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## *ESSAY*

### REEVALUATING SCHOOL POLICING

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*School police, often referred to as school resource officers (“SROs”), contribute to a pattern called the school-to-prison pipeline, through which Black and brown children are diverted from classrooms and into the criminal justice system. In schools that employ SROs, SROs disproportionately search and discipline Black and brown students. This leads to SROs preventing these students from accessing the educational opportunities their states have guaranteed them. Despite these racially disparate searches and seizures, many courts have failed to adequately protect students’ Fourth Amendment rights in their interactions with SROs. This Essay addresses how to ensure that all students receive full Fourth Amendment rights in school police interactions. In doing so, this Essay responds to Black Lives Matter protests, which emphasized that entrenched racial biases pervade American policing. This Essay builds on existing literature to propose a student-conscious framework for considering the constitutionality of any law enforcement officer’s involvement with a student in a school-*

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*based search or seizure. By “student-conscious,” this Essay means an approach that focuses on the young person’s status as both a child and a student who is statutorily guaranteed access to education by the state.*

#### INTRODUCTION

Soon after a police officer killed George Floyd, an unarmed Black man, in Minneapolis in May 2020, Minneapolis Public Schools severed its decades-long relationship with the city’s police department.<sup>1</sup> Other large school districts soon followed suit by cutting ties with school police regimes.<sup>2</sup> In doing so, these districts sought to end school police officers’ negative effects on students, particularly students of color—responding to Black Lives Matter (“BLM”) protests, which emphasized entrenched racial biases that pervade American policing.<sup>3</sup> However, many schools have continued to station officers, often called school resource officers (“SROs”), on their campuses due to unsubstantiated school safety justifications.<sup>4</sup> In schools employing SROs, SROs disproportionately search and discipline Black and brown students.<sup>5</sup>

Though the Fourth Amendment is meant to protect individuals from unreasonable searches and seizures, violations of students’ Fourth Amendment rights persist in school contexts.<sup>6</sup> Such persistence is two-pronged. First, although students receive certain constitutionally-rooted rights with law enforcement officers outside of school contexts—such as the right not to be searched without a warrant and probable cause unless an exception applies—courts have commonly limited these rights in

<sup>1</sup> Ryan Faircloth, *Minneapolis Public Schools Terminates Contract with Police Department over George Floyd’s Death*, StarTribune (June 2, 2020, 9:38 PM), <https://www.startribune.com/mps-school-board-ends-contract-with-police-for-school-resource-officers/570967942/> [https://perma.cc/9C7G-TWD2].

<sup>2</sup> E.g., Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. Times (Oct. 28, 2021), <https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html> [https://perma.cc/54U4-V4LJ].

<sup>3</sup> E.g., Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, Time (June 4, 2020), <https://time.com/magazine/us/5847952/june-15th-2020-vol-195-no-22-u-s/> [https://perma.cc/RT4B-FLJ9].

<sup>4</sup> E.g., Kim Bellware, *Chicago School Board Votes to Keep \$33M Police Contract – But Student Activists Say the Fight Isn’t Over*, Wash. Post. (June 25, 2020), <https://www.washingtonpost.com/education/2020/06/25/chicago-school-police/> [https://perma.cc/BT7V-85C3]; *infra* Part I.

<sup>5</sup> E.g., Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 *Fordham L. Rev.* 2013, 2043–45 (2019).

<sup>6</sup> E.g., Derek W. Black, *Ending Zero Tolerance: The Crisis of Absolute School Discipline* 204–05 (2016).

relation to school officials.<sup>7</sup> Courts have often treated SROs as school officials, rather than traditional law enforcement officers, despite strong opposition to this approach.<sup>8</sup> They therein apply a reduced Fourth Amendment search standard—which the Court created for teachers and school administrators interacting with students—to officers.<sup>9</sup> Second, in considering the reasonableness of a search or seizure, courts balance an individual’s interests against the government’s interests.<sup>10</sup> When doing so, courts have repeatedly failed to recognize and weigh individual interests specific to schoolchildren<sup>11</sup>—such as a child’s interest in accessing educational benefits.<sup>12</sup>

This Essay proposes a student-conscious model for considering the constitutionality of any law enforcement officer’s involvement with a student in a school-based search or seizure.<sup>13</sup> It builds on other scholars’ work discussing the need for the Court to clarify how a Fourth Amendment reasonableness standard should be understood in school contexts.<sup>14</sup> This Essay introduces students’ educational interests and socio-emotional wellbeing as explicit factors in determining whether a school-based seizure passes constitutional muster. By “student-conscious,” this Essay means an approach focused on a young person’s status as both a (1) child and (2) student to whom the state statutorily guarantees access to education.<sup>15</sup> There is little opportunity for success in

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<sup>7</sup> E.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 340–43 (1985) (plurality opinion); see also Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 *Stan. L. Rev.* 987, 1006 (2014) (pointing out that, in some contexts, an all-things-considered “general reasonableness” approach may allow for consideration of interests beyond just quantitative measures of legal guilt such as “probable cause”).

<sup>8</sup> *Infra* Section II.A.

<sup>9</sup> *Infra* Sections II.A, III.A.

<sup>10</sup> E.g., *T.L.O.*, 469 U.S. at 337 (plurality opinion).

<sup>11</sup> *Infra* Section II.B.

<sup>12</sup> E.g., *Goss v. Lopez*, 419 U.S. 565, 576 (1975). But cf. Bowers, *supra* note 7 (arguing that consideration of probable cause should supplement, rather than replace, other relevant considerations).

<sup>13</sup> This Essay considers only federal law. Additionally, officer qualified immunity in a school context is outside this Essay’s scope.

<sup>14</sup> E.g., Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 *Nev. L.J.* 863, 905–17 (2018); Jason E. Yearout, *Individualized School Searches and the Fourth Amendment: What’s a School District to Do?*, 10 *Wm. & Mary Bill Rts. J.* 489, 522–23 (2002).

<sup>15</sup> E.g., *Goss*, 419 U.S. at 576. The student-conscious model considers only K–12 students, as only K–12 education is guaranteed in all states. Emily Parker, 50 *State Review: Constitutional Obligations for Public Education*, *Educ. Comm’n of the States* 1–2 (Mar. 2016),

disparate impact claims related to school policing's disproportionate effect on children of color.<sup>16</sup> Yet, a student-conscious model for students' Fourth Amendment rights could overcome disparate impact litigation's limitations by supporting *all* children interacting with police officers at school—therein implicitly working against SROs' disproportionate effects on Black and brown students.<sup>17</sup>

This Essay proceeds in three parts. Part I addresses how school policing hinders children's educational interests, particularly by contributing to educational inequality for Black and brown students. Part II synthesizes the law surrounding (1) student and government interests in educational benefits and (2) students' reduced Fourth Amendment rights in school contexts. Part III presents a student-conscious model for interpreting children's Fourth Amendment rights with law enforcement officers at school.

### I. SROs AND RACIAL INEQUALITY

Despite the surge in SROs following high-profile school shootings, the notion that SROs increase school safety remains unsubstantiated and heavily contested. Interest in federal SRO funding has increased after each high-profile school shooting since the Columbine massacre.<sup>18</sup> State laws have also explicitly encouraged more SRO involvement in schools following school shootings.<sup>19</sup> Due to high-profile school shootings, school officials today are more concerned about shootings occurring at their institutions.<sup>20</sup> Yet, (1) mass shootings in schools are rare,<sup>21</sup> (2) school

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<https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [https://perma.cc/CUR7-4HJR].

<sup>16</sup> *Infra* Part II; Jason P. Nance, *Implicit Racial Bias and Students' Fourth Amendment Rights*, 94 *Ind. L.J.* 47, 93–94 (2019).

<sup>17</sup> *Cf.* Josh Bowers, *Annoy No Cop*, 166 *U. Pa. L. Rev.* 129 (2017) (arguing for Fourth Amendment doctrines that would do more to accommodate the particular perspectives of specific individuals and groups).

<sup>18</sup> Jack Denton, *When Schools Increase Police Presence, Minority Students Are Harmed Disproportionately*, *Pacific Standard* (Feb. 15, 2019), <https://psmag.com/education/after-parkland-schools-upped-police-presence-has-it-made-students-safer> [https://perma.cc/2LU3-BMGJ].

<sup>19</sup> For example, following Parkland's shooting, Florida legislated schools must always have a "safe-school officer" present. *Fla. Stat.* § 1006.12 (2019).

<sup>20</sup> See Nat'l Inst. of Just., *School Safety: By the Numbers* (Nov. 2017), <https://www.ncjrs.gov/pdffiles1/nij/251173.pdf> [https://perma.cc/A6V7-25LZ].

<sup>21</sup> *Id.*; Ashley Fetters, *The Developing Norms for Reopening Schools After Shootings*, *Atlantic* (Aug. 27, 2018), <https://www.theatlantic.com/education/archive/2018/08/how-schools-decide-when-to-reopen-after-a-shooting/568666/> [https://perma.cc/A9QG-SC4Q].

crime rates and student fear of crimes have decreased since the early 1990s,<sup>22</sup> and (3) increasing investments in SROs does not necessarily lead to safer schools.<sup>23</sup> Despite SROs' questionable school safety benefits, schools have hired more SROs over time, and SRO supporters argue there would be additional school shootings without SRO presence.<sup>24</sup>

We may not conclusively know if SROs increase school safety, but we know SROs negatively impact students.<sup>25</sup> Evidence indicates SROs' use of zero-tolerance policies has pushed students from classrooms and into the juvenile justice system.<sup>26</sup> School discipline zero-tolerance policies require that schools apply predetermined consequences to students based on their disciplinary violations.<sup>27</sup> These consequences are typically severe and punitive, and they do not consider situational context, mitigating circumstances, or the gravity of the behavior at issue.<sup>28</sup> Data regarding SROs' effects on schools largely signal that SRO presence increases the

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<sup>22</sup> Nat'l Inst. of Just., *supra* note 20; Philip J. Cook, Denise C. Gottfredson, and Chongmin Na, *School Crime Control and Prevention*, 39 *Crime & Just.* 313, 316 (2010).

<sup>23</sup> Kenneth Alonzo Anderson, *Does More Policing Make Middle Schools Safer?*, Brookings Inst. (Nov. 8, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/11/08/does-more-policing-make-middle-schools-safer/> [<https://perma.cc/8Y97-49S4>].

<sup>24</sup> Compare Anya Kamenetz, *Why There's a Push to Get Police Out of Schools*, NPR (June 23, 2020, 7:00 AM), <https://www.npr.org/2020/06/23/881608999/why-theres-a-push-to-get-police-out-of-schools> [<https://perma.cc/2JQP-SN4B>] (describing an argument SROs stop shootings before they happen), with Eli Saslow, *'It Was my Job, and I Didn't Find Him': Stoneman Douglas Resource Officer Remains Haunted by Massacre*, *Wash. Post* (June 4, 2018), [https://www.washingtonpost.com/national/it-was-my-job-and-i-didnt-find-him-stone-man-douglas-resource-officer-remains-haunted-by-massacre/2018/06/04/796f1c16-679d-11e8-9e38-24e693b38637\\_story.html](https://www.washingtonpost.com/national/it-was-my-job-and-i-didnt-find-him-stone-man-douglas-resource-officer-remains-haunted-by-massacre/2018/06/04/796f1c16-679d-11e8-9e38-24e693b38637_story.html) [<https://perma.cc/H3Z9-82P9>] (describing an account by an SRO who failed to stop the Marjory Stoneman shooting).

<sup>25</sup> Compare, e.g., Emily G. Owens, *Testing the School-to-Prison Pipeline*, 36 *J. Pol'y Analysis & Mgmt.* 11, 34 (2016) (describing how SRO presence increases school safety), with Aaron Kupchik, *Research on the Impact of School Policing*, *ACLU Penn.* 1 n.3 (Aug. 2020), <https://www.endzerotolerance.org/impact-of-school-policing> [<https://perma.cc/X3VF-7HGZ>] (listing studies indicating SROs either do not impact student crime or SRO presence is associated with increased student misconduct). Inconclusive data may be due to SROs filling a solely law enforcement role in some schools while serving in mentorship capacities in others. See Kupchik, *supra*, at 1.

<sup>26</sup> See, e.g., Emily M. Homer & Benjamin W. Fisher, *Police in Schools and Student Arrest Rates Across the United States: Examining Differences by Race, Ethnicity, and Gender*, 19 *J. Sch. Violence* 192, 192 (2020).

<sup>27</sup> Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 *Wash. U. L. Rev.* 919, 933 (2016) [hereinafter Nance, *Students, Police*].

<sup>28</sup> *Id.*

probability of arrest and court referral for low-level offenses.<sup>29</sup> As SRO prevalence increased nationally, disciplinary violations conventionally managed by school administrators and teachers became more likely to be handled through law enforcement interventions.<sup>30</sup> Accordingly, a hallway tussle is deemed assault and class disruptions become disorderly conduct: behavior posing no real threat to school safety causes students to be taken from classrooms for delinquent and criminal prosecution.<sup>31</sup>

Such law enforcement interventions negatively affect a young person's education. Removing students from classrooms for disciplinary purposes, whether due to a school-based search or otherwise, causes students to miss educational opportunities, face stigma from peers and instructors, experience greater surveillance, and have a higher likelihood of leaving school before graduating.<sup>32</sup> Use of force against a student at school in a disciplinary context can be particularly traumatic, adversely affecting the student's socio-emotional growth and educational success.<sup>33</sup> Overall, punishing students by pushing them out of the classroom increases their likelihood of future incarceration, and there is no evidence that handling school-based discipline through zero-tolerance policies reduces school disciplinary violations.<sup>34</sup> Studies have shown non-punitive disciplinary practices—which focus on helping students continue their education after disciplinary violations<sup>35</sup>—improve a school's climate by reducing violent acts, suspensions, and office referrals.<sup>36</sup> Nevertheless, harsh disciplinary

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<sup>29</sup> E.g., Deanna N. Devlin & Denise C. Gottfredson, *The Roles of Police Officers in Schools: Effects on the Recording and Reporting of Crime*, 16 *Youth Violence & Juv. Just.* 208, 217 (2016).

<sup>30</sup> Matthew T. Theriot & Matthew J. Cuellar, *School Resource Officers and Students' Rights*, 19 *Contemp. Just. Rev.* 363, 369 (2016).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 369–70.

<sup>33</sup> Richard G. Dudley, Jr., *Childhood Trauma and Its Effects: Implications for Police*, *New Perspectives Policing*, July 2015, at 1, 5 (trauma can “rewire [children's] brains,” impacting their future encounters with law enforcement).

<sup>34</sup> Nancy Heitzeg, *The School-to-Prison Pipeline: Education, Discipline, and Racialized Double Standards* 102 (2016).

<sup>35</sup> See, e.g., Erin R. Archerd, *Restoring Justice in Schools*, 85 *U. Cin. L. Rev.* 761, 794–95 (2017) (explaining restorative justice as an example of a discipline practice that helps students work towards improved behavior); Nance, *Students, Police*, *supra* note 27, at 981.

<sup>36</sup> Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 *Ariz. St. L.J.* 313, 356–57, 360 (2016).

practices now permeate schools serving middle-class and low-income students.<sup>37</sup>

Black and brown children bear the brunt of these negative educational effects. SRO biases and strict school security measures disproportionately affect Black and brown students.<sup>38</sup> Students of color do not commit more disciplinable school offenses than their white peers, either by individual racial group or collectively.<sup>39</sup> Yet, Hispanic and Black students comprise almost three-quarters of students arrested due to an incident at school or referred by schools to the police.<sup>40</sup> Most of these school-based arrests are for nonviolent offenses.<sup>41</sup>

These negative educational effects stemming from SROs prevent the government from achieving its well-documented interest in ensuring all children have access to education.<sup>42</sup> While there is no federally recognized right to education,<sup>43</sup> the Court has held that, when a government *does* provide students with a basic education, it must provide that right *equally*.<sup>44</sup> In a Fourth Amendment context, the Court has described that a government's interest in school discipline rests on

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<sup>37</sup> See, e.g., Aaron Kupchik, Things Are Tough All Over: Race, Ethnicity, Class and School Discipline, 11 *Punishment & Soc'y* 291, 292 (2009).

<sup>38</sup> See Charles Ogletree, Robert J. Smith, and Johanna Wald, Coloring Punishment: Implicit Social Cognition and Criminal Justice, in *Implicit Racial Bias Across the Law* 54 (Justin D. Levinson & Robert J. Smith eds., 2012).

<sup>39</sup> U.S. Comm'n on C.R., Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities 161 (July 2019), <https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf> [<https://perma.cc/H7W3-E8LH>] [hereinafter *Beyond Suspensions*].

<sup>40</sup> Archerd, *supra* note 35, at 773. For comparison, in fall 2018, 15% of public-school students were Black and 27% were Hispanic. Racial/Ethnic Enrollment in Public Schools, Nat'l Ctr. for Educ. Stat. (May 2021), [https://nces.ed.gov/programs/coe/indicator\\_cge.asp](https://nces.ed.gov/programs/coe/indicator_cge.asp) [<https://perma.cc/9FV2-CQGD>].

<sup>41</sup> *Beyond Suspensions*, *supra* note 39, at 42, 45 n.244, 53.

<sup>42</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”); *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (“Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses . . . .”); *Plyler v. Doe*, 457 U.S. 202, 214 (1982) (holding everyone within a state's boundaries has educational rights).

<sup>43</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>44</sup> See sources cited *supra* note 42; see also Eric Merriam, Obergefell and the Dignitary Harm of Identity-Based Military Service and Exclusion, 27 *UCLA Women's L.J.* 41, 67 (2020) (“[A]n equal protection right to basic education . . . requires that when the government does provide it, it be provided equally.”).

promoting school order—a prerequisite for ensuring all children have the opportunity to learn.<sup>45</sup> Some Justices have also emphasized that the government interest rests on protecting students’ safety, which itself is key for students to have a positive learning environment.<sup>46</sup> However, if SROs discipline students in a manner that pushes them from classrooms without directly contributing to other students’ safety and positive learning environment, such action *opposes* the government’s interest in ensuring equal educational access.<sup>47</sup>

## II. GAPS IN PROTECTING STUDENTS’ RIGHTS IN SCHOOL SEARCHES AND SEIZURES

Current federal law largely allows police officers to disparately impact students of color.<sup>48</sup> Schoolchildren of color thus need more remedial avenues when they experience disproportionate disciplinary discrimination. Though the Department of Education and Department of Justice can pursue disparate impact cases, policies associated with different political administrations can strengthen or weaken the departments’ civil rights enforcement capacities.<sup>49</sup> To protect students

<sup>45</sup> E.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 339–40 (1985) (plurality opinion).

<sup>46</sup> E.g., *id.* at 353 (Blackmun, J., concurring); *id.* at 357 (Brennan, J., concurring).

<sup>47</sup> The disparate rate at which SROs discipline students of color hinders the government from achieving its interest in creating integrated school environments. E.g., *Brown*, 347 U.S. at 493 (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).

<sup>48</sup> Since 2001, only regulatory agencies and the Department of Justice (“DOJ”) can enforce disparate impact claims under Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 284–85 (2001) (private litigants cannot bring disparate impact suits); 34 C.F.R. § 100.8(a) (2021) (allowing regulatory agencies and the DOJ to enforce disparate impact claims). The DOJ can engage in disparate impact suits, and the Department of Education (“ED”) can investigate complaints and review schools’ compliance with the ED’s Office for Civil Rights’s (“OCR”) guidelines, consequently revoking federal funds pursuant to Title VI as necessary. Office for Civil Rights, U.S. Dep’t of Educ., Case Processing Manual (CPM) 23 (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<https://perma.cc/K4YP-HFU2>]; 42 U.S.C. § 2000d-1.

<sup>49</sup> E.g., Catherine E. Lhamon & Jocelyn Samuels, U.S. Dep’t of Educ. & U.S. Dep’t of Just., Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 4, 7 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> [<https://perma.cc/9SPS-H26B>] (rescinded by Kenneth L. Marcus & Eric S. Dreiband, U.S. Dep’t of Educ. & U.S. Dep’t of Just., Dear Colleague Letter (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf> [<https://perma.cc/MXX7-V2B3>]); Office for Civil Rights, U.S. Dep’t of Educ., Questions & Answers on Racial Discrimination and School Discipline 2 n.6 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-vi-201812.pdf> [<https://perma.cc/9Z8A-QV35>].

from disparate negative educational opportunities, civil rights advocates must not rely on government entities' intervention. Such efforts could end when, for example, a presidential administration transition occurs.<sup>50</sup> Instead, litigants must consider new avenues for protecting students' constitutional rights in student-SRO interactions long-term.

*A. Educational Interests and the Fourth Amendment*

When considering Fourth Amendment standards surrounding school searches, the Court has discussed the importance of the government's interest in ensuring students receive an education. Before SRO prevalence in American public schools, the Court attempted to support students' educational interests by preserving the "informality of the student-teacher relationship"—through limiting students' traditional Fourth Amendment protections in relation to "school officials."<sup>51</sup> In *New Jersey v. T.L.O.*, the Court abandoned traditional probable cause and warrant requirements for "school officials" conducting searches of students on school grounds.<sup>52</sup> In place of the traditional requirements, the Court put forward an approach balancing "the individual [student]'s legitimate expectations of privacy and personal security; [and] the government's need for effective methods to deal with breaches of public order."<sup>53</sup>

*T.L.O.* considered educational interests only in terms of the government's interest in promoting education for most students, failing to also consider the educational interests of an individual child searched by school officials. The Court concluded schoolchildren in public schools have legitimate expectations of privacy that could be violated by searching their personal property.<sup>54</sup> The Court also recognized teachers and administrators have a "substantial interest... in maintaining discipline in the classroom and on school grounds."<sup>55</sup> Thus, the Court sought to weigh the individual privacy interest of a searched student against a "school's equally legitimate need to maintain an environment in which learning can take place."<sup>56</sup>

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<sup>50</sup> *Supra* note 49 and surrounding text.

<sup>51</sup> *T.L.O.*, 469 U.S. at 340 (plurality opinion).

<sup>52</sup> *Id.* at 340–41.

<sup>53</sup> *Id.* at 337.

<sup>54</sup> *Id.* at 337–38.

<sup>55</sup> *Id.* at 339.

<sup>56</sup> *Id.* at 340.

To balance a “schoolchild’s legitimate expectations of privacy” against the school’s overall interest in ensuring students can access education, the *T.L.O.* plurality ruled that school officials could search students based on “the reasonableness, under all the circumstances, of the search.”<sup>57</sup> The plurality concluded that, ordinarily, when “a teacher or other school official” searches a student, as long as there are “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school,” the search is “justified at its inception.”<sup>58</sup> A search by a teacher or other school official will be considered “reasonably related” to the circumstances initially causing the search as long as “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.”<sup>59</sup>

The Court did not intend *T.L.O.*’s reasonableness standard to extend to students’ Fourth Amendment rights in relation to law enforcement officers. The plurality emphatically rooted the *T.L.O.* holding in the relationship between educators and students, recognizing “a certain degree of flexibility in school disciplinary procedures” and “the value of preserving the informality of the student-teacher relationship.”<sup>60</sup> In their concurrences, Justices Powell and Blackmun differentiated between searches by traditional school officials—such as teachers and administrators—and searches by police.<sup>61</sup> However, the *T.L.O.* Court

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<sup>57</sup> *Id.* at 340–41; see generally Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 *Am. Crim. L. Rev.* 119 (1989) (describing “general reasonableness” as understood by this Essay).

<sup>58</sup> *T.L.O.*, 469 U.S. at 341–42 (citation omitted).

<sup>59</sup> *Id.* at 342 (citation omitted). This theoretically provides more protection than a probable cause, or quantum of guilt, standard in conventional crime-solving contexts. See, e.g., Bowers, *supra* note 7, at 1021–22. However, as this Essay further explores, this standard has been treated as “amorphous.” See, e.g., *T.L.O.*, 469 U.S. at 367 (Brennan, J., concurring) (describing the new standard as “ambiguous,” potentially “leav[ing] teachers and administrators uncertain as to their authority and . . . encourag[ing] excessive fact-based litigation.”); Barry C. Feld, *T.L.O. and Redding’s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 *Miss. L.J.* 847, 848–49 (2011) (presenting *T.L.O.*’s reasonableness standard as “amorphous”).

<sup>60</sup> 469 U.S. at 340 (plurality opinion).

<sup>61</sup> *Id.* at 351–53 (Blackmun, J., concurring); *id.* at 349–50 (Powell, J., concurring). Justice Powell emphasized that the flexible Fourth Amendment standard described by the *T.L.O.* plurality stemmed from a close relationship between teachers and students, which differs from students’ relationship with “[l]aw enforcement officers[, who] function as adversaries of criminal suspects.” *Id.* at 349 (Powell, J., concurring); see also *id.* at 351 (Blackmun, J.,

declined to address the role of school searches “in conjunction with or at the behest of law enforcement agencies.”<sup>62</sup>

Since *T.L.O.*, the Court has belabored that students’ limited Fourth Amendment rights in school search contexts depend on whether a search, or its effects, involves law enforcement participation.<sup>63</sup> *Board of Education v. Earls* and *Vernonia School District 47J v. Acton*, cases considering whether schools could require students to submit a urinalysis drug test to participate in extracurricular activities, held the urinalysis drug test requirements did not violate the Fourth Amendment.<sup>64</sup> In both cases, the Court emphasized law enforcement would not obtain the drug test results, so students would not face delinquency or criminal charges.<sup>65</sup> Students would miss non-scholastic opportunities<sup>66</sup>—but their states’ statutorily guaranteed educational benefits would not be disrupted.<sup>67</sup>

Judicial precedent also supports that searches by school officials still require traditional warrant and probable cause standards when the search is “extensive[ly] entangle[d]” with law enforcement.<sup>68</sup> Reduced Fourth Amendment standards are only permitted when a search fulfills “special needs, beyond the normal need for law enforcement . . . .”<sup>69</sup> When law enforcement is involved in a search outside of a school context, the Court has held a close analysis is necessary to determine whether a legitimate special need can be distinguished from collecting evidence for law

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concurring) (emphasizing searches, such as the school official-led search at hand, could evade Fourth Amendment warrant and probable cause requirements, “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable”).

<sup>62</sup> *Id.* at 341 n.7; see also Gupta-Kagan, *supra* note 5, at 2022 (“*T.L.O.*’s rationale set up an important question: Are searches by school resources officers, or searches by school officials at the behest of or in conjunction with SROs, governed by *T.L.O.*?”).

<sup>63</sup> See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 833 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); Gupta-Kagan, *supra* note 5, at 2023.

<sup>64</sup> *Earls*, 536 U.S. at 837–38; *Acton*, 515 U.S. at 663–65.

<sup>65</sup> *Earls*, 536 U.S. at 833; *Acton*, 515 U.S. at 658.

<sup>66</sup> *Earls*, 536 U.S. at 833–34.

<sup>67</sup> *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (“But, ‘education is perhaps the most important function of state and local governments,’ and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.”) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>68</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.20 (2001); see also *Developments in the Law — Policing*, 128 Harv. L. Rev. 1706, 1762 (2015) (“[T]he identity of who uses the result of a search *does* bear on the seriousness of the privacy intrusion.”).

<sup>69</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

enforcement purposes.<sup>70</sup> Yet, many state and federal courts have still extended the *T.L.O.* standard to SROs, therein limiting students' Fourth Amendment rights in school settings.<sup>71</sup> Further, although *T.L.O.* only considered students' Fourth Amendment rights in relation to a school-based search, courts have also applied *T.L.O.*'s reasonableness standard to school-based seizures.<sup>72</sup>

### *B. Reasonableness and School-Based Seizures*

Without clarification regarding how to understand reasonableness in an SRO-led school-based search or seizure of a student, some circuits have ignored students' educational interests. For example, in the Sixth Circuit, in a case in which a seventh-grader was handcuffed after being involved in two school fights, the court described the need to determine if an officer's actions were "objectively reasonable."<sup>73</sup> The court overlooked the way an experience such as handcuffing could be more traumatic for a student than an adult, based on his age, and how the incident could hinder his future educational opportunities.<sup>74</sup>

Special needs searches such as those *T.L.O.* anticipates fall under the "objective reasonableness" umbrella—an umbrella that also includes excessive force.<sup>75</sup> Courts adapt the objective reasonableness standard to

<sup>70</sup> E.g., *Ferguson*, 532 U.S. at 83 n.20, 84, 88 (Kennedy, J., concurring); see also Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene*, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine, 87 *Tulane L. Rev.* 353, 399–422 (2012) [hereinafter Gupta-Kagan, *Beyond Law Enforcement*] (theorizing how to improve the special needs test to best serve children, based on empirical evidence).

<sup>71</sup> *A.M. v. Holmes*, 830 F.3d 1123, 1157–61 (10th Cir. 2016) (applying *T.L.O.* analysis to an SRO as well as a school principal and assistant principal); *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1304–06 (11th Cir. 2006) (applying *T.L.O.* when analyzing an unlawful seizure claim filed against a law enforcement deputy at an elementary school); *Shade v. City of Farmington*, 309 F.3d 1054, 1060–62 (8th Cir. 2002) (applying *T.L.O.* to determine the legality of a search law enforcement officers conducted away from school grounds in conjunction with a school teacher and administrator); Gupta-Kagan, *supra* note 5, at 2024–25 (explaining a majority of state courts have applied *T.L.O.* to SROs).

<sup>72</sup> E.g., *Bostic*, 458 F.3d at 1304; *C.B. v. City of Sonora*, 769 F.3d 1005, 1023–28 (invoking *T.L.O.* without using its two-part analysis for the seizure at issue); *Ziegler v. Martin Cnty. Sch. Dist.*, 831 F.3d 1309, 1322–24 (11th Cir. 2016); *Wofford v. Evans*, 390 F.3d 318, 326–27 (4th Cir. 2004); *Doe ex rel. Doe v. Hawaii Dep't. of Educ.*, 334 F.3d 906, 909–10 (9th Cir. 2003).

<sup>73</sup> *Neague v. Cynkar*, 258 F.3d 504, 505–07 (6th Cir. 2001).

<sup>74</sup> *Infra* Section III.A; see also Bowers, *supra* note 17, at 198 (arguing that in Fourth Amendment cases judges should do more to accommodate the perspective of the layperson).

<sup>75</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989); *supra* note 71 (listing relevant cases). Deadly force is outside the scope of this Essay, as it is uncommon in school policing. For a

weigh school-specific reasonableness factors when considering a students' Fourth Amendment rights.<sup>76</sup> This reasonableness standard necessitates “a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing government interests at stake.”<sup>77</sup> The Court has held that determination regarding whether a law enforcement officer’s actions are “objectively reasonable” cannot consider an officer’s “underlying intent or motivation.”<sup>78</sup> This effectively forecloses any argument that a seizure is unreasonable based on an officer’s implicit biases.<sup>79</sup> Further, the Court has emphasized the Fourth Amendment reasonableness test “is not capable of precise definition or mechanical application”<sup>80</sup> and therefore “requires careful attention to the facts and circumstances of each particular case.”<sup>81</sup> Lower courts, in applying the Fourth Amendment objective reasonableness standard to children, thus must fully consider the specific facts and circumstances inherent to childhood and students’ educational interests, as Part III discusses.

Courts have commonly ignored students’ status as children when determining if a school-based search or seizure is reasonable. For example, the Tenth Circuit has treated a nine-year-old more like an adult

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discussion of deadly force, see, e.g., Scott A. Harman-Heath, *Renaming Deadly Force*, 106 *Cornell L. Rev.* 1689, 1690–713 (2021).

<sup>76</sup> E.g., *Hoskins v. Cumberland Cnty. Bd. of Educ.*, No. 2:13-cv-15, 2014 WL 7238621, at \*7 (M.D. Tenn. Dec. 17, 2014) (“[T]he Court must first consider the factors uniquely relevant to this case as required by *Graham*, namely the very young age of T.H. and the fact that this incident took place in a school setting.”); *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 179 (4th Cir. 2018) (“Here, we believe it prudent to consider also the suspect’s age and the school context.”); *Hawker v. Sandy City Corp.*, 591 F. App’x 669, 675 (“His age and size are certainly factors in the totality-of-the-circumstances reasonableness calculation. . . . However, these factors alone do not render force used against him unreasonable per se.”).

<sup>77</sup> *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)); *United States v. Place*, 462 U.S. 696, 703 (1983); *Scott v. Harris*, 550 U.S. 372, 383 (2007); see also Rachel A. Harmon, *When Is Police Violence Justified?*, 102 *Nw. U. L. Rev.* 1119, 1127, 1136–38 (2008) (discussing how the *Scott* Court undermined *Graham* and *Garner*, therein “reduc[ing] the Fourth Amendment regulation of reasonable force to its vaguest form . . .”).

<sup>78</sup> *Graham*, 490 U.S. at 397 (citations omitted).

<sup>79</sup> See, e.g., Charles Ogletree et al., *supra* note 38, at 54 (discussing that implicit biases often affect decisions made by school administrators and school resource officers).

<sup>80</sup> *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

<sup>81</sup> *Id.* But see Harmon, *supra* note 77, at 1127, 1130 (explaining the *Graham* reasonableness standard allows juries to decide use of force cases based on “their intuitions”). The Eighth Circuit has noted sister circuits’ lack of clarity regarding whether to apply the *T.L.O.* or *Graham* reasonableness standard when considering a student seizure involving law enforcement officers on school grounds. *K.W.P. v. Kan. City Pub. Schs.*, 931 F.3d 813, 822 (8th Cir. 2019).

than a child when determining an SRO acted reasonably by using a twist-lock to “command [the child’s] compliance.”<sup>82</sup> After the SRO grabbed a sixty-seven-pound nine-year-old who was sitting quietly in a hallway, the child responded by grabbing the SRO’s arm.<sup>83</sup> The court emphasized that “[a]n arrestee’s age and small demeanor do not necessarily undermine an officer’s concern for safety and need to control the situation.”<sup>84</sup> The court thus unrealistically determined a reasonable officer could view a small child grabbing her arm as “an act of violent resistance” and a safety concern.<sup>85</sup>

Fortunately, some circuits have taken an explicitly *child*-conscious approach when considering reasonableness of an SRO’s seizure of a student, though not an explicitly *student*-conscious approach. That is, unsurprisingly, as common sense and the Court counsel,<sup>86</sup> they implicitly consider students’ status as children when determining objective reasonableness—assessing children’s size, lack of maturity, and general nature in assessing the reasonableness of force used against them. For example, the Eleventh Circuit determined that an SRO, in handcuffing a nine-year-old child after escorting her out of gym class because she vaguely threatened her physical education teacher when he told her to do jumping jacks, unreasonably seized her.<sup>87</sup> Taking a child-conscious approach, the court described, “[T]he handcuffing was excessively intrusive given [the student’s] young age and the fact that it was not done to protect anyone’s safety.”<sup>88</sup> The Fourth Circuit has likewise described youth as an important factor in deciding if handcuffing is an appropriate use of force, emphasizing courts must be mindful of the way criminally punishing young students can have long-lasting effects on children’s future success, therein implying the need to consider students’ educational interests.<sup>89</sup> Similarly, the Ninth Circuit recognized handcuffing a child was inherently unnecessary, i.e., unreasonable, for achieving the government’s interest in maintaining school order—ruling

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<sup>82</sup> *Hawker v. Sandy City Corp.*, 591 F. App’x 669, 675 (10th Cir. 2014).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; see also *C.B. v. Sonora*, 769 F.3d 1005, 1030 (9th Cir. 2014) (describing the child’s small size as factoring against the reasonableness of his seizure).

<sup>85</sup> *Hawker*, 591 F. App’x at 675.

<sup>86</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370 (2009) (considering age when determining reasonableness in a Fourth Amendment context).

<sup>87</sup> *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1300–07 (11th Cir. 2006).

<sup>88</sup> *Id.* at 1306.

<sup>89</sup> *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 180–82, 188 (4th Cir. 2018).

that other mechanisms should have instead been used to support the child's own educational interests.<sup>90</sup>

### III. A STUDENT-CONSCIOUS APPROACH TO FOURTH AMENDMENT PROTECTIONS AT SCHOOL

Building on legal scholarship and empirical evidence, Part III proposes a student-conscious model for deciding whether a school-based search or seizure of a student by law enforcement officers is constitutional. This model (1) makes explicit how existing Fourth Amendment precedent relates to students, while (2) aiming to protect students—of all racial backgrounds—from negative emotional and educational impacts tied to searches and seizures. In doing so, such a model could particularly benefit students of color disproportionately impacted by school discipline.

#### *A. Adopting a School-Specific Reasonableness Standard for Students*

The Supreme Court has ruled that determining “reasonableness under all the circumstances” for a school-based Fourth Amendment search requires balancing an individual child's interests against governmental interests.<sup>91</sup> In so ruling, the Court recognized that a student's interests should only be limited to the extent necessary to accommodate the government's interests.<sup>92</sup> Furthermore, the Court has expressed that (1) procedural protections for students' educational interests and socio-emotional growth are important,<sup>93</sup> (2) age is relevant both in considering how a student interprets a police interaction<sup>94</sup> and evaluating Fourth Amendment issues related to schoolchildren,<sup>95</sup> and (3) overly-invasive treatment of minors violates Fourth Amendment privacy rights.<sup>96</sup>

Building on such precedent, this Essay proposes a model by which, when a school-based search or seizure by law enforcement officers occurs, courts consider a student's educational interests, socio-emotional vulnerability, age, and (in the case of a seizure) stature—in addition to

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<sup>90</sup> *C.B. v. City of Sonora*, 769 F.3d 1005, 1023–24, 1029–30 (9th Cir. 2014).

<sup>91</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (plurality opinion); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).

<sup>92</sup> *T.L.O.*, 469 U.S. at 341–42; *Acton*, 515 U.S. at 656.

<sup>93</sup> E.g., *In re Gault*, 387 U.S. 1, 21–27 (1967); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374–79 (2009); *Goss v. Lopez*, 419 U.S. 565, 576, 581 (1975).

<sup>94</sup> E.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 280–81 (2011).

<sup>95</sup> *T.L.O.*, 469 U.S. at 342; *Redding*, 557 U.S. at 375.

<sup>96</sup> *Redding*, 557 U.S. at 368, 379.

more traditional Fourth Amendment standards such as privacy and security—when balancing an individual child’s interests against government interests.<sup>97</sup> Thus far, when considering student interests at stake in a school-based search context, the Court has focused on privacy.<sup>98</sup> Yet, in a school search context, which has commonly been extended to seizures, the Court recognized the need to consider “reasonableness, under *all* the circumstances.”<sup>99</sup> As cases outside the Fourth Amendment context have emphasized the importance of students’ psychological wellbeing and interests in continuing to receive an education,<sup>100</sup> it would be valuable to encompass these interests in a Fourth Amendment reasonableness approach for students.<sup>101</sup> Doing so would prevent courts from ignoring students’ educational interests and would make explicit some circuits’ implicit consideration of a plaintiff’s student status when determining reasonableness of a search or seizure.<sup>102</sup>

When balancing an individual’s interest against government interests to determine reasonableness of a search or seizure, courts must weigh whether the search or seizure of one student effectively promotes a safe, orderly educational environment to such an extent that the harm to the plaintiff-child’s education is outweighed by the benefit to other children’s

<sup>97</sup> These factors build on those Professor Alexis Karteron has previously discussed when describing a school-specific reasonableness standard for students. Karteron, *supra* note 14, at 870 (“[R]easonableness requires consideration of objective factors especially relevant to the school context and unique vulnerabilities of youth including: the seriousness of the alleged infraction or crime; the likelihood that the student has committed an infraction or crime; the age of the student; the size and stature of the student; the likelihood of inflicting harm or trauma, especially in light of known disabilities or vulnerabilities; and the necessity of the enforcement action.”).

<sup>98</sup> *T.L.O.*, 469 U.S. at 338–40; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995); Karteron, *supra* note 14, at 907 (“In *T.L.O.* and subsequent cases, all decided in the context of a search conducted by a school official, the Court identified privacy as the only student interest at stake.”).

<sup>99</sup> *T.L.O.*, 469 U.S. at 341 (emphasis added); see *Bowers*, *supra* note 7, at 1105–07 (arguing that special-needs searches may sometimes be more protective by accommodating considerations that the Court deems irrelevant for crime-solving searches).

<sup>100</sup> E.g., *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (First Amendment Establishment Clause context); *Tinker v. Des Moines Indep. Sch. Dist.* 393 U.S. 503, 508 (1969) (First Amendment Speech Clause context); *J.D.B. v. North Carolina*, 564 U.S. 261, 280–81 (2011) (Fifth Amendment context); *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (Eighth Amendment context); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (Fourteenth Amendment Equal Protection Clause context); *Goss v. Lopez*, 419 U.S. 565, 576, 581 (1975) (Fourteenth Amendment Due Process Clause context).

<sup>101</sup> Other scholars have agreed these broader interests must be encompassed. E.g., Karteron, *supra* note 14, at 905; Gupta-Kagan, *Beyond Law Enforcement*, *supra* note 70, at 411.

<sup>102</sup> *Supra* Section II.B.

education.<sup>103</sup> In a school-based search, the Court has explained that courts must balance (1) the “serious emotional damage” that could result from a search against (2) the governmental interest in the search, emphasizing that “[t]he indignity of [a] search does not, of course, outlaw it, but it does implicate the rule of reasonableness. . . .”<sup>104</sup> Governmental interest encompasses local and state interests in keeping schools safe for the purpose of “maintain[ing] an environment [where] learning can take place.”<sup>105</sup> Despite positing this balancing test in a search context, the Court has provided little guidance regarding reasonableness in school-based seizures. This Section thus proceeds to explicate the student-conscious reasonableness model in a seizure context.

The student-conscious reasonableness model this Essay proposes recognizes balancing “serious emotional damage” against the governmental interest in a search as useful under the objective reasonableness balancing test for seizures. It provides a student-specific mode of considering “a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests[]’ against the countervailing governmental interests at stake.”<sup>106</sup> This prompts courts to consider whether a government’s interest in creating an orderly educational environment outweighs the emotional and psychological effects a seizure could have on a child.

Courts have approached such balancing inadequately. In the Tenth Circuit, for example, use of excessive force on a child, which the court deemed reasonable, led to the affected child receiving treatment for post-traumatic stress disorder.<sup>107</sup> The court focused on the government’s interest in creating an orderly educational environment, without considering how its decision hindered the government’s interest in supporting *all* students’ education.<sup>108</sup> Such selective consideration cannot continue.

In a school seizure by law enforcement officers, the governmental interest in supporting education for most students will seldom outweigh the plaintiff-child’s educational interests. The Court has recognized that

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<sup>103</sup> *Supra* notes 45–47 and accompanying text.

<sup>104</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009). For a depiction of the Court taking different views of “dignity” in Fourth Amendment consideration, see *Bowers*, *supra* note 7, at 1010–18.

<sup>105</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (plurality opinion).

<sup>106</sup> *Supra* note 77 and surrounding text.

<sup>107</sup> *Hawker v. Sandy City Corp.*, 591 Fed. App’x. 669, 671 (10th Cir. 2014).

<sup>108</sup> *Supra* note 42 and surrounding text.

only “[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process” may “be immediately removed from school.”<sup>109</sup> If students do not pose such a continuing danger or threat, the educational harm caused by seizing them outweighs the seizure’s benefit to the overall student body. After all, empirical evidence indicates SRO involvement in school discipline creates a negative educational environment for all students, even those not disciplined by an SRO.<sup>110</sup>

Further, potential student body benefits seldom outweigh the socio-emotional harm a seizure causes a child. In a search context, the Court has emphasized “adolescent vulnerability intensifies” a search’s “intrusiveness,”<sup>111</sup> and research indicates the same is true in seizures.<sup>112</sup> To ascertain the socio-emotional effects of a seizure on a student, courts must consider a child’s age and stature to determine the reasonableness of said seizure. The Court has long-recognized children cannot be considered “miniature adults,”<sup>113</sup> and has noted “childhood yields objective conclusions.”<sup>114</sup> One such conclusion is that children cognitively differ from adults, making them more likely both to act out and to experience greater physical and mental harm from being subject to the use of force.<sup>115</sup> Similarly, empirical evidence supports that, while anyone who is “yanked” physically by a law enforcement officer or handcuffed could be traumatized by such an occurrence, youth have a heightened risk for such trauma.<sup>116</sup>

Along with age, considering a child’s stature is key in a school-based seizure. There are typically less restrictive ways for a law enforcement officer to discipline or restrain a child.<sup>117</sup> Thus, as force should only be used when it is necessary to preserve governmental interests,<sup>118</sup> an officer

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<sup>109</sup> *Goss v. Lopez*, 419 U.S. 565, 582 (1975).

<sup>110</sup> *Supra* Part I.

<sup>111</sup> *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 375 (2009).

<sup>112</sup> *Infra* note 116 and surrounding text.

<sup>113</sup> E.g., *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”).

<sup>114</sup> *J.D.B.*, 564 U.S. at 275.

<sup>115</sup> See, e.g., *Karteron*, *supra* note 14, at 880.

<sup>116</sup> *Id.*; *Hawker v. Sandy City Corp.*, 591 Fed. App’x. 669, 671 (10th Cir. 2014).

<sup>117</sup> *Karteron*, *supra* note 14, at 913.

<sup>118</sup> E.g., *Graham v. Connor*, 490 U.S. 386, 395–97 (1989).

should not be able to use force when a less restrictive manner of restraint exists.<sup>119</sup>

Strengthening students' Fourth Amendment protections in school policing contexts by adopting this student-conscious framework aligns with precedent, which has recognized children's needs for increased procedural protections in school spaces.<sup>120</sup> Critics may argue such a framework hinders school safety, therein hampering students' learning opportunities. However, the Court is well-positioned to deliver guidance emphasizing procedural requirements meant to deter school searches and seizures.<sup>121</sup> After all, in recent years, the Court has struck down state actors' aggressive treatment of minors in school spaces, finding strip searching a student for Tylenol is overly invasive<sup>122</sup> and police interrogations at school must be informed by a student's age.<sup>123</sup>

Some critics may argue a student-conscious reasonableness standard could diminish the administrability of existing Fourth Amendment reasonableness standards.<sup>124</sup> In a Fifth Amendment context, Justice Alito, joined by Justices Scalia and Thomas, alleged that considering a child's age—and therein departing from a “one-size-fits-all” reasonableness test—would be hard for police to follow and for judges to apply.<sup>125</sup> He specifically posited it would be difficult for a judge to recognize how the “average” child or adolescent experiences a police interaction.<sup>126</sup> Further, critics may assert a student-conscious reasonableness standard opens litigation floodgates, prompting vulnerable defendants to always argue a “one-size-fits-all reasonable-person test” must be adapted to account for their individualized characteristics.<sup>127</sup> However, the student-specific nature of the proposed model protects against these critiques.

Courts commonly consider student status and age when determining children's constitutional rights.<sup>128</sup> Although Justice Alito expressed

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<sup>119</sup> See, e.g., *Hawker*, 591 Fed. App'x. at 671.

<sup>120</sup> Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 *Minn. L. Rev.* 823, 903–04 (2015).

<sup>121</sup> *Id.*

<sup>122</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368–369, 379 (2009).

<sup>123</sup> *J.D.B. v. North Carolina*, 564 U.S. 261, 280–81 (2011).

<sup>124</sup> See, e.g., *Bowers*, *supra* note 7, at 1016–17; *Bowers*, *supra* note 17, at 144.

<sup>125</sup> *J.D.B.*, 564 U.S. at 293 (Alito, J., dissenting).

<sup>126</sup> *Id.* at 294 (Alito, J., dissenting).

<sup>127</sup> *J.D.B.*, 564 U.S. at 283 (Alito, J., dissenting).

<sup>128</sup> Policy-and-practice arguments are outside the scope of this Essay, but it is worth noting that, though some states require no school-specific training for SROs, e.g., Ala. Code § 16-1-44.1 (2019); Ky. Rev. Stat. Ann. §158.441 (West 2020), many states already train SROs to

concern in the Fifth Amendment context that judges may struggle to put themselves in the position of a reasonable child to understand a child-specific age-based standard,<sup>129</sup> judicial precedent already indicates age and student status should be considered in First, Fourth, Fifth, and Eighth Amendment contexts.<sup>130</sup> Justice Alito himself has signed on to an opinion indicating agreement with this approach in the Fourth Amendment context.<sup>131</sup> Rather than introducing a new requirement for judges, the posited student-conscious reasonableness standard makes explicit the requirement that judges consider children's ages when determining Fourth Amendment violations, as has already been made explicit in other constitutional contexts. This standard's focus on age is complemented by a focus on student status, aligning with precedent regarding the government's interest in education.<sup>132</sup> As this standard distills *existing* precedent related to age and student-status to illuminate how the Fourth Amendment should be understood in a school context, it does not provide a basis for opening the floodgates for non-school-based Fourth Amendment litigation.

### *B. Cross-Ideological Support*

The proposed student-conscious reasonableness model makes explicit how existing Fourth Amendment doctrine applies to schoolchildren, and has the potential to gain cross-ideological support from the Roberts Court Justices. Justice Gorsuch has expressed his distaste for the current role of policing in school discipline.<sup>133</sup> Justices Breyer, Roberts, and Alito all

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work with students. E.g., Wash. Rev. Code § 28A.320.124(1)(a) (2021); Cal. Educ. Code § 38000(e) (West 2020); Conn. Gen. Stat. § 17a-22bb (2013); N.M. Stat. Ann. § 29-7-14(B) (2020); Va. Code Ann. § 9.1-102 (2020); see also Ga. Code Ann. § 35-8-27(b) (training is available but not required). Training SROs in a student-conscious reasonableness model would thus be a low-cost initiative, building on existing training models.

<sup>129</sup> *J.D.B.*, 564 U.S. at 293 (Alito, J., dissenting).

<sup>130</sup> *Supra* note 100; *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (Fourth Amendment context).

<sup>131</sup> *Safford*, 557 U.S. at 368, 379 (2009); see also *Howes v. Fields*, 565 U.S. 499 (2012) (Justices Alito, Scalia, and Thomas abandoning a one-size-fits-all approach and accepting a reasonable inmate's perspective on custody).

<sup>132</sup> *Supra* notes 42–47 and surrounding text; *supra* Section II.A.

<sup>133</sup> *A.M. v. Holmes*, 830 F.3d 1123, 1169 (10th Cir. 2016) (Gorsuch, J., dissenting) (“If a seventh grader starts trading fake burps for laughs in gym class, . . . Maybe today you call a police officer. And maybe today the officer decides that . . . an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option . . . Respectfully, I remain unpersuaded.”).

ruled school officials violated a student's Fourth Amendment rights when strip searching the child for painkillers, basing their holding largely on the student's vulnerability as a child.<sup>134</sup> Justices Sotomayor and Kagan have yet to hear a case regarding students' Fourth Amendment rights at school or school policing more generally. However, they have advocated for strong Fourth Amendment rights broadly.<sup>135</sup> Justice Sotomayor has particularly emphasized the need for robust Fourth Amendment rights for those disproportionately targeted by police due to their race.<sup>136</sup>

Support from Justices Thomas, Barrett, and Kavanaugh for the proposed student-conscious Fourth Amendment reasonableness standard is less certain. Justice Thomas would likely prefer courts heavily defer to school choices regarding campus policing policies. He has explained children have reduced rights at schools—viewing schools as a “substitute[] of parents” with broad authority “to discipline speech and conduct.”<sup>137</sup> Although Justices Barrett and Kavanaugh have not expressed views regarding students' Fourth Amendment rights at school or school policing more generally, they may support deference to school police, having exhibited limited views of the Fourth Amendment's scope.<sup>138</sup>

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<sup>134</sup> *Safford*, 557 U.S. at 368, 375, 379.

<sup>135</sup> E.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (maintaining individuals have a reasonable expectation to digital privacy).

<sup>136</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

<sup>137</sup> *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2059 (2021). (Thomas, J., dissenting); see also *Redding*, 557 U.S. at 384 (Thomas, J., dissenting) (“[S]chool officials retain broad authority to protect students and preserve ‘order and a proper educational environment’ under the Fourth Amendment.”) (citation omitted).

<sup>138</sup> E.g., *Torry v. City of Chicago*, 932 F.3d 579, 588–89 (7th Cir. 2019) (Barrett, J.) (then-Judge Barrett, finding officers were entitled to immunity in a lawsuit alleging they illegally stopped and harassed three Black men in a car); *United States v. Jones*, 625 F.3d 766, 770–71 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (arguing a defendant had no reasonable expectation of privacy while driving a car on a public thoroughfare, so police could install a tracking GPS in his car); *United States v. Askew*, 529 F.3d 1119, 1165 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (arguing that officers were within their rights to unzip and open a defendant's jacket after an original frisk yielded nothing). But see *Caniglia v. Strom*, 141 S. Ct. 1599, 1602–05 (2021) (Kavanaugh, J., concurring) (supporting a broad view of the Fourth Amendment by agreeing the “community caretaking” exception to the Fourth Amendment's warrant requirement does not extend to the home). Still, as they have sought to protect students' First Amendment rights away from school campuses, they could possess broader views on children's constitutional protections than currently known. See *Mahanoy*, 141 S. Ct. at 2042–43.

## CONCLUSION

Race-based criminalization in schools must end. Otherwise, American schools can never move beyond a dual system of education, which provides minority students with unequal educational opportunities, setting them up for a lifetime of inequality. Ensuring *all* students' Fourth Amendment rights in school policing contexts would work towards dismantling the school-to-prison pipeline's racially based pattern of pushing students from classrooms and into the criminal justice system. Judicial precedent supports that (1) students deserve procedural protections at school, (2) children experience police interactions differently than adults, and (3) both students and state governments have important interests in the provision of an education. Building on such precedent, it is time to hold schools and law enforcement agents accountable, end racialized school discipline, and ensure students receive full Fourth Amendment rights so they can more readily access the educational opportunities their states have guaranteed them.