restriction of Students' Fourth Amendment Rights Post-*T.L.O. — *T.L.O.* specifically reserved the question of what would be the appropriate standard for a search of a student "conducted by school officials in conjunction with or at the behest of law enforcement agencies,"[34] and the Supreme Court has not since answered the question. Numerous lower courts have addressed the issue, though — given the significant increase in police presence in schools since *T.L.O.*,[35] it is not surprising that this issue arises with some regularity in juvenile and criminal court proceedings. The majority of lower courts to have faced the question have converged around the standard originally set forth by the Illinois Supreme Court in *People v. Dilworth*.[36] There, the court defined three general categories of school

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[26] For some examples of special needs, see *Maryland v. King*, 133 S. Ct. 1958, 1981 (2013) (Scalia, J., dissenting).

[27] *Id.* at 1969 (majority opinion). The Court has also allowed exceptions to the warrant requirement where privacy expectations are "diminished" or the intrusion is "minimal." *See id.* (quoting Illinois v. McArthur, 531 U.S. 326, 330 (2001)).

[28] *See id.* at 1970.

[29] 515 U.S. 646 (1995).

[30] *Id.* at 653 ("We have found such 'special needs' to exist in the public school context.").

[31] 536 U.S. 822, 829 (2002) ("[T]his Court has previously held that 'special needs' inhere in the public school context.").

[32] 557 U.S. 364 (2009).

[33] *Id.* at 370. *Redding* is the only case in the school context in which the Court found a Fourth Amendment violation; the Court placed greater emphasis on the student's privacy interest because she was subject to a strip search. *Id.* at 374–75; *cf.* Forman, *supra* note 21, at 318 ("*Redding* . . . sets a floor for violations under the reasonable suspicion standard . . . at complete humiliation . . . ."). The student nonetheless lost her civil claim because the Court found that those who searched her in violation of the Fourth Amendment had qualified immunity. *Redding*, 557 U.S. at 378–79.

[34] New Jersey v. T.L.O., 469 U.S. 325, 341 n.7 (1985).

[35] *See infra* p. 1754.

[36] 661 N.E.2d 310, 317–18 (Ill. 1996); *see* State v. R.D.S., No. M2005-00213-COA-R3-JV, 2006 WL 3350699, at *11 (Tenn. Ct. App. Nov. 17, 2006) ("The majority of those states addressing the issue have adopted the reasoning and analysis set out by the Illinois Supreme Court in *People v. Dilworth* . . . ."), *aff'd in part, rev'd in part*, 245 S.W.3d 356 (Tenn. 2008); Russell v. State, 74

search cases involving the police: "(1) those where school officials initiate a search or where police involvement is minimal, (2) those involving school police or liaison officers acting on their own authority, and (3) those where outside police officers initiate a search."[37] The court found that courts usually applied the reasonable suspicion test to the first and second categories, but required probable cause for the third category.[38]

In *Dilworth*, an SRO empowered to discipline students under the school's rules initiated and carried out a search on his own.[39] The court held that the search fell into the second category and should be subjected to the reasonable suspicion standard.[40] Although the *Dilworth* court seemingly defined that category by the identity of the searcher, in holding that the reasonable suspicion standard should apply, the court emphasized the SRO's school-oriented, rather than law enforcement–oriented, purpose: he had conducted the search to further "the school's attempt to maintain a proper educational environment."[41]

Many courts that adopted the *Dilworth* test (whether explicitly or not)[42] have, like *Dilworth*, found significant the distinction between searches conducted "to obtain evidence of a crime"[43] and those done "to maintain discipline, order, or student safety."[44] Since the relationships between schools and police officers vary, courts have been reluctant to rely on factors such as who pays the officer's salary.[45] Focusing

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S.W.3d 887, 891 (Tex. App. 2002) (noting that the *Dilworth* court was first to "establish[] a three-part inquiry to follow when a law enforcement official is involved in a school search").

37 *Dilworth*, 661 N.E.2d at 317.

38 *Id.* at 317–18.

39 *Id.* at 313.

40 *Id.* at 317.

41 *Id.* The court emphasized the school-oriented purpose in spite of the fact that the SRO "chased and captured defendant, arrested him, placed him in custody, handcuffed him, placed him in the squad car, and took him down to the investigative division of the Joliet police station." *Id.* at 322 (Nickels, J., dissenting) ("These were the acts of a police officer, not a school official . . . ."). The *Dilworth* court also emphasized that its holding comported with the "special needs" doctrine articulated in *Vernonia*. *Id.* at 318 (majority opinion).

42 *See, e.g.*, Russell v. State, 74 S.W.3d 887, 892 (Tex. App. 2002) (applying *Dilworth* and noting two cases where Texas appellate courts "at least implicitly followed the rationale of *Dilworth*").

43 *In re* D.D., 554 S.E.2d 346, 353 (N.C. Ct. App. 2001).

44 *Id.* at 352–53 ("[T]he *T.L.O.* standard has also been applied to cases where a school resource officer conducts a search . . . in the furtherance of well-established educational and safety goals." *Id.* at 352.); *see also* State v. Alaniz, 815 N.W.2d 234, 239 (N.D. 2012) (holding reasonable suspicion standard applied to an SRO investigating school rule and law violations "to maintain a safe and educational environment"); R.D.S. v. State, 245 S.W.3d 356, 369 (Tenn. 2008) (holding reasonable suspicion standard is appropriate where SRO is "assigned duties at the school beyond those of a ordinary law enforcement officer"); State v. Meneese, 282 P.3d 83, 84 (Wash. 2012) (en banc) (holding that reasonable suspicion standard did not apply where the "focus of the investigation was no longer on informal school discipline").

45 *See, e.g.*, *In re* Randy G., 28 P.3d 239, 247 (Cal. 2001) ("If we were to draw the distinction urged by the minor, the extent of a student's rights would depend not on the nature of the assert-

on the officer's purpose allows the court to avoid the complicated line drawing between SROs and outside law enforcement officers.

Because courts are particularly worried about drugs and weapons in schools,[46] when determining an officer's purpose, they almost always find that it involved school discipline or safety,[47] even where there is an evidence-seeking bent to the search — for example, in situations where the school will report any contraband found to police[48] or

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ed infringement but on the happenstance of the status of the employee who observed and investigated the misconduct."); *In re* William V., 4 Cal. Rptr. 3d 695, 699–700 (Ct. App. 2003) (rejecting distinction between SRO and police officer based on whether the school district is the employer because "[t]his distinction focuses on the insignificant factor of who pays the officer's salary, rather than on the officer's function at the school," *id.* at 700).

[46] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662 (1995) ("[O]f course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."); *In re* J.D., 170 Cal. Rptr. 3d 464, 466–67 (Ct. App. 2014) (emphasizing school officials' "increased concern," *id.* at 466, after Columbine, Sandy Hook, and Virginia Tech, and citing statistics about the prevalence of school violence); *In re* Gregory M., 627 N.E.2d 500, 502 (N.Y. 1993) ("The extreme exigency of barring the introduction of weapons into the schools by students is no longer a matter of debate."); *In re* Angelia D.B., 564 N.W.2d 682, 689 (Wis. 1997) ("With the growing incidence of violence and dangerous weapons in schools, [protecting students and teachers] has become increasingly difficult.").

While violence in schools is a particularly weighty problem, there may be a mismatch between the level of media attention paid to such violence and the actual threat of violence at any given school. *See, e.g.*, Forman, *supra* note 21, at 316–17 ("[T]he narrative of the dangerous, potentially violent youngster roaming the halls of our public schools, ready to shoot and kill 'has features of what sociologists describe as a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat.'" (quoting Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003))); *cf.* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1076 n.45 (2003) ("Commentators disagree about the extent of school violence, but nonetheless attribute various heightened security measures, including police presence, to concern about such violence, whether accurate or exaggerated."). The media's disproportionate attention to school violence is of some concern since many schools that employ SROs cite the media's reports of violence as their motivation. Julie Kiernan Coon & Lawrence F. Travis III, *The Role of Police in Public Schools: A Comparison of Principal and Police Reports of Activities in Schools*, 13 POLICE PRAC. & RES. 15, 20 (2012). There is also evidence that rates of school violence have declined in recent years. Peter Price, Comment, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 547 (2009). In addition, there is no convincing evidence that harsh policies connected with school policing increase school safety. *See id.* at 545; *see also* NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON 78 (2014) (explaining that recent large declines in juvenile crime rates were not due to "tougher laws or longer sentences," because researchers found "the drops were steepest in those states that did *not* jump on the lock-'em-up bandwagon").

[47] *See, e.g.*, *In re J.D.*, 170 Cal. Rptr. 3d at 471; People v. Dilworth, 661 N.E.2d 310, 317 (Ill. 1996); *Alaniz*, 815 N.W.2d at 239. *But see* State v. Meneese, 282 P.3d 83, 86 (Wash. 2012) (holding the reasonable suspicion standard did not apply to SRO's search because of "overwhelming indicia of police action").

[48] The school at issue in *Dilworth*, for example, stated in its handbook that if "any illegal items or controlled substances are found in a search, these items and the student will be turned over to the police." *Dilworth*, 661 N.E.2d at 314; *cf.* Commonwealth v. Lawrence L., 792 N.E.2d 109, 112 (Mass. 2003) (holding reasonable suspicion standard applied to principal even where memoran-

the search is related to a crime that has already taken place.[49] Other courts simply treat SROs as equivalent to school officials without investigating the purpose of the search.[50] Some of these courts have, however, investigated the officer's role in the school to determine whether he was an official of the school or an official of the police department.[51] Though these two treatments of the *Dilworth* categories could lead to opposing outcomes on the same facts,[52] in practice, courts tend to apply the reasonable suspicion standard to searches conducted by SROs under either treatment.

Cases where courts find that a search of a student required probable cause are rare and usually involve either an outside police search only tangentially related to the school setting, or an SRO who has a purely law enforcement role.[53] In an example of the former, a South Carolina court held that probable cause was required where a police officer, on the request of the student's mother, drove the student to school and searched him before releasing him.[54] In an example of the latter, the New Hampshire Supreme Court found that probable cause

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dum with police department "requires school officials to notify police if a student is found to possess a controlled substance illegally").

[49] *See, e.g.*, *In re J.D.*, 170 Cal. Rptr. 3d 464 (finding that the SRO's search was primarily in the interest of school safety even though local police department members were present and the search was for a weapon used in a crime the day before).

[50] *See, e.g.*, Lopera v. Town of Coventry, 652 F. Supp. 2d 203, 212 (D.R.I. 2009) (stating that even where search is done by outside police, the reasonable suspicion standard applies), *aff'd*, 640 F.3d 388 (1st Cir. 2011); *In re William V.*, 4 Cal. Rptr. 3d at 699 (finding an SRO equivalent to a school official for "assessing the legality of a search on school grounds"); M.D. v. State, 65 So. 3d 563, 566 (Fla. Dist. Ct. App. 2011) ("[A] search conducted by [an SRO] is more akin to a search from a school official than from an outside police officer . . . ."); State v. Taylor, 50 So. 3d 922, 925–26 (La. Ct. App. 2010) (applying without comment *T.L.O.*'s reasonable suspicion standard to school police officer search); Commonwealth v. J.B., 719 A.2d 1058, 1061–62 (Pa. Super. Ct. 1998) (same); *In re* S.K., 647 A.2d 952, 955 (Pa. Super. Ct. 1994) (same); *In re Gregory M.*, 627 N.E.2d at 502 (holding reasonable suspicion standard applied to SRO); Russell v. State, 74 S.W.3d 887, 892 (Tex. App. 2002) (holding that an SRO fell into the second *Dilworth* category, and that therefore the reasonable suspicion standard applied, without looking into the purpose of the search). *But see In re* Doe, 91 P.3d 485, 490 (Haw. 2004) (indicating that probable cause standard would apply to school's SRO, but not reaching the question because the SRO did not even have reasonable suspicion), *overruled on other grounds by In re* Doe, 100 P.3d 75, 77 (Haw. 2004).

[51] *See, e.g.*, *Alaniz*, 815 N.W.2d at 238 (discussing many factors in making this determination).

[52] For example, reasonable suspicion would be sufficient under a role-focused test where a police officer who was employed full time by the school and had educational responsibilities searched a student for goods stolen from a nearby house the night before. In contrast, under a purpose-inflected test, probable cause would likely be required unless there was some special reason to believe those stolen goods would disrupt the order or safety of the school.

[53] *But see* Patman v. State, 537 S.E.2d 118, 120 (Ga. Ct. App. 2000) (finding with little comment that a police officer on special detail to a school needed probable cause to search a student).

[54] *In re* Thomas B.D., 486 S.E.2d 498, 500 (S.C. Ct. App. 1997). Another case found that police officers hired for a school dance needed probable cause to conduct a search at their sole discretion and with no contact with school officials. State v. Tywayne H., 933 P.2d 251, 254 (N.M. Ct. App. 1997).

was required where an SRO was assigned to the school "to investigate criminal activity on school grounds,"[55] and the SRO admitted that he had an understanding with school officials where he would "pass[] information to the school when he could not act," and they would "gather evidence otherwise inaccessible to [the SRO] due to constitutional restraints."[56]

B. Public School Discipline Has Become Increasingly Criminalized, Subjecting Students to Considerably More Severe Punishments

1. Public School Discipline Has Become Increasingly Criminalized. — Many scholars have reported on the rise of zero-tolerance policies and police presence in schools in reaction to "[c]oncern about school safety, fueled by high-profile shootings" like the tragedy at Columbine[57] and, more recently, Sandy Hook,[58] and as part of the "get-tough" reaction to rising crime and drug rates in the 1980s.[59] There has since "been a massive increase in the police and security presence in schools,"[60] with 42.8% of public schools reporting a weekly security presence, including SRO and non-SRO law enforcement officers, in the 2009–2010 school year,[61] compared to 10% of schools in the 1996–1997 school year.[62] From 1997 to 2007, the number of police officers in schools rose by 55%.[63]

In addition, many school districts have expanded the zero-tolerance policies originally enacted to focus on "truly dangerous and criminal

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[55] State v. Heirtzler, 789 A.2d 634, 636 (N.H. 2001).

[56] *Id.* at 637. The Washington Supreme Court required probable cause where an SRO had no school discipline power and searched a student's bag after arresting and handcuffing him, with little school official involvement. State v. Meneese, 282 P.3d 83, 87–88 (Wash. 2012).

[57] Coon & Travis, *supra* note 46, at 15.

[58] Stephen Ceasar, *L.A. Schools Police Will Return Grenade Launchers but Keep Rifles, Armored Vehicle*, L.A. TIMES, Sept. 16, 2014, http://www.latimes.com/local/lanow/la-me-schools-weapons-20140917-story.html [http://perma.cc/7Q2R-KVY4]; *cf. In re* J.D., 170 Cal. Rptr. 3d 464, 466–67 (Ct. App. 2014) (citing Columbine, Sandy Hook, and Virginia Tech as evidence of "the increased concern school officials must have in the daily operation of public schools").

[59] *See, e.g.*, OPPORTUNITIES SUSPENDED, *supra* note 11, at 1; ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 3–4, 9–10 (2010) [hereinafter TEST, PUNISH]; Coon & Travis, *supra* note 46, at 15–17; *see also* Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84 CLEARING HOUSE 160, 160 (2011).

[60] TEST, PUNISH, *supra* note 59, at 10.

[61] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2013, at 155 tbl.20.3 (2014). The percentage is much higher when considering only high schools, with 76.4% reporting weekly security presence. *Id.*

[62] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2002, at 140 tbl.A4 (2002).

[63] Gary Fields & John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, WALL ST. J., Oct. 20, 2014, http://online.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602.

behavior by students" to include "infractions that pose little or no safety concerns."[64] State laws also increasingly require schools to report various infractions to law enforcement agencies, with forty-three states so requiring in 2000.[65] While the majority of referrals are for criminal conduct, school districts interpret these laws broadly, often reporting students to law enforcement agencies for noncriminal infractions.[66] Further, even where limited to criminal conduct, some jurisdictions have specifically criminalized behavior in school that is far less threatening than drug use or weapon possession — for example, in Toledo, Ohio, it is illegal to disrupt a class,[67] and in Texas it is a crime for a child age twelve or older to miss three days of school within a four-week period.[68]

In addition, the expansion of strict school rules directly implicates students' Fourth Amendment rights. Because the reasonable suspicion standard does not even require the school officer to have a reasonable suspicion that the student is breaking the law, but only that the student is violating a school rule,[69] evidence found because of a reasonable suspicion that a student is, for example, eating Certs[70] or hiding a cell phone[71] could be admitted against him in a criminal proceeding.

Together, these changes show that much behavior in schools that would have previously been handled internally "through school disciplinary processes" is now handled by law enforcement authorities.[72] Police are both more involved in the searching of students, and more likely to be involved in the resulting discipline via the criminalization of student behavior. This increased policing of students has serious consequences for students and their communities.

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[64] OPPORTUNITIES SUSPENDED, *supra* note 11, at 1. In some cases, "drugs" and "weapons" are defined to sweep in less threatening objects like Midol, Certs, paper clips, and nail files. *Id.* In other cases, district policies "apply the theory of 'Zero Tolerance' to a broad range of student actions that have absolutely no connection to violence and drugs." *Id.*

[65] *Id.* at 49.

[66] *Id.*

[67] TOLEDO, OHIO, MUN. CODE § 537.16 (2014); *see* TEST, PUNISH, *supra* note 59, at 10.

[68] TEX. EDUC. CODE ANN. § 25.094 (West 2013); *see also* Derek Cohen & Deborah Fowler, *Texas Legislature Should Decriminalize Truancy*, DALL. MORNING NEWS (Oct. 23, 2014, 9:13 PM), http://www.dallasnews.com/opinion/latest-columns/20141023-derek-cohen-and-deborah-fowler-texas-legislature-should-decriminalize-truancy.ece [http://perma.cc/E5M2-WEH6] ("If a child . . . misses one more day after adjudication, he or she can face jail time . . . .").

[69] New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985).

[70] *See* OPPORTUNITIES SUSPENDED, *supra* note 11, at 1.

[71] *See* Aditi Mukherji, *School Cell Phone Policies: 7 Common Rules*, FINDLAW (Aug. 20, 2013, 7:48 AM), http://blogs.findlaw.com/law_and_life/2013/08/school-cell-phone-policies-7-common-rules.html [http://perma.cc/8645-P4RP] ("A classic cell phone policy is a blanket ban on the use of cell phones during school hours or on school premises . . . .").

[72] Pinard, *supra* note 46, at 1080. Two troubling examples include a student receiving "a misdemeanor ticket for wearing too much perfume" and a student "charged with theft after sharing the chicken nuggets from a classmate's meal." Fields & Emshwiller, *supra* note 63.

2. The Increased Policing of Public Schools Subjects Students to Considerably More Severe Punishments. — The most fundamental consequence of the increased policing of schools is that a disturbing number of children[73] are being pushed out of school and into the criminal justice system.[74] This is troubling in light of the Supreme Court's recent jurisprudence on the reduced culpability of youthful offenders[75] and the significant amount of science supporting such reduced culpability,[76] as these students are now being punished in courtrooms and juvenile prisons instead of principals' offices, and the punishments for delinquent behavior are often quite severe.

The severity takes several forms. First and most basically, many students are tried and sentenced as adults.[77] Second, when students are charged as juveniles, they are afforded fewer procedural rights.[78] This can have an escalating impact, as the majority of jurisdictions al-

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[73] *See, e.g.*, TEST, PUNISH, *supra* note 59, at 3 ("[H]uge numbers of students throughout the country are . . . routinely pushed out of school and toward the juvenile and criminal justice systems."); ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 14 (2011) ("[A]n alarming number of students [are] being arrested and referred to the juvenile justice system for disorderly behavior that was once considered routine and handled informally within the schools.").

[74] *See* Weiler & Cray, *supra* note 59, at 162 (noting that "the rise of the SRO program has coincided with a rise in" child participation in the criminal justice system); *see also* Coon & Travis, *supra* note 46, at 20 ("As would be expected, schools with SROs experience higher levels and frequency of law-enforcement involvement."); Fields & Emshwiller, *supra* note 63 ("The juvenile court in Clayton County, Ga. . . . received 46 misdemeanor school referrals in 1996, the year before police were placed on campuses, court records show. By 2003, referrals had grown to 1,147 for misdemeanors including school fights, disorderly conduct and disrupting school.").

[75] *See* Shobha L. Mahadev, *Youth Matters:* Roper*,* Graham*,* J.D.B.*,* Miller*, and the New Juvenile Jurisprudence*, THE CHAMPION, March 2014, at 14 ("In *Roper v. Simmons*, *Graham v. Florida*, *J.D.B. v. North Carolina*, and *Miller v. Alabama*, the U.S. Supreme Court rendered a series of decisions that calls for transformational change in the way that children are treated in criminal procedure and sentencing matters." (footnotes omitted)).

[76] *See* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 166 (2009) (explaining that the "general principles that, as a group, normal young people differ from normal adults in systematic ways directly relevant to their relative culpability, ability to be deterred, and potential for rehabilitation . . . are now well supported by behavioral and criminological research").

[77] *See* BERNSTEIN, *supra* note 46, at 250–51; DONALD T. KRAMER, 2 LEGAL RIGHTS OF CHILDREN § 22:19 (rev. 2d ed. 2005) ("All state juvenile codes provide a procedure by which a juvenile charged with delinquent behavior may be transferred for prosecution in the adult criminal courts."); *see, e.g.*, People v. Dilworth, 661 N.E.2d 310, 327 (Ill. 1996) (Nickels, J., dissenting) ("[D]efendant was charged and sentenced to four years in the penitentiary as an adult.").

[78] *See* Forman, *supra* note 21, at 329–30 ("When [evidence that can be used against students in court] is obtained through a search justified by a reasonable suspicion, students get the worst of both worlds: they face the full panoply of sanctions and punishments under the juvenile or criminal justice systems, but without the constitutional protections that normally adhere to such proceedings.").

low juvenile offenses to count toward three strikes–type laws,[79] even though critics of such policies have noted, inter alia, the "prevalence of pleas," "lack of a jury trial," and "lack of zealous advocacy in juvenile proceedings."[80]

Third, the experience of juvenile prison in most states[81] is at least as unpleasant as that of adult prison[82]: There is rampant violence[83] and sexual abuse between wards and at the hands of guards.[84] Solitary confinement is frequently imposed.[85]

Fourth, time in juvenile prison can have a devastating impact on the course of a child's life. Juvenile incarceration makes a person significantly more likely to end up in the adult criminal justice system later.[86] For example, one study of 35,000 juvenile offenders "found that those who were incarcerated as juveniles were twice as likely to go on to be locked up as adults as those who committed similar offenses and came from similar backgrounds but were given an alternative sanction or simply not arrested."[87] In addition, students who spend time in juvenile prison are significantly less likely to graduate from high school.[88] Even for students who are not charged, simply being arrested reduces the odds that they will graduate.[89] Such a system

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[79] *See* United States v. Matthews, 498 F.3d 25, 34–35 (1st Cir. 2007) (joining the four circuits that had "held that juvenile adjudications may be deemed qualifying convictions under the [Armed Career Criminal Act]," *id.* at 34, as opposed to the one circuit that had held otherwise).

[80] State v. Hand, No. 25840, 2014 WL 4384131, at *2 (Ohio Ct. App. Sept. 5, 2014) (Donovan, J., dissenting).

[81] Some states have made a concerted effort to address the failings of the juvenile justice system by redesigning their juvenile prisons. *See, e.g.*, BERNSTEIN, *supra* note 46, at 217–20 (describing reforms in New York). Missouri has had particular success. *See id.* at 284–87.

[82] *See* ANNIE E. CASEY FOUND., *supra* note 73, at 2 ("[T]he largest share of committed youth . . . are held in locked . . . facilities . . . [that] typically operate in a regimented (prison-like) fashion, and feature correctional hardware such as razor-wire, isolation cells, and locked cell blocks.").

[83] *See* BERNSTEIN, *supra* note 46, at 81–102.

[84] *See id.* at 103–28.

[85] *See id.* at 129–50. International standards forbid this practice. *Id.* at 132.

[86] *See id.* at 7–8, 182 (listing studies finding extremely high long-term recidivism rates and that "involvement in the juvenile system was the single strongest predictor of adult incarceration," *id.* at 182).

[87] *Id.* at 7. Another study found that incarceration was "the single most significant factor in predicting whether a youth will offend again — more so than family difficulties or gang membership." *Id.*

[88] ANNIE E. CASEY FOUND., *supra* note 73, at 12 ("Follow-up studies have long shown that youth released from juvenile correctional facilities seldom succeed in school.").

[89] *See* Fields & Emshwiller, *supra* note 63 ("A study last year of Chicago public schools . . . found the high-school graduation rate for children with arrest records was 26%, compared with 64% for those without. The study estimated about one-quarter of the juveniles arrested in Chicago annually were arrested in school."); *cf. id.* ("[T]hose arrested as juveniles and not convicted were likely to earn less money by the time they were 25 than their counterparts."). This is a serious consequence. *See* Lee v. Macon Cnty. Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974) ("Stripping a child of access to educational opportunity is a life sentence to second-rate citizen-

should trouble even those who prefer a "tough on crime" approach, as there is no evidence it is making schools or communities safer.[90]

C. The Reasonable Suspicion Standard for Public School Students Is Problematic

The Supreme Court and lower courts following its guidance have largely ignored the effects of the rising police presence in public schools when limiting Fourth Amendment rights for students. The resulting reasonable suspicion standard required for the majority of searches of students is problematic both doctrinally and in effect.

1. The Reasonable Suspicion Standard Interacts Problematically with Criminalized Schools. — As many scholars have described, the burdens of increasingly criminalized public schools fall most heavily on racial minorities, children with disabilities, and children from low-income families.[91] Studies show that racial disparities are largest where the offense — be it a violation of a school rule or a law — requires a subjective determination, that is, something like "Disturbing Schools" rather than weapon possession.[92] That subjective violations are disproportionately enforced against minority students could very well indicate that police in schools are more likely to have their "reasonable suspicion" raised against such students. If police are more likely to view a particular action as disruptive if it is performed by a minority student than if it is performed by a white student, then police may be more likely to view behaviors exhibited by minority students as suspicious, even if no conscious racism is involved.[93] Additionally,

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ship . . . ."); PRESTON ELROD & R. SCOTT RYDER, JUVENILE JUSTICE 63 (3d ed. 2011) (noting school's importance as a "major socializing institution" and "primary determinant of both economic status and social status").

[90] *See* BERNSTEIN, *supra* note 46, at 182–83; *see also* ANNIE E. CASEY FOUND., *supra* note 73, at 3 ("We now have overwhelming evidence showing that wholesale incarceration of juvenile offenders is a counterproductive public policy."); *cf.* Forman, *supra* note 21, at 333 ("[C]hildren who are subjected to school searches may . . . develop negative views of school and distrust of law enforcement that alienates them from mainstream society, increasing the lure of counter-culture ideas (such as gangs and other anti-social groups).").

[91] *See, e.g.*, Fields & Emshwiller, *supra* note 63 ("The Justice Department has charged that the impact of school arrests falls disproportionately on African-American students."); Molly Knefel, *The School-to-Prison Pipeline: A Nationwide Problem for Equal Rights*, ROLLING STONE, Nov. 7, 2013, http://www.rollingstone.com/music/news/the-school-to-prison-pipeline-a-nationwide-problem-for-equal-rights-20131107 [http://perma.cc/GS3J-WT96] (noting that school-based arrests and suspensions have disproportionately targeted black and disabled students in many public schools).

[92] *See* OPPORTUNITIES SUSPENDED, *supra* note 11, at 7–9; *see also id.* at 8 ("In South Carolina, the consequences for . . . 'Disturbing Schools,' with which black children were overwhelmingly charged, are still serious. Of the children charged with 'Disturbing Schools,' 70% were referred to a law enforcement agency . . . .").

[93] *See* Forman, *supra* note 21, at 320–22 (arguing that the low threshold for reasonable suspicion makes the standard susceptible to racial bias); *id.* at 320 ("If anyone and anything can be

minority students are more likely to feel the full weight of student searches' practical harms because those students are more likely to face criminal charges for anything found incident to those searches.[94]

Limiting the Fourth Amendment rights of students in public schools also disproportionately impacts students of lower economic status. Although private schools "exercise only parental power over their students," and are therefore "not subject to constitutional constraints,"[95] in practice, private schools are much less likely than public schools to employ police officers.[96] If private schools did institute search policies that led to a significant number of their students being imprisoned, it is unlikely parents would keep sending their children to those institutions. Not only do public schools generally have a higher police presence than private schools, but public schools with higher percentages of students receiving reduced-price lunch have a higher daily police presence than other public schools.[97] Additionally, failing schools lead to higher levels of delinquency,[98] so those too poor to avoid a bad public school may end up in the criminal justice system at least partially because of their school's failure to meet acceptable standards. And while Justice Thomas suggested in *Redding* that parents could "send their children to private schools or home school them; or . . . simply move" if they don't like the school's rules,[99] low-income families may not have those options.[100] Because of compulsory educa-

viewed as suspicious, the exercise of discretion becomes particularly susceptible to all kinds of bias . . . because determining what constitutes a reasonable suspicion is based on a subjective interpretation of behavior."); *id.* at 321 ("[S]chool officials — no matter how well-meaning — are influenced in their decision making process by race-based stereotypes about students.").

94 *See, e.g.*, BERNSTEIN, *supra* note 46, at 60 (noting that "African American youth are 4.5 times more likely . . . than white youth to be detained *for identical offenses*," and "African American youth with no prior offenses" are seven times more likely than white youth with no criminal histories to be charged for public order offenses, and forty-eight times more likely to be charged for drug offenses); Pinard, *supra* note 46, at 1113, 1116.

95 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

96 In the 2011–2012 school year, 28.1% of public schools had a daily police or security presence, compared with 7.2% of private schools. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *supra* note 61, at 154 tbl.20.2. Additionally, 24% of public schools had random dog sniffs for drugs, compared to only 4.1% of private schools, and public schools were over six times more likely to have daily metal detector checks. *Id.*

97 *See* Price, *supra* note 46, at 548.

98 *See* ELROD & RYDER, *supra* note 89, at 64 (describing research indicating that "school failure precedes delinquency and not the reverse").

99 Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 400 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting Morse v. Frederick, 551 U.S. 393, 420 (2007) (Thomas, J., concurring)).

100 *See* Nicole Stelle Garnette, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 203 (2010) (explaining that average private school tuition in the United States is $6,600 and that "[m]ost middle class families . . . cannot afford to send their children to private schools"); Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI.

tion laws, parents who cannot afford to move or to send their children to private schools have no choice but to send their children to their local public school,[101] where they will be part of "perhaps the most 'policed' group in the country."[102]

2. The Reasonable Suspicion Standard Is Doctrinally Problematic. — The doctrinal argument against the reasonable suspicion standard highlights weaknesses in the standard that, when joined with its troubling practical impacts, demonstrate that a different standard would be more appropriate. The reasonable suspicion standard is built upon a special needs premise that, when applied to public school searches as they function today, is inconsistent with broader Supreme Court doctrine. First, when school officials are police officers, or are required to report infractions to law enforcement, their non–law enforcement special need for a search becomes indistinguishable from the law enforcement purposes of the search. Second, even if there is still a special need present beyond law enforcement, student privacy interests are far more weighty, and government interests are less so, than courts typically acknowledge.

The Supreme Court clarified in 2001 that the special needs doctrine cannot be used to uphold "the collection of evidence for criminal law enforcement purposes."[103] As one scholar has pointed out, this limitation is problematic for the lower courts' application of *T.L.O.* to school searches where "school administrators have, in effect, become agents of law enforcement authorities."[104] In schools where students are being searched by police officers, or where school officials are required to report what they find to law enforcement, the non–law enforcement in-

66, 72 (2001) ("For the citizen who lacks access to information, funds, or transportation, the legal possibility of liberty in a neighboring state may provide no succor.").

101 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 336 (1985). Many courts have taken the fact that education is compulsory into account when applying *T.L.O.*'s balancing of interests test, but they have done so to argue that compulsory education militates in favor of *weaker* privacy rights for students since schools must keep the children that are forced to attend safe. *See, e.g.*, *In re* J.D., 170 Cal. Rptr. 3d 464, 467 (Ct. App. 2014) (finding that requirement for students to be in school militated in favor of "having security departments in the school"). While student safety is of paramount value, circuit courts that have addressed the issue have uniformly held that public schools have no *constitutional* duty to protect students from private actors. *See* Morrow v. Balaski, 719 F.3d 160, 170 (3d Cir.) (collecting cases), *cert. denied*, 134 S. Ct. 824 (2013).

102 TEST, PUNISH, *supra* note 59, at 4 ("[B]ecause of the increasingly strong ties between schools and law enforcement, perhaps the most 'policed' group in the country right now — outside of prison and jail inmates — is public schools students.").

103 Ferguson v. City of Charleston, 532 U.S. 67, 83 n.20 (2001); *id.* at 88 (Kennedy, J., concurring in the judgment) ("The traditional . . . requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes."); *see* Pinard, *supra* note 46, at 1103 ("As . . . explained in *Ferguson*, the special needs exception applies only to those searches which are conducted for reasons unrelated to law enforcement." (footnotes omitted)).

104 *See* Pinard, *supra* note 46, at 1102.

terest in school safety becomes so entangled with the law enforcement interest that the former cannot be viewed as primary[105] or even distinct.[106] The non–law enforcement interests should not be viewed as "special," and the reasonable suspicion test should not apply.[107]

Even if there is a distinct special need[108] to maintain school safety and order justifying use of the balancing test, courts generally fail to accord proper weight to students' privacy interests and generally overvalue the government's interests. The weight courts give to students' privacy interests does not rely on or even consider the likely consequences of the search[109] — school discipline or criminal prosecution.[110] Such a consequence-blind weighing may at first seem to align with the Court's tendency to focus on the immediate context of the

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[105] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000) ("Because the primary purpose of the . . . checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."); Price, *supra* note 46, at 546 ("No longer is education the primary goal; rather, the system emphasizes controlling children who are viewed as dangerous, even in kindergarten.").

[106] *See* Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979) (finding that reasonable suspicion was the wrong standard where the "governmental interest" was "not distinguishable from the general interest in crime control").

[107] *See Ferguson*, 532 U.S. at 83 n.20 ("[T]he extensive entanglement of law enforcement cannot be justified by reference to legitimate needs."); *see also* Maryland v. King, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting) ("It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form 'reasonableness' inquiry . . . .").

[108] The Court has also found an exception to the Fourth Amendment's warrant requirement where there is not a distinct non–law enforcement purpose, but where the individuals have diminished interest in privacy. *See King*, 133 S. Ct. at 1969. This branch of the doctrine should not apply to school searches. While in *Earls* and *Vernonia* the Court held that public schools could randomly drug test without having a reasonable suspicion of wrongdoing, the Court reasoned in those cases that the students had a diminished expectation of privacy in comparison to that of regular students because they chose to participate in extracurricular activities. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 831–32 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995). It would also be troubling to dictate to students who are compelled to attend school that they must give up all rights to privacy.

[109] *Cf., e.g.*, Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1320–22 (7th Cir. 1993) (noting an older student's privacy interest against a strip search could be less than a younger student's because an older student is more likely to be engaging in criminal activity, and neglecting to discuss the criminal or procedural results of the search); *In re* Kameron V., No. B232514, 2012 WL 489097, at *3 (Cal. Ct. App. Feb. 15, 2012) (quoting *In re* William G., 709 P.2d 1287, 1295 (Cal. 1985), for the proposition that "students' zones of privacy are considerably restricted as compared to the relation of a person to the police" although the search at issue was performed by an SRO and led to juvenile prosecution of the student); *In re* K.S., 108 Cal. Rptr. 3d 32, 35–36 (Ct. App. 2010) (noting student's privacy interest and finding that "cooperation between school and police officials is likely when violations of the criminal law," *id.* at 36, are at issue, but making no connection between the two); People v. Dilworth, 661 N.E.2d 310, 326 (Ill. 1996) (Nickels, J., dissenting) ("[W]hile defendant was at school, his expectation of privacy was diminished in relation to school officials . . . who served as guardian and tutor in a nonadversarial role. However, defendant's right to an expectation of privacy was not diminished in relation to the State in its adversarial role as law enforcer.").

[110] The cases handled by the juvenile justice system are not technically "criminal prosecution," but the term is apt as the distinction between the two carries little weight. *See supra* pp. 1756–57.

physical search in determining whether someone had a reasonable expectation of privacy.[111] In fact, this weighing conflicts with the Supreme Court's acknowledgment in *Ferguson v. City of Charleston*[112] that the identity of who uses the result of a search *does* bear on the seriousness of the privacy intrusion.[113] There, the Court found that while one might not have a reasonable expectation of privacy against medical personnel, one would still retain a reasonable expectation of privacy against law enforcement, even where both groups use the same search result.[114] Similarly, in the school context the Court in *Earls*, when deciding whether public schools could constitutionally require drug testing of students participating in extracurricular activities, considered the fact that the drug "test results [were] not turned over to any law enforcement authority" and that the only consequences of the policy were to limit students' participation in extracurricular activities, in determining the students' privacy interest.[115] The Court's analysis implies that students have a strong expectation that their persons will be free from intrusion by law enforcement, even if they have a very limited expectation that their persons will be free from intrusion by school officials. Where students are searched by police, or where the results of the search must be turned over to law enforcement, the students' privacy interest should therefore weigh more heavily.

The Supreme Court has also recently broadened its consideration of the reasonable expectation of privacy to include significantly more than just the context of the search. For example, in *Riley v. California*,[116] in determining whether a police officer could search a cell phone incident to arrest, the Court found that the warrantless search was not justified[117] because the nature of a cell phone implicated much greater privacy interests.[118] In another example, the Court in *Maryland v. King*,[119] in determining whether police officers could collect DNA samples from arrestees detained in custody, did not just consider the privacy interests at the moment of the intrusion; rather, the Court considered the kind of testing performed, explaining that "[i]f in the future police analyze samples to determine, for instance, an arrestee's predis-

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111 *See generally* Katz v. United States, 389 U.S. 347 (1967).

112 532 U.S. 67.

113 *See id.* at 78 ("The use of an adverse test result to disqualify one from . . . an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties.").

114 *See id.* at 78–85.

115 536 U.S. 822, 833 (2002).

116 134 S. Ct. 2473 (2014).

117 *See id.* at 2493.

118 *See id.* at 2488–91. The Court found this in spite of the "diminished privacy interests" of an arrestee. *Id.* at 2488.

119 133 S. Ct. 1958 (2013).

position for a particular disease[,] . . . that case *would present additional privacy concerns*."[120] The Court has thus been willing to broaden the context for determining an individual's privacy interests.[121]

Finally, courts tend to overweigh the government's interest in searching students. First, because the government's interest in law enforcement is subsumed into its interest in maintaining safety, courts implicitly and impermissibly weigh the law enforcement interest as part of the government's interest.[122] Second, the government's interest in maintaining safety in schools, while certainly important, is undermined in this context by evidence that heavily policing schools, and subjecting students to criminal rather than administrative punishments, may have long-term negative effects on the most heavily policed communities, as well as on society as a whole.[123] Thus, the government's interest should be defined more broadly as an interest in creating safer schools and communities in the long term.

The doctrine therefore does not require courts to apply a reasonable suspicion test to searches in public schools. Thus the unwelcome effects of this test — the erosion of students' Fourth Amendment rights due to unchecked searches by school officials or law enforcement officers with assault rifles[124] — are not inevitable.

D. Improving the Situation

Because the problematic practical outcomes of a weakened Fourth Amendment standard in schools arise from the interplay of many factors,[125] there are many potential correctives. While a modification of the judicial approach to the Fourth Amendment rights of students can

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120 *Id.* at 1979 (emphasis added).

121 The Court similarly considered the scope of the data retrieved to be pertinent in the school search context in *Vernonia*, finding it relevant to the privacy-interest inquiry that "the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995).

122 *See, e.g.*, *In re* K.S., 108 Cal. Rptr. 3d 32, 36 (Ct. App. 2010) (using the fact that "[a] certain level of cooperation between school and police officials is likely when violations of the criminal law, as well as the student code of conduct, are the basis for discipline" to justify applying reasonable suspicion standard even where police are involved in the search).

123 *See, e.g.*, Forman, *supra* note 21, at 306–08; TEST, PUNISH, *supra* note 59, at 6.

124 Molly Knefel, *Why Are Police Using Military-Grade Weapons in High Schools?*, ROLLING STONE, Oct. 8, 2014, http://www.rollingstone.com/politics/news/why-are-police-using-military-grade-weapons-in-high-schools-20141008 [http://perma.cc/PR7L-GP9P] ("[S]chool districts around the country have been receiving military-grade weapons," including grenade launchers and military assault rifles, at no cost "through the federal Department of Defense's 1033 program."); *see also* Ceasar, *supra* note 58.

125 These factors include actual and perceived problems of drugs and violence in schools, transferring of disciplinary authority from schools to law enforcement, increasing criminalization of misbehavior, rising police presence in schools, disparities of enforcement against racial minorities, lowered constitutional procedural rights for juveniles, the failures of juvenile prisons, and the inability of low-income families to choose alternatives to their local public schools.

go only so far in alleviating the harms of the confluence of the above factors, there are critical reasons why such a modification is necessary, even if not sufficient.

Section 1 argues that probable cause should be required where an officer is involved, even if a school official initiates or performs the search. Section 2 proposes that the underlying suspicion for either the reasonable suspicion or probable cause standard should be suspicion of a violation of law, not just of a school rule. Section 3 suggests modifying the balancing of interests test to incorporate the societal harms that school searches might create. Finally, section 4 argues that school officials acting independently from police should also be held to a probable cause standard whenever they are required to disclose any evidence found to law enforcement agencies.

1. Dictating the Standard According to Police Involvement, Regardless of Role Played by School Officials. — Searches should be held to a probable cause standard where law enforcement officers, no matter their relation to the school, search students when tasked to do so by school officials or when they are present during the school officials' search of the student.[126] Such a standard would reflect the reality of police involvement in public schools and the law enforcement nature of that involvement, even where the officer works with a school official or is employed by the school. This standard would still sufficiently protect schools' safety interests because officers could still take the same actions that they take on the street[127] — including frisking students who are stopped because of suspected criminal activity — where the officer has reasonable concern for his own or others' safety.[128] And because possession of guns in schools is outlawed in the vast majority of states,[129] an officer or school official who reasonably suspects a student has a gun on school grounds would be justified in stopping and frisking the student.[130]

Furthermore, when, as in the above examples, a police officer is involved in the search, this standard would not implicate the *T.L.O.* Court's concern about school officials having to learn the legal intricacies of probable cause.[131] Finally, this standard finds legal support in the Court's previous acknowledgment of the import of the law en-

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126 *See* Pinard, *supra* note 46, at 1119.

127 *Id.* at 1121.

128 *Id.* at 1122.

129 *Cf. Gun Control*, *in* NATIONAL SURVEY OF STATE LAWS (2007) ("Forty-nine states have legislation directly or indirectly affecting possession of guns in and around schools.").

130 *Cf.* CONG. RES. SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, 112th Cong., 2d Sess. 1409 (2014), www.gpo.gov/constitutionannotated [http://perma.cc/FRY8-3JUF].

131 *See* New Jersey v. T.L.O., 469 U.S. 325, 343 (1985).

forcement context on the special needs doctrine,[132] as well as the Court's willingness in some cases to consider the broader context when weighing privacy interests.[133]

2. Requiring Suspicion of More Than a School Rule Violation. — Whether a search requires reasonable suspicion or probable cause, the suspicion should have to be of a violation of law, not simply of school rules. Because of the breadth of school rules[134] and the threat of pretextual searches,[135] the suspicion hurdle for either reasonable suspicion or probable cause would be quite low absent such a requirement. This suggestion departs from that proposed by Professor Michael Pinard, who would allow a reasonable suspicion standard where there is no law enforcement involvement and "the purpose of the search is to uncover evidence of a school rule violation that does not impose independent criminal liability."[136] While this exception would allow school officials greater flexibility in maintaining order, it could still allow for pretextual searches, as Pinard concedes, whereby school officials "would conduct searches for suspected school rule violations under the more flexible reasonable suspicion standard as a pretext to search for indicia of criminal activity," which they could then give to the police.[137] Because in many instances school officials not only can, but also must, hand any evidence over to police, the problem of pretextual searches may carry significant weight. Changing the standard to depend on law rather than school rules would also diminish the potential disparities between school districts in the kinds of behavior that could trigger a constitutionally permissible search, which could alleviate some of the disparate socioeconomic impacts of the reasonable suspicion standard.[138]

3. Altering the Balance of Interests to Include Society's Civic Interest. — The balance of interests should incorporate society's interest "in the development of future citizens"[139] by having it diminish the government's interest in searching students. There is reason to believe that heavily policed and searched students, from communities with significant distrust of law enforcement,[140] are socialized negatively to

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132 *See* Pinard, *supra* note 46, at 1120 & n.252; *supra* p. 1760.

133 *See supra* pp. 1762–63.

134 *See supra* p. 1755.

135 *See* Pinard, *supra* note 46, at 1123 n.270 (noting that under federal law, there probably would be no way to protect students from such pretextual searches "as long as [the school officials] had reasonable suspicion to perform the underlying search").

136 *Id.* at 1120.

137 *Id.* at 1123 n.270.

138 *See supra* pp. 1759–60.

139 Forman, *supra* note 21, at 368.

140 *See id.* at 327 ("Children in [the most turbulent] schools already have adversarial relationships with law enforcement, which [are] only exacerbated by their presence in the school.").

distrust governmental authority.[141] While Professor Sarah Jane Forman has proposed that the incorporation of society's interest in future citizens take the form of weighing a distinct "development interest,"[142] such a formulation seems unlikely to be adopted because it is supported by little legal authority. Though the Court has, in certain instances, broadened its consideration of the privacy interests at stake,[143] it has yet to add a separate, third interest to the balancing equation. This idea could be conceptualized as adding weight to the privacy interest instead, but incorporating a search's impact on a student's perception of their place in democratic society requires a change of much broader scope than incorporating the law enforcement purpose or the impact of the search.[144]

In addition, the Supreme Court has repeatedly emphasized the importance of allowing schools the flexibility to do the complicated work of educating children while keeping them safe.[145] Adopting a standard that holds teachers who suspect students of a school rule violation, no matter how insignificant, to the same standard as police officers, seems unlikely to entice the Court. Therefore, incorporating the civic interests on the government's side of the scale and having it diminish the government's interest in searching students would be a better move. Where government searches threaten to harm schools and communities more broadly,[146] that harm should diminish the weight of the interest in performing searches.

4. Shifting Focus to Mandated Disclosure. — The current doctrine does not acknowledge that even where school officials search students independently of any police officers, students' privacy interests might be implicated by requirements that school officials report evidence to police. Thus, probable cause should apply where school officials search students without a law enforcement presence, but are required to report the evidence found to police, potentially "lead[ing] to the student's arrest."[147] This suggestion acknowledges the practical reality that student discipline is not just criminalized because police officers are in schools, but also because schools often report student misbehavior to law enforcement authorities.[148] School officials who lack discretion are far from the ideal of educators whose interests align with those of students, an ideal that was part of the rationale for lower

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141 *See id.* at 327, 331.

142 *Id.* at 369.

143 *See supra* pp. 1762–63.

144 While as a legal argument this idea seems tenuous, the normative argument is a bit more persuasive. *See infra* p. 1770.

145 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985).

146 *See supra* p. 1763.

147 Pinard, *supra* note 46, at 1120.

148 *See supra* p. 1755.

search standards in schools. Furthermore, though the *T.L.O.* Court's worry about holding school officials to probable cause standards[149] is implicated here, this hurdle should not be dispositive. With increasingly close ties between law enforcement and schools, it would not be difficult to offer training to school officials regarding the requirements for meeting the probable cause standard, and the burden does not seem great enough to justify the continued incursion on students' Fourth Amendment rights.

School officials should additionally be held to a probable cause standard even for searches based on a suspected violation of school rules, where the policy of the school is to turn over any evidence of criminal activity found to the police. Such a requirement would, of course, mean that more evidence would be excluded from criminal cases. Though the exclusionary rule is often criticized for preventing valuable evidence from being introduced at trial,[150] this criticism has less force when applied to children, who are considered less culpable for their crimes by both courts and legislatures. The criminal justice system has proved incapable of rehabilitating juveniles, and may indeed fate children who would otherwise have grown out of an unruly period to be forever connected with the system.[151] In addition, the Supreme Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials,"[152] which means that evidence recovered without probable cause could still be used in school disciplinary proceedings.[153] Schools would therefore not be without recourse to protect their students and maintain order if an official were to find evidence of a rule violation. Where the exclusionary rule leads to children being disciplined and taught to reform their behavior out-

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149 *See T.L.O.*, 469 U.S. at 343.

150 *See, e.g.*, Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425, 429–30 (1997) ("The costs of the present rule in terms of human suffering are enormous. One study suggests that the rule results in the loss of evidence in anywhere from one percent to eight percent of all criminal prosecutions." *Id.* at 429.).

151 *See* BERNSTEIN, *supra* note 46, at 7, 182. This risk is especially troubling because that unruly period most often does not involve violence: "[Y]oung people are far more likely to be locked up for minor offenses than for violent crimes." *Id.* at 9.

152 Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998).

153 *See, e.g.*, Medlock v. Trs. of Ind. Univ., 738 F.3d 867, 871 (7th Cir. 2013) (declining to extend exclusionary rule to public school disciplinary proceedings); Thompson v. Carthage Sch. Dist., 87 F.3d 979, 982 (8th Cir. 1996) ("[L]ike most district courts[,] . . . we conclude that the exclusionary rule may not be applied to prevent school officials from disciplining students based upon the fruits of a search conducted on school grounds."). Although juvenile court proceedings are technically civil proceedings, courts have extended the exclusionary rule to apply in juvenile prosecutions. *See In re* Montrail M., 589 A.2d 1318, 1325 (Md. Ct. Spec. App. 1991) (finding that "states which have reached the issue have consistently held that the exclusionary rule is applicable" in juvenile delinquency proceedings, and listing cases), *aff'd*, 601 A.2d 1102 (Md. 1992).

side, rather than inside, the criminal justice system, it is more adequately serving justice.[154]

More troubling than the potential exclusion of evidence from criminal proceedings, however, would be school officials' expanded liability under 42 U.S.C. § 1983.[155] The problem is nevertheless not sufficiently serious to weigh against expanding students' Fourth Amendment rights. First, as noted above, school officials could be trained in the requirements of probable cause; since the majority of cases involve searches by either police officers working in schools,[156] who would already be trained in assessing probable cause, or by assistant principals or other school officials with a key role in the school disciplinary system,[157] the pool of officials needing to be carefully trained would in fact be quite small. Second, the doctrine of qualified immunity was developed for just such a purpose — "to protect [public officials] 'from undue interference with their duties and from potentially disabling threats of liability.'"[158] The Court made clear in *Redding* that the qualified immunity defense has significant teeth. There, the Court found that a strip search of a thirteen-year-old honors student in an effort to find "the equivalent of two Advils"[159] was unreasonable, but that the searching officials had qualified immunity,[160] even though Justice Stevens described it as "a case in which clearly established law meets clearly outrageous conduct."[161] For a school official to be held

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154 In addition, a school or social welfare program would likely be able to work to reform students' behavior at a much lower cost than the average $88,000 per year it costs to incarcerate a young person in state facilities. *See* BERNSTEIN, *supra* note 46, at 6.

155 Section 1983 states that "[e]very person who, under color of any statute . . . or usage, of any State . . . subjects . . . any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983 (2012).

156 *See, e.g.*, Shade v. City of Farmington, 309 F.3d 1054 (8th Cir. 2002); *In re* William V., 4 Cal. Rptr. 3d 695 (Ct. App. 2003); Patman v. State, 537 S.E.2d 118 (Ga. Ct. App. 2000); State v. Taylor, 50 So. 3d 922 (La. Ct. App. 2010); *In re* D.D., 554 S.E.2d 346 (N.C. Ct. App. 2001); State v. Alaniz, 815 N.W.2d 234 (N.D. 2012).

157 *See, e.g.*, State v. Serna, 860 P.2d 1320 (Ariz. Ct. App. 1993) (search by school security guard); *In re* William G., 709 P.2d 1287 (Cal. 1985) (in bank) (search by assistant principal); *In re* Kameron V., No. B232514, 2012 WL 489097 (Cal. Ct. App. Feb. 15, 2012) (search by campus supervisor in "gangs and graffiti unit," *id.* at *1); *In re* K.S., 108 Cal. Rptr. 3d 32 (Ct. App. 2010) (search by vice principal in presence of two police officers); State v. Burdette, 225 P.3d 736 (Kan. Ct. App. 2010) (search by principal in presence of multiple officers).

158 Elder v. Holloway, 510 U.S. 510, 514 (1994) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982)).

159 Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 381 (2009) (Ginsburg, J., concurring in part and dissenting in part).

160 *Id.* at 378–79 (majority opinion).

161 *Id.* at 380 (Stevens, J., concurring in part and dissenting in part); *see also* New Jersey v. T.L.O., 469 U.S. 325, 382 n.25 (1985) (Stevens, J., concurring in part and dissenting in part) ("It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude." (quoting Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980) (internal quotation marks omitted))).

liable, the case law would have to define "[t]he contours of the right . . . sufficiently clear[ly] that a reasonable official would understand that what he is doing violates that right."[162]

E. Conclusion

Bolstering students' Fourth Amendment rights will ameliorate some of the problems caused by policing in schools. However, a constitutionally founded solution, even if perfectly designed, can go only so far, especially where, as here, a multitude of factors contribute to the problem. Advocates should therefore take note of the policy solutions adopted by several jurisdictions. For example, a North Carolina county instituted a pilot program in 2014 that encourages police "to refer first-time offenders" to the program, "where they attend classes and mock sentencing to show the penalties they could have faced" without actually getting a record.[163] In Texas, a law came into effect in September 2013 prohibiting school police from issuing citations to students for school offenses,[164] and since then "misdemeanor tickets issued for school-related violations [have fallen] 37%."[165] Missouri has developed probably the most humane juvenile prison system in the country and has had significant improvement in outcomes for children in the system.[166] And because failing schools lead to delinquency,[167] education reform in the public schools could play a vital role in addressing the problems of policing in schools.

That a constitutional solution is not sufficient to address the normative problems of policing in schools is not a reason to reject the attempt. This is especially true here because of the fundamental role schools play in preparing young people to contribute to society. As the Supreme Court has repeatedly noted, the fact that the 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

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[162] Anderson v. Creighton, 483 U.S. 635, 640 (1987). Additionally, if school officials found meeting the probable cause standard sufficiently onerous under the threat of § 1983 liability, they could lobby to change school policies or local law mandating reporting contraband to the police. If they were successful, under the standard proposed here, they could return to searching with reasonable suspicion.

[163] Fields & Emshwiller, *supra* note 63.

[164] TEX. EDUC. CODE ANN. § 37.143 (West 2013); *see also* Ryland Barton, *Law Keeps Some Students out of Court, but Questions Remain*, KWBU, (Oct. 8, 2014, 6:08 PM), http://kwbu.org/post/law-keeps-some-students-out-court-questions-remain [http://perma.cc/BM9Z-J529] (noting that before the new law, public school students could get a "class c misdemeanor from campus police" for "trespassing, classroom disruption, or possession of drugs or alcohol on school grounds").

[165] Fields & Emshwiller, *supra* note 63.

[166] *See* BERNSTEIN, *supra* note 46, at 284.

[167] ELROD & RYDER, *supra* note 89, at 64.

free mind at its source and teach youth to discount important principles of our government as mere platitudes."[168]

To teach students in poor communities that the Constitution allows their privacy to be invaded by the police because they have writing on their backpack,[169] or a bandana in their pocket,[170] or because the school was told that the police received an anonymous tip that they violated a law,[171] or because they are standing in an area rumored to be the site of a forthcoming fight,[172] is troubling, but perhaps not an inaccurate lesson for what they can expect from the government.[173] There is little evidence to suggest that heavy policing, more frequent searching, and zero-tolerance rules actually increase school safety.[174] If anything, it is likely these policies exacerbate students' disdain for the police, and presumably, for the government.[175] This suggests that Justice Jackson's warning in *West Virginia State Board of Education v. Barnette*[176] was prescient — our system of policing in the public schools is in fact "teach[ing] youth to discount important principles of our government as mere platitudes."[177]

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168 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *see* Wallace v. Jaffree, 472 U.S. 38, 61 n.51 (1985) (quoting the above language from *Barnette*); New Jersey v. T.L.O., 469 U.S. 325, 334 (1985) (same); Bd. of Educ. v. Pico, 457 U.S. 853, 864–65 (1982) (same); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (same).

169 *See In re* Kameron V., No. B232514, 2012 WL 489097, at *8 (Cal. Ct. App. Feb. 15, 2012) (holding search of student's bag by SRO reasonable where he had writing on the outside in violation of school rules, and had been seen associating with "known taggers").

170 *See In re* William V., 4 Cal. Rptr. 3d 695 (Ct. App. 2003) (holding search of student by SRO reasonable where he had a bandana in his pocket in violation of school rules).

171 *See* People v. Perreault, 781 N.W.2d 796, 796 (Mich. 2010) (Markman, J., concurring).

172 *See In re* D.D., 554 S.E.2d 346, 347–48 (N.C. Ct. App. 2001).

173 *See* N.Y. CIVIL LIBERTIES UNION, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE 15 (2013), http://www.nyclu.org/files/publications/nyclu_STPP_1021_FINAL.pdf [http://perma.cc/7S9J-WHWP] ("Students who live in many neighborhoods with high stop-and-frisk rates . . . experience higher rates of suspensions . . . ."); Knefel, *supra* note 91 ("The data . . . shows a correlation between neighborhoods whose students experience high rates of suspension and those with high rates of stop-and-frisk . . . ."). Commentators have noted the connection between the school-to-prison pipeline and the failures to indict the police officers who killed Michael Brown and Eric Garner. *See, e.g.*, Katherine Krueger, *#FergusonNext: Here's How to End the School-to-Prison Pipeline, Starting Now*, THE GUARDIAN (Dec. 10, 2014, 7:15 AM), http://www.theguardian.com/commentisfree/2014/dec/10/end-school-to-prison-pipeline [http://perma.cc/YG6D-XUQS] ("[E]nding the institutional racism that allowed a white man who killed an unarmed black teenager to walk free requires more than just reforming the processes that started after Michael Brown died. It requires us to begin . . . at school, where children of color are labeled (and sometimes treated) as little more than criminals . . . .").

174 *See* TEST, PUNISH, *supra* note 59, at 10; Price, *supra* note 46, at 545 ("[T]he response [to drugs and violence in schools] has not been in proportion to the reality, nor has it been particularly effective.").

175 *See* Forman, *supra* note 21, at 363 ("The way in which students experience rights, like institutional practices and textbook lessons, can contribute to democratic socialization.").

176 319 U.S. 624 (1943).

177 *Id.* at 637.