ARRESTED DEVELOPMENT: RETHINKING FOURTH AMENDMENT STANDARDS FOR SEIZURES AND USES OF FORCE IN SCHOOLS

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Fourth Amendment standards regarding seizures and uses of force against juveniles in schools require a critical reassessment. Although jurists and scholars have paid it scant attention, this branch of Fourth Amendment doctrine offers a valuable lens for understanding the school-to-prison pipeline and the power of law enforcement officers to detain, handcuff, and use force against schoolchildren. While the Supreme Court has announced principles regarding the Fourth Amendment in schools generally, it has never addressed this issue directly.

This Article explores empirical findings on the role of law enforcement in schools and the unique characteristics of juveniles that should impact Fourth Amendment "reasonableness" analyses. Police practices in schools often negatively affect not only the students subjected to them, but the entire school climate. Additionally, youth are more likely than adults to be harmed by law enforcement tactics. A review of lower court jurisprudence in this area reveals incoherence. Courts have taken a variety of approaches, often relying on faulty assumptions about law enforcement practices in schools. They frequently import bright-line rules from street-policing cases, which are inappropriate in the school context.

This Article proposes a recalibration of the "reasonableness" standard to reflect the Supreme Court's admonitions that the school environment and age of the student matter. It suggests mandated consideration of objective factors that reflect the specific interests of youth in schools. This approach is workable and provides the flexibility needed to ensure substantive judicial review of troubling practices that deserve attention.

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INTRODUCTION

In recent years, the policing of youth in schools has attracted substantial public attention. In one story that made headlines, a shocking video depicted a police officer slamming a student to the floor in a South Carolina high school classroom.[1] What offense elicited such a violent response? The student, a fifteen-year-old girl, refused to turn over a cell phone to a teacher.[2] *The New York Times* described the incident as follows: as the girl sat quietly, the officer was seen "grabbing [her]" by the neck, "flipping her backward" as she sat at her desk, then "dragging and throwing her across the floor."[3] She was removed from the classroom, handcuffed, taken to a local police station, and charged under South Carolina's "disturbing schools" statute. A classmate who protested

[1] Christine Hauser, *Video of Student Arrest in South Carolina Puts Focus on School Officers*, N.Y. TIMES (Oct. 27, 2015), https://www.nytimes.com/2015/10/28/us/video-of-student-arrest-n-south-carolina-puts-focus-on-school-officers.html [https://perma.cc/T3ZJ-CU7C].

[2] Richard Pérez-Peña et al., *Rough Student Arrest Puts Spotlight on Police*, N.Y. TIMES (Oct. 28, 2015), https://www.nytimes.com/2015/10/29/us/police-officers-in-schools.html [https://perma.cc/9QX3-R6TP].

[3] Hauser, *supra* note 1.

her rough treatment was arrested as well.[4] Similarly, in New York City, a twelve-year-old girl was charged with "making graffiti" after writing "Lex was here" on a desk, a fourteen-year-old was arrested for refusing to stop texting, and an eleven-year-old was charged with theft for taking a lollipop.[5] Aside from arrests involving handcuffing, law enforcement officers (often referred to as "school resource officers" or "SROs") have subjected students across the country to punches, kicks, other unwanted touchings, along with shocks and assaults with Tasers and mace.[6]

The "school-to-prison pipeline" is the term commonly used to describe this pattern of aggressive arrests and uses of force by SROs, as well as the excessive use of exclusionary disciplinary measures like suspensions. This metaphorical term encompasses a range of policies and practices often leading young people to become ensnared in the criminal justice system. Sometimes the connection to the criminal justice system is instant—such as when a student who is arrested in school is then prosecuted. But sometimes the connection is more attenuated—such as when a student is subject to repeated or lengthy suspensions from school, ultimately drops out, and then turns to criminal activity. Along with students and parents, civil rights and juvenile justice advocates across the United States have confronted school districts, police departments, and actors in the criminal justice system to insist that they recognize the significant harm that the school-to-prison pipeline and its typical "zero tolerance" policies have on youth.[7] In the 2013–2014 school year, data collected by the U.S. Department

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[4] Represented by the ACLU, that classmate has filed a federal lawsuit challenging the statute under which she was arrested on vagueness grounds. *See* Complaint, Kenny v. Wilson, No. 2:16-CV-2794-CWH (D.S.C. Aug. 11, 2016).

[5] *See* Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y. L. SCH. L. REV. 1373, 1374 & nn.1–3, 1376–77 & n.13 (2011).

[6] The ACLU recently published an excellent compilation of news accounts of arrests and uses of force against students in school. *See* ACLU, BULLIES IN BLUE 23 (2017), https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf [https://perma.cc/84DE-2474].

[7] *See* Kavitha Mediratta, *Grassroots Organizing and the School-to-Prison Pipeline: The Emerging National Movement to Roll Back Zero Tolerance Discipline Policies in U.S. Public Schools*, *in* DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 211–36 (Sofía Bahena et al. eds., 2012) (describing grassroots organizing and research and policy efforts to address the school-to-prison pipeline); *see also, e.g.*, ACLU & NYCLU, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 28 (2007), https://www.aclu.org/sites/default/files/field_document/overpolicingschools_20070318.pdf [https://perma.cc/MY7Z-XLFA]; ACLU OF WASHINGTON, STUDENTS NOT SUSPECTS: THE NEED TO REFORM SCHOOL POLICING IN WASHINGTON STATE 12 (2017), https://www.aclu-wa.org/docs/students-not-suspects-need-reform-school-policing-washington-state [https://perma.cc/V25H-Y2FU]; ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7 (2005), https://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf [https://perma.cc/FX4N-9KQK]; ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000), https://civilrightsproject.ucla.edu/resear

of Education revealed nearly 70,000 arrests and 223,000 referrals to law enforcement by schools.[8]

The public outcry about law enforcement practices in schools has been loud in some arenas, but has largely occurred in policymaking circles such as school boards, departments of education, and legislative bodies. The courts have played a quieter, but significant role. Specifically, they have explained—in a fairly disjointed body of law—how the Fourth Amendment's prohibition on unreasonable searches and seizures applies in schools.

The Fourth Amendment protects all persons from "unreasonable searches and seizures" and offers an important legal framework for understanding law enforcement practices in schools that result in arrests, handcuffing, and uses of force.[9] The " 'basic purpose of t[he Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' "[10]

The Supreme Court has opined that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."[11] Seizures take different forms, ranging from temporary stops or detentions,[12] to full-blown arrests, which usually involve handcuffs.[13] Typically, a

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ch/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf [https://perma.cc/8EBT-P6GC]; DIGNITY IN SCHOOLS CAMPAIGN, COUNSELORS NOT COPS: ENDING THE REGULAR PRESENCE OF LAW ENFORCEMENT IN SCHOOLS 1 (2016), http://dignityinsc.wpengine.com/wp-content/uploads/2017/10/DSC_Counselors_Not_Cops_Recommendations-1.pdf [https://perma.cc/BJR4-YW5K]; TEXAS APPLESEED & TEXANS CARE FOR CHILDREN, DANGEROUS DISCIPLINE: HOW TEXAS SCHOOLS ARE RELYING ON LAW ENFORCEMENT, COURTS, AND JUVENILE PROBATION TO DISCIPLINE STUDENTS (2016), http://stories.texasappleseed.org/dangerous-discipline [https://perma.cc/6KLX-5THN]; KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED 16 (2015), https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54dcc1ece4b001c03e323448/1423753708557/AAPF_BlackGirlsMatterReport.pdf [https://perma.cc/5P9B-WDBU]; ACLU, BULLIES IN BLUE, *supra* note 6 at 9.

[8] Evie Blad & Alex Harwin, *Black Students More Likely to Be Arrested at School*, ED. WEEK (Jan. 24, 2017), https://www.edweek.org/ew/articles/2017/01/25/black-students-more-likely-to-be-arrested.html [https://perma.cc/JYY9-JXNK].

[9] The Fourth Amendment provides as follows:

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

US CONST. amend. IV.

[10] New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

[11] United States v. Mendenhall, 446 U.S. 544, 553 (1980). This standard is an objective one, "looking to the reasonable man's interpretation of the conduct in question[.]" Michigan v. Chesternut, 486 U.S. 567, 574 (1988) (citation omitted).

[12] Terry v. Ohio, 392 U.S. 1, 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

police officer must have "reasonable, articulable suspicion that criminal activity is afoot" to conduct a temporary stop or detention.[14] In contrast, probable cause is required for an arrest.[15] In general, an arrest is permissible whenever there is probable cause that some offense—no matter how minor—has been committed.[16]

Exceptions to these standards are permitted under the "special needs" doctrine, which allows government agents to conduct temporary detentions without suspicion in certain circumstances. For example, road checkpoints in which all vehicles are required to stop are permissible when conducted for the purpose of verifying drivers' licenses and vehicle registrations, or to identify drunk drivers, but not for general crime control purposes.[17] The Supreme Court has more commonly addressed whether "special needs" necessitate suspension of usual standards in the search context.[18] As discussed further in Section II.A, the Supreme Court has never addressed how the Fourth Amendment standards for seizures of the person apply in schools, although it has invoked the special needs doctrine when deciding numerous cases involving searches in schools.

The right to be free from the use of excessive force by government agents is also usually analyzed under the Fourth Amendment.[19] As discussed in detail

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[13] *Terry* stops sometimes involve handcuffing as well. *See, e.g.*, United States v. Perdue, 8 F.3d 1455, 1463 (10th Cir. 1993); United States v. Hastamorir, 881 F.2d 1551, 1557 (11th Cir. 1989).

[14] Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30).

[15] Maryland v. Pringle, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."). The Supreme Court has defined probable cause as " 'a reasonable ground for belief of guilt,' and that the belief of guilt must be particularized with respect to the person to be searched or seized." *Id.* at 371 (quoting Ybarra v. Illinois, 444 U.S. 85, 91, 100 (1979)).

[16] Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("[T]he standard of probable cause 'applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations. . . . [Officers acting with probable cause are] authorized . . . to make a custodial arrest without balancing costs and benefits or determining whether or not [the] arrest was in some sense necessary."). But it is noteworthy that "individualized review" is appropriate when an arrest "is 'conducted in an extraordinary manner, unusually harmful to [the citizen's] privacy or even physical interests.' " *Id.* at 352–53 (quoting Whren v. United States, 517 U.S. 806, 818 (1996)).

[17] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (holding that checkpoint program with purpose of seizing drugs violated the Fourth Amendment); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990) (holding that checkpoint program with purpose of identifying drunk drivers passed Fourth Amendment scrutiny).

[18] *See, e.g.*, Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989) (considering whether Fourth Amendment permits suspicionless drug testing of certain US Customs employees); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 606 (1989) (same for railroad employees).

[19] Graham v. Connor, 490 U.S. 386, 394 (1989) ("Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." (quoting US CONST. amend. IV)).

in Section II.B, the Supreme Court's decision in *Graham v. Connor* demands consideration of the "facts and circumstances of each particular case" to determine whether a law enforcement officer's use of force was objectively reasonable.[20]

While the standards concerning seizures identified above are essentially binary ones, e.g., probable cause exists or it does not, both the special needs and excessive force doctrines rely on balancing the interests of the individual subjected to the seizure or use of force against the government's.[21] It is within this context that this Article attempts to elucidate the meaning of the Fourth Amendment's "fundamental command" of reasonableness[22] regarding seizures and uses of force in schools, and argues that the current doctrine does not account for the unique interests and harms at play in this unique context.

Scholars have largely overlooked the standards for seizures and uses of force in schools. In general, seizures are the "neglected sibling" of the Fourth Amendment world.[23] Criminal procedure scholarship rarely delves into the realm of schools, and when it does, it tends to focus on searches.[24] Similarly, scholars writing about education and the school-to-prison pipeline rarely emphasize the criminal procedure issues in play, and instead often focus on potential policy prescriptions that could be used by school districts and the federal government to address the school-to-prison pipeline.[25] This Article thus fills a

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[20] *Id.* at 396.

[21] *See id.* at 394.

[22] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

[23] Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 59 (2015).

[24] *See, e.g.*, Barry C. Feld, T.L.O. *and* Redding's *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 847 (2011); Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 302 (2011); Martin R. Gardner, *Strip Searching Students: The Supreme Court's Latest Failure to Articulate a "Sufficiently Clear" Statement of Fourth Amendment Law*, 80 MISS. L.J. 955, 955 (2011) [hereinafter Gardner, *Strip Searching Students*]; Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 897 (1988) [hereinafter Gardner, *Student Privacy*]; 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, 1069 (2003).

[25] *See, e.g.*, Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 825 (2015) (discussing due process standards that should apply to school expulsions and suspensions); Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 565, 566 (2016) (describing negative impact of criminal justice adjudication of school disciplinary issues and assessing one county's "anti-pipeline collaborative"); Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 864–65 (2012) (suggesting that courts should consider social science evidence about the impact of school discipline practices when determining whether constitutional standards should be altered in the school context); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 959–60 (2016) [hereinafter Nance, *Students, Police, and the School-to-Prison Pipeline*] (offering empirical analysis of impact of police officer presence on law enforcement referrals); Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 1 (2013) [hereinafter Nance, *Students, Security, and Race*] (providing empirical analysis of students'

gap in both criminal procedure and education scholarship by directly answering the question of how reasonableness should be defined under the Fourth Amendment when addressing seizures and uses of force in schools. It is beyond this Article's scope to address the many policy reforms that school districts and police departments can, and in some cases, have taken to ameliorate the harms of the school-to-prison pipeline.[26] Instead, it focuses on the Fourth Amendment questions concerning seizures and uses of force, and the particular ways they unfold in schools.

Because defining "reasonableness" requires understanding how the use of seizures and force impact the communities and youth they are levied against, Part I addresses the findings of social scientists regarding the negative impact that aggressive police practices can have on the school environment and students. Part I also discusses the unique vulnerabilities of youth to aggressive police practices, particularly those who suffer from the lasting effects of traumatic experiences.

Beginning with the seminal case of *New Jersey v. T.L.O.*,[27] Part II of this Article traces the development of Fourth Amendment standards concerning seizures of persons and uses of force by law enforcement officers in schools in the courts, primarily the federal circuit courts. Although courts have frequently invoked *T.L.O.*'s demand for "reasonableness," the comprehensive review of federal and state appellate decisions in Section II.C reveals that courts have haphazardly applied that standard, and sometimes inappropriately supplemented it with rules developed in cases involving adults (outside of schools), without any regard for whether those standards are appropriate for youth in the school context. This review reveals a dismal jurisprudential record, remarkable for its incoherence.

Part III proposes that courts rethink their approach to analyzing seizures and uses of force on youth in schools by recalibrating the reasonableness standard. It concludes that the lower courts have gleaned the wrong lessons from the Supreme Court's decisions concerning searches in schools, missing the funda-

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likelihood of encountering "intense security conditions in their schools" and arguing that such conditions fuel mistrust between students and educators). *But see* Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 79 (2014) [hereinafter Nance, *School Surveillance and the Fourth Amendment*] (offering reformulated Fourth Amendment framework for evaluating students' claims); Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 367 (2013) (analyzing Fourth Amendment questions concerning suspicionless searches of students).

[26] For example, students in Phoenix have recently launched a campaign titled #CopsOuttaCampus to protest the presence of police officers in public schools. *See* BrieAnna J. Frank, *Students Launch #CopsOuttaCampus Campaign at Phoenix Union High School District Schools*, REPUBLIC (May 5, 2017), https://www.azcentral.com/story/news/2017/05/05/cops-outta-campus-campaign-launches-phoenix-union-high-schools/311279001 [https://perma.cc/AN9Q-DY6Q]. For excellent descriptions of policy efforts aimed at addressing the harms of the school to prison pipeline, see generally Mediratta, *supra* note 7.

[27] *T.L.O.*, 469 U.S. at 325.

mental principles that the school context and unique vulnerabilities of juveniles are relevant to defining reasonableness, and disregarded evidence of those vulnerabilities.

Relying in part on the empirical evidence regarding the harm of seizures and uses of force on school climate and youth, this Article offers an amended approach for analyzing these claims that courts can readily put to use when confronted with Fourth Amendment claims in this context. It concludes that reasonableness 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. This approach is faithful to Supreme Court precedent and provides sufficient flexibility to account for evolving understandings of the interests of both schools and youth.

I. SEIZURES AND THE USE OF FORCE IN SCHOOLS: THE EMPIRICAL BACKGROUND

Fourth Amendment claims concerning seizures and uses of force in schools often address complex issues. Are school resources officers functioning as counselors or cops? Does arresting a student for engaging in disruptive behavior improve the school climate for other students and facilitate learning? Do law enforcement tools and tactics, such as Tasers or mace, affect kids the same way they affect adults? Unfortunately, courts confronting these issues tend to resolve questions like these—often implicitly—without a complete understanding of the impact those practices have on school environments or students. Instead, they engage in what has been termed "blind balancing": "the process of decision making based simply on common sense and a gut assessment of risk, without consideration of data, evidence, or empirical studies."[28] This leaves courts unable to assess the interests the stake—both the student's and the government's—in Fourth Amendment cases concerning seizures and uses of force in schools.

To avoid blind balancing, defining "reasonableness" under the Fourth Amendment requires an accurate understanding of the school environment and the youth who inhabit it. However, instead of gaining that understanding, courts often make erroneous assumptions. Two particular assumptions stand out. First, as several scholars have pointed out, courts commonly assume that a school disciplinary approach focused on order maintenance, which sometimes involves a police presence, contributes positively to the school environment.[29]

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[28] Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 3 (2013).

[29] *See, e.g.*, Kim, *supra* note 25, at 868–74 (discussing foundational Supreme Court cases on school discipline and searches and noting that courts have relied on "common-sense intui-

Courts often presume that police in schools assist in maintaining order, thereby fostering an environment that is conducive to learning. Second, courts often import rules from the street-policing context into cases addressing seizures or uses of force in schools. These importations rest on the assumption that seizures and uses of force are one-size-fits-all law enforcement tools and, therefore, are just as appropriate for youth in school as they are for adults.

This Part addresses these assumptions by identifying empirical evidence that reveals the negative impact of aggressive police practices in schools. In particular, two areas are worthy of attention. First, the negative impact the use of law enforcement tactics like arrests can have on school climates, including the role of SROs in criminalizing normal adolescent behavior that traditionally has not been treated as criminal. Second, the unique characteristics of juveniles that make them more likely to engage in disruptive behavior and more vulnerable to police practices like arrests and uses of force.

A. Criminalization of Student Misbehavior

Reports by advocates and social scientists show that criminalization of student misbehavior, like subjecting students to arrest or other criminal justice enforcement mechanisms, is a common occurrence in many American schools. This occurs for a variety of reasons. At times, law enforcement officers respond to serious crimes in schools that virtually all agree would require a police response, such as those involving violence. But sometimes law enforcement officers respond to minor misbehavior that should not subject a student to criminal treatment, such as food fights, hair pulling, drawing on desks, or using cell phones.[30] Incidents that escalate to arrest, regardless of the seriousness of the offense, often involve handcuffing, being perp-walked out of school in front of peers, and hours (or even days) spent detained at police precincts and other holding facilities.[31] This response may turn on the culture of the school in

tions about what is good for the child, rather than engaging in a fact-based inquiry"); Nance, *School Surveillance and the Fourth Amendment*, *supra* note 25, at 130 (noting that the Supreme Court has lowered Fourth Amendment standards in schools "to preserve an orderly environment conducive to learning"); Pinard, *supra* note 24, at 1095–96 (noting that courts have justified applying lower Fourth Amendment standards based on assumptions about the role of law enforcement in schools).

[30] *See supra* notes 1–6 and accompanying text. *See also* Sara Gates, *Students Arrested After Food Fight at Ola High School in Georgia*, HUFFINGTON POST (Feb. 6, 2013), http://www.huffingtonpost.com/2013/02/06/food-fight-ola-high-school-georgia-students-arrested_n_2631829.html [https://perma.cc/E9N4-XSC9]; Susan Saulny, *25 Students Arrested for a Middle-School Food Fight*, N.Y. TIMES (Nov. 10, 2009), http://www.nytimes.com/2009/11/11/us/11foodfight.html [https://perma.cc/WXX6-PKYR].

[31] *See* KATHLEEN NOLAN, POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL 54–55 (2011) (describing common scenario in a Bronx high school of students being handcuffed, brought to a dean's office, and walked out of school for arrest processing).

which it takes place, which is determined in part by the attitude of the educators involved and the role of law enforcement officers in the school.[32]

The widespread presence of law enforcement officers in schools is a relatively new phenomenon, although not one that affects American schools evenly. In the 1990s, a shift in federal policies contributed significantly to the rise of the school-to-prison pipeline and the growth of a law-enforcement presence in schools. Following the mass shooting at Columbine High School in 1999, the federal government provided a surge in funding for law enforcement officers in schools,[33] which was renewed in 2012 following the mass shooting at Sandy Hook elementary school in Connecticut.[34] In addition, the Gun-Free Schools Act of 1994, a federal law, required the adoption of zero-tolerance policies for certain offenses.[35] As a result, law enforcement officers are now present in schools of all types, but more common in large schools and urban high schools.[36] In the 2013–14 school year, 44,000 part-time and full-time onsite law enforcement officers were present in the nation's schools.[37] In the same year, out of 90,000 public schools, 46 percent of high schools, 42 percent of middle schools, and 18 percent of elementary schools reported the presence of at least one law enforcement officer in their school to the US Department of Education.[38] Black and Latino high-school and middle-school students are more likely than white and Asian students to attend schools with a law enforcement presence.[39]

Despite their common presence, there is little uniformity the role of law enforcement officers in schools. As one sociologist observed, "there is no typical school officer."[40] Their duties range from patrolling the halls, monitoring metal detectors, and responding to calls for assistance from teachers and other educa-

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[32] *See* AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 9–10 (2010).

[33] *See id.* at 29–30.

[34] NATHAN JAMES & GAIL MCCALLION, *School Resource Officers: Law Enforcement Officers in Schools*, CONGRESSIONAL RESEARCH SERVICE REPORT 1 (2013).

[35] *See* JUDITH KAFKA, THE HISTORY OF "ZERO TOLERANCE" IN AMERICAN PUBLIC SCHOOLING 2 (2011); KUPCHIK, *supra* note 32, at 30; Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 25, at 932–33.

[36] JAMES & MCCALLION, *supra* note 34, at 6.

[37] Blad & Harwin, *supra* note 8.

[38] *Id.*

[39] *Id.* More specifically, Education Week found as follows:

> *Education Week*'s data analysis found that 74 percent of black high school students attend a school with at least one on-site law enforcement officer, compared with 71 percent of both Hispanic and multiracial high school students, and 65 percent of both Asian and white high school students. The disparity is more pronounced at the middle school level, where 59 percent of black students attend schools with law enforcement, compared with 49 percent of both Hispanic and multiracial students, 47 percent of white students, and 40 percent of Asian students.

Id.

[40] KUPCHIK, *supra* note 32, at 82; *see also* JAMES & MCCALLION, *supra* note 34, at 2 ("[SROs'] activities can be placed into three general categories: (1) safety expert and law enforcer, (2) problem solver and liaison to community resources, and (3) educator.").

tional staff to completing paperwork, counseling students, and engaging in extracurricular school activities.[41] Moreover, while some school districts and police departments have formal agreements specifically outlining the duties of police officers in schools, others do not, which creates tremendous variance across the nation's schools.[42] In sum, in this growing field—the fastest growing segment of the law enforcement industry as of 2008[43]—there is incredible variety.

The impact of these officers in schools also varies tremendously. Remarkably, there is no rigorous research suggesting that the presence of law enforcement officers reduces school violence.[44] And the role of police in schools has grown despite a consistent decrease in school crime in recent years.[45]

Law enforcement practices in schools can also significantly impact the culture of discipline within a school, influencing how students perceive authority and, ultimately, whether the school's climate makes misbehavior more or less likely.[46] To reduce misbehavior, schools must establish positive environments where students feel valued.[47] But research reveals that the aggressive use of law enforcement tactics in schools often has precisely the opposite effect.[48]

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[41] KUPCHICK, *supra* note 32, at 83; *see also* Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 979, 990 (2009) (noting, in reporting results of interviews with school police chiefs and school resources officers in 16 Massachusetts school districts, that visions for policing in school varied tremendously, from "the extended-beat approach (regarding SROs as law enforcement handling crime), or the caseworker approach (regarding SROs as case workers with law enforcement powers, who promote a high quality of life for teens and schools).").

[42] *See, e.g.*, Ofer, *supra* note 5, at 1394–97 (describing memorandum of understanding governing relationship between the New York City Police Department and New York City Department of Education); Thurau & Wald, *supra* note 41, at 991.

[43] Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIM. 79, 82 (2008).

[44] *See* JAMES & MCCALLION, *supra* note 34, at 9 (reviewing literature and noting that as of 2011, there were no published studies of SRO programs that "collect[ed] data on reliable and objective outcome measures during a treatment period . . . and a control period").

[45] Aaron Kupchik summarizes the recent data on crime in schools as follows:

> Despite common rhetoric about the growing dangers inside schools, school crime has been declining over the past two decades. In 1992, the rate of crime against students (both violent and non-violent combined) at school was 144 incidents per 1,000 students. By 2005, the rate had dropped to 57 per 1,000 students. In fact, schools are among the safest places for youth to be; students are much more likely to be affected by violent crime outside of school than inside.

KUPCHIK, *supra* note 32, at 15.

[46] *Id.* at 7–8 ("By enacting overly harsh punishments, failing to listen to students when they get in trouble, denying them a voice in shaping school rules or in how they are treated in school, and inconsistently enforcing rules, schools damage the perceived legitimacy of school rules and punishments, thereby making misbehavior more likely.").

[47] Aaron Kupchik, a criminologist and sociologist, summarizes the relevant research as follows:

> A . . . consistent theme in this research is that schools can reduce student misbehavior by creating an inclusive, democratic, or positive psycho-social climate for students. . . . A number of studies conclude that when schools are able to create a climate that rewards positive behaviors,

In particular, the available research that specifically explores the impact of arrest practices in schools suggests that the mere presence of law enforcement officers increases the likelihood that normal juvenile misbehavior typically requiring a trip to the principal's office instead ends up involving handcuffing and a trip to the police precinct. An empirical study of data from the U.S. Department of Education's 2009–2010 School Survey on Crime and Safety[49] found that "regular contact with SROs is related to increased odds of referring students to law enforcement for lower-level offenses that school administrators and teachers should address themselves using pedagogically sound disciplinary methods."[50] This conclusion "hold[s] true . . . even after controlling for variables such as state statutes mandating referral to law enforcement, general levels of criminal activity and disorder, neighborhood crime, and other demographic variables."[51]

Additionally, a 2011 study reviewing data from several years of results from the same national survey found that "as schools increase their use of police officers, the percentage of crimes involving non-serious violent offenses that are reported to law enforcement increases."[52] A 2009 study of a single school district reached a similar conclusion,[53] as did a previous qualitative study.[54]

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allows students a voice in their treatment and in school governance, maintains a sense of fairness among students, and treats students with respect and care, student misbehavior is reduced.

Id. at 16 (footnotes omitted).

[48] Similar to arrests, the use of strict security measures—typically implemented by law enforcement officers—such as metal detectors, security cameras, and the use of random sweeps for contraband, can negatively impact school climate. Nance, *Students, Security, and Race*, *supra* note 25, at 5. In a review of numerous studies, Jason Nance reported that "while strict security measures negatively affect the learning environment, several studies call into doubt whether these measures reduce school violence at all." *Id*. at 21. Instead of establishing trust between students and educators, "a vital component to establishing a healthy climate conductive to learning," it "sends a negative message that students are harmful, dangerous, and prone to commit illegal, violent acts." *Id*. at 19. "That message 'sour[s] students' attitudes toward school and school authorities and undermine[s] a positive, respectful academic environment.'" *Id*. at 19–20; *see also* Michelle Fine et al., *"Anything Can Happen with Police Around": Urban Youth Evaluate Strategies of Surveillance in Public Places*, 59 J. SOC. ISSUES 141, 154 (2003) (documenting low trust among "urban" youth in adults in positions of public authority, including police or security guards in schools).

[49] The survey was conducted by the US Department of Education's National Center for Education Statistics and sought responses from 3,480 randomly selected schools. Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 25, at 959–60.

[50] *Id*. at 976.

[51] *Id*.

[52] Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offender Behaviors*, 30 JUST. Q. 1, 24 (2011).

[53] Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUSTICE 280, 285 (2009) (concluding that the presence of school resource officers increased arrest rates for disorderly conduct, but reduced them for assault and weapons charges).

[54] KUPCHIK, *supra* note 32, at 11 ("[Police officers'] presence escalates disciplinary situations, both by introducing a law-and-order mentality to the school and by facilitating the ar-

Moreover, it is noteworthy that law enforcement tactics like arrest are more likely to be used against black and Latino children.[55] At least for black children, psychological research suggests that such disparate treatment may be attributable to the black children, especially black boys, being viewed as less innocent and older than their white peers.[56] This dynamic has been found to be true specifically among police officers.[57]

A leading theory about why the presence of law enforcement officers leads to higher arrest rates for minor offenses is that law enforcement officers tend to define misbehavior as criminal, even though educators would not. Officers often have carte blanche to address misbehavior as they roam school hallways, but their presence can escalate situations.[58] Jason Nance has described this dynamic as follows:

> [M]any SROs also become involved in student disciplinary matters that educators traditionally have handled and should continue to handle. It is easy to see how this happens. Most SROs spend their time each day patrolling buildings and grounds, investigating complaints, minimizing disruptions, and maintaining order. When SROs observe students being disruptive and disorderly, they intervene because they view this as one of their duties, even when those duties overlap with the traditional duties of school officials. . . . [I]f a student is involved in a scuffle with another student, talks back to a teacher, yells at another student, steals another student's pencil, or exhibits other types of poor behavior, SROs have legal authority to arrest that student, even a six-year old student who is throwing a temper tantrum. Thus, in many schools, SROs have become the "new authoritative agents" of discipline.[59]

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rest of students whose crimes may otherwise have been considered too minor to warrant calling the police (e.g., involvement in a fistfight)").

[55] *See, e.g.*, U.S. DEP'T OF EDU. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE, ISSUE BRIEF NO. 1, at 1 (2014) ("While black students represent 16% of student enrollment, they represent 27% of students referred to law enforcement and 31% of students subjected to a school-related arrest. In comparison, white students represent 51% of enrollment, 41% of students referred to law enforcement, and 39% of those arrested.").

[56] *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539–40 (2014); *see also* REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 11 (2017); Ann C. McGinley & Frank Rudy Cooper, *How Masculinities Distribute Power: The Influence of Ann Scales*, 91 DENV. U. L. REV. 187, 200, 209 (2013) (explaining that the " 'boys will be boys' " attitude that excuses the misbehavior of white boys does not apply to black and Latino boys).

[57] Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, *in* POLICING THE BLACK MAN 57 (Angela J. Davis ed., 2017) [hereinafter Henning, *Boys to Men*].

[58] KUPCHIK, *supra* note 32, at 83, 99 ("In allowing the officer to help deal with potential and actual problems, the school is complicit in redefining behavioral problems as criminal problems.").

[59] Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 25, at 949–50 (footnotes omitted).

In short, as Kristin Henning has observed: "The problem is that police are always police."[60]

Thus, while a teacher or principal might counsel a misbehaving student, law enforcement officers who encounter similar behavior may be more inclined to turn to law enforcement tools, such as arrest. Moreover, law enforcement officers in schools are often not school employees and thus are not accountable to school officials. Instead, they are accountable only to the law enforcement agencies that employ them, and the school administration has no power to supervise or discipline them.[61] In response, some school districts have adopted policies specifying when law enforcement officers may become involved in behavioral issues,[62] but most have done nothing to clarify when police authority is appropriate for school settings. This leaves constitutional and general statutory provisions as the only constraints on police action in schools.

For the punished student, the negative effects of being subjected to a seizure or use of force (for example, being handcuffed, perp-walked through school, detained at a police precinct, and, perhaps, spending a night in jail) are substantial. Aside from the obvious impacts of physical pain, humiliation, and anxiety,[63] an arrest increases the likelihood that a student will drop out of high school.[64] And for those students who are ultimately incarcerated, the costs are staggering.[65]

In addition, the negative impact of law enforcement responses to student misbehavior falls on *both* the punished student and other students.[66] Although this phenomenon has been studied even less than the effect of arrest and use of force practices on the students subjected to them, some evidence suggests that this impact is significant. For example, "a recent meta-analysis of 178 individual studies assessing the effectiveness of different school-based disciplinary interventions found no evidence that the use of arrest and juvenile courts to han-

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[60] Henning, *Boys to Men*, *supra* note 57, at 66.

[61] Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 25, at 950–51.

[62] *See, e.g.*, Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 88, 88 (2011) (finding that a multi-disciplinary approach that used a warning system for certain offenses rather than arrest reduced suspensions, the felony referral rate, and number of serious weapons found on campus).

[63] See *infra* Section I.B for further discussion of this issue.

[64] Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 463, 473, 477–78 (2006) (longitudinal data revealed that first-time arrest and court appearance in high school increased the odds of dropping out of high school by at least three times); *see also* Paul Hirschfeld, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOC. EDUC. 368, 384–87 (2009) (concluding in study of Chicago students that arrest in the 9th or 10th grade substantially increased odds of dropping out of high school).

[65] Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 25, at 954 (summarizing research demonstrating that "incarcerating juveniles limits their future educational, housing, employment, and military opportunities").

[66] Kim, *supra* note 25, at 889–92.

dle school disorder reduces the occurrence of problem behavior in schools."[67] In addition, a meta-analysis of studies on the presence of SROs in high schools and exclusionary discipline (that is, suspension and expulsion) revealed that the presence of SROs is positively correlated with higher levels of exclusionary discipline[68] and, presumably, all of its concomitant negative effects.[69] Indeed, frequent use of arrests and other police tactics negatively affects school climate, as well as increases fear and distrust among students.[70] Overall, there is certainly no evidence suggesting that the school climate is improved by the use of arrests and force in schools.[71]

In sum, empirical research on law enforcement practices in schools suggests that such practices are detrimental to the school environment. The mere presence of law enforcement officers likely increases the chance that minor misbehavior will result in arrest or referral to the criminal justice system. This criminalization approach negatively impacts school climates, harming not just the punished students, but their classmates as well.

B. The Unique Characteristics and Vulnerabilities of Juveniles

Those who study the lives and minds of juveniles—social scientists, neuroscientists, and psychologists among them—have conducted a variety of research showing how juveniles are different from adults in a variety of ways that are relevant to Fourth Amendment jurisprudence. Over thirty years of research

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[67] *Id*. at 891 (citing Philip J. Cook et al., *School Crime Control and Prevention*, 39 CRIME & JUST. 313, 369 (2010)).

[68] Benjamin W. Fisher & Emily A. Hennessy, *School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-Analysis*, 1 ADOLESCENT RES. REV. 217, 229 (2016).

[69] *See* Nance, *Students, Police, and the School-to-Prison Pipeline*, *supra* note 25 at 956 (footnotes omitted) ("One . . . should not underestimate the negative impact of suspending or expelling a student. Excluding a student from school, even for a short time period, disrupts that student's educational experience and provides that student with more time and opportunities to engage in harmful or illegal activities.").

[70] KUPCHIK, *supra* note 32, at 115; Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT CHILD. 333, 349 (1999); *see also* Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 18 (1998) (noting that witnessing corporal punishment, which can be likened to forceful arrests or other uses of force, can have the same negative impact as receiving it); Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y. L. SCH. L. REV. 1331, 1357–58 (2011) (describing negative impact of witnessing police harassment on youth, including in school).

[71] Kim, *supra* note 25, at 891; *see also id*. at 892 ("[I]t can hardly be argued that school-based arrest is 'a valuable educational device' or has 'long been an accepted method of promoting good behavior and instilling notions of responsibility . . . into the mischievous heads of school children.'" (quoting Goss v. Lopez, 419 U.S. 565, 580 (1975); Ingraham v. Wright, 430 U.S. 651, 659 (1977))).

reveals that "adolescents are not simply miniature adults."[72] Instead, there are "significant disparities between adolescent and adult capacity—cognitively, psychosocially and . . . neurologically."[73] This research suggests that youth who act out in school may not do so to disrupt the school environment, but because misbehavior is simply an unavoidable and expected feature of adolescence.

Of particular importance, adolescents differ from adults in their ability to assess risk,[74] their ability to think independently and resist peer pressure, their ability to identify and consider future consequences, their ability to regulate their emotions, and their heightened reactions to fear.[75] Notably, "youth's psy-

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[72] Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 153 (2003).

[73] Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 23 (2012) [hereinafter Henning, *Juvenile Justice After* Graham]; *see also id*. ("Cognitive capacity involves logical reasoning and the ability to identify and weigh competing alternatives of a given choice, while psychosocial development involves social, emotional, and temporal perceptions and judgments. Neurological development involves the maturation of the brain and brain functioning over time." (citing Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Development Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 291, 303–04 (Thomas Grisso & Robert G. Schwartz, eds., 2000))); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 812 (2005).

[74] Two commentators have summarized the research findings on adolescents and risk as follows:

> Risk-taking is the result of normal reward-seeking behavior and should be anticipated as part of the normal developmental process. Researchers propose a "dual systems model" to explain adolescent risk-taking. The model consists of a socio-emotional system and a cognitive control system, where the socio-emotional system explains reward-seeking behavior and the cognitive control system is responsible for impulse control. Adolescence marks the period where the structures comprising these two systems are developing at different paces, with reward-seeking areas preceding areas responsible for impulse control. Consistently, research findings from neurobiology support the notion that risky behavior in adolescence is attributable, in part, to an immature cognitive control system that cannot regulate the more mature socio-emotional or reward-seeking system. Research from animal models and human brain-imaging studies supports this distinction.

Jennifer Lynn-Whaley & Arianna Gard, *The Neuroscience Behind Misbehavior: Reimagining How Schools Discipline Youth*, *in* KEEPING KIDS IN SCHOOL AND OUT OF COURTS: A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS 26, 27–28 (2012) (internal citations omitted).

[75] Taylor-Thompson, *supra* note 72, at 153–55. A brief excerpt of Kim Taylor-Thompson's more thorough summary of this literature follows:

> Adolescents assess risk differently than adults. . . . Interestingly, adolescents experience greater concern—and anxiety—over the consequences of *refusing* to engage in risky conduct than adults do, thanks to greater fear of being socially ostracized. . . .
>
> [A]dolescents use information less effectively, and tend to exhibit less independent thinking in their decision-making, than adults. In situations where adults will likely perceive and weigh multiple alternatives as part of rational decision-making, adolescents typically see only one option. This inflexible "either-or-mentality" becomes especially acute under stressful conditions. Psychologists have found that when adolescents feel cornered, their immaturity may impede their ability to see an alternate course of action and prod them into making a decision inconsistent with their moral values. . . .

chosocial deficiencies persist well into late adolescence and often into early adulthood."[76]

While these observations apply to juveniles in general, special attention should be devoted to the unique cognitive and psychosocial characteristics of youths who have experienced trauma. As described in a recent report published by the U.S. Department of Justice, exposure to trauma "can permanently rewire [children's] brains" in ways that impact their interactions with law enforcement.[77] Such children experience "increas[ed] . . . fear and anxiety," which sometimes "causes them to be hyperresponsive to frightening situations in both their physiology and their observable behavior."[78] That is, some youth engage in behavior that is labeled insubordinate or aggressive, but stems from their traumatic experiences.[79] Moreover, it suggests that for some youth, actions labeled as misbehavior is simply unavoidable,[80] and that the appropriate law-enforcement response is one of extraordinary care.[81]

But for all children and adolescents, not just those who have been subjected to trauma, the risks of handcuffing and other forms of restraint are significant. In a campaign against the indiscriminate shackling of juveniles during court proceedings, the National Juvenile Defender Center collected testimony

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> [D]ifferences in the development of perspective—the ability to think about future consequences and to evaluate one's actions as they affect others—emerge when examining adolescent and adult decisions. Adolescents, more than adults, tend to discount the future and to afford greater weight to short-term consequences of decisions. . . .
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> Finally, one recent study indicates that youth offending may stem from psychosocial factors that affect adolescent judgment more profoundly than adult decision-making. . . . These researchers concluded that "[o]n average, adolescents make poorer (more antisocial) decisions than adults do because they are more psychologically immature."

Id. at 153–55 (footnotes omitted).

[76] Henning, *Juvenile Justice After Graham*, *supra* note 73, at 24 (citing Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL, *supra* note 73, at 304–05).

[77] Richard G. Dudley, Jr., *Childhood Trauma and Its Effects: Implications for Police*, NEW PERSPECTIVES POLICING 1, 5 (2015).

[78] *Id*. It is also noteworthy that risk of exposure to trauma does not fall evenly across American neighborhoods. Instead, poor children from violent neighborhoods are more likely to experience trauma and its related challenges. *Id*. at 10.

[79] *Id*. at 7 (explaining that adolescents often display "a tough, 'I don't care about anything' façade" in place of the intense anxiety and fear they experience, resulting in the outward display of hostility and threatening behavior); Cheryl Smithgall et al., *Responding to Students Affected by Trauma: Collaboration Across Public Systems*, *in* KEEPING KIDS IN SCHOOL AND OUT OF COURT: A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS 40, 43 (2012) ("Just as trauma may impair cognitive functioning, it may also lead to difficulties with social and behavioral functioning that manifest as often-misunderstood behavioral problems in the classroom. Students may display behaviors that are impulsive, aggressive, or defiant.").

[80] Of course, reckless behavior is common to all youth. *See* Henning, *Boys to Men*, *supra* note 57, at 75 ("Reckless behavior is so common among adolescents that it has been described as 'virtually a normative characteristic of adolescent development.' ").

[81] Dudley, *supra* note 77, at 6–7 (suggesting that calm attempts to de-escalate may be necessary when dealing with youth suffering the ill-effects of trauma).

from numerous psychiatrists, psychologists, and pediatricians about the impact of shackling on children and adolescents. They reported that shackling can cause physical harm such as cuts and bruises in physically healthy children, or more serious injuries in children with limited mobility or prior nerve or vessel damage.[82] Given the public nature of shackling in court, shackling can lead to humiliation, as well as feelings of powerlessness and self-blame.[83] For youth who have experienced trauma, shackling can reinforce the effects of prior traumas.[84]

These findings suggest that youth are especially vulnerable to the use of force and arrests in schools. Although all arrestees and those subjected to the use of force experience physical and mental harm, the harm is likely exacerbated in K–12 school students. This is even more likely for students who have experienced trauma.[85]

As described in Part II, *infra*, courts frequently assume that law enforcement officers contribute positively to the school environment, although the evidence recounted above suggests that, in fact, their presence negatively impacts school climate and leads to criminalization of minor misconduct. Additionally, courts invoke rules created in the street-policing context in cases involving youth in schools without understanding the different impact that the aggressive arrest and force practices have on youth. The empirical evidence described above demonstrates the fallacy of these analyses.

II. DEVELOPMENT OF FOURTH AMENDMENT STANDARDS ON SEIZURES AND USES OF FORCE IN SCHOOLS

Fourth Amendment doctrine is one of the main legal constraints on law enforcement officers operating in schools. Ideally, this doctrine would account for the unique characteristics of schools and juveniles, especially the harms to which both school climate and youth are uniquely vulnerable. But Fourth

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[82] Affidavit of Dr. Gwen Wurm at ¶ 16, (Jan. 7, 2015), http://njdc.info/campaign-against-indiscriminate-juvenile-shackling [https://perma.cc/TY3B-JK4N]; Affidavit of Dr. Marty Beyer at ¶ 21–22 (Jan. 15, 2015), http://njdc.info/campaign-against-indiscriminate-juvenile-shackling [https://perma.cc/CHX4-EE2K].

[83] Affidavit of Dr. Marty Beyer, *supra* note 82, at ¶ 9–10; Affidavit of Dr. Gwen Wurm, *supra* note 82, at ¶ 11, 14; Affidavit of Dr. Donald Rosenblitt at ¶ 11, (Jan. 6, 2015), http://njdc.info/campaign-against-indiscriminate-juvenile-shackling [https://perma.cc/FC72-3ZVW]; Affidavit of Dr. Robert Bidwell at ¶ 11, (Feb. 12, 2015), http://njdc.info/campaign-against-indiscriminate-juvenile-shackling [https://perma.cc/MM6V-4MQT].

[84] Affidavit of Dr. Gwen Wurm, *supra* note 82, at ¶ 13; Affidavit of Dr. Donald Rosenblitt, *supra* note 83, at ¶ 12; Affidavit of Dr. Eugene Griffin at ¶ 19, (Dec. 12, 2014), http://njdc.info/campaign-against-indiscriminate-juvenile-shackling [https://perma.cc/2UUV-RPBM]; Affidavit of Dr. Julian Ford at ¶ 13, (Dec. 11, 2014), http://njdc.info/campaign-against-indiscriminate-juvenile-shackling [https://perma.cc/8TCU-JTPM]; Affidavit of Dr. Robert Bidwell, *supra* note 83, at ¶ 8.

[85] Given these findings, it is unsurprising that at least 75 percent of youth in the juvenile justice system have experienced trauma. *See* Smithgall et al., *supra* note 79, at 42 (citation omitted).

Amendment jurisprudence on seizures and uses of force in schools is best described as incoherent. Utilizing "blind balancing," an analytic approach resting on little data or empirical study,[86] courts considering cases in this realm often rely on incorrect assumptions rather than evidence. While the Supreme Court has decided numerous cases concerning searches in schools, it has never decided a case concerning seizures of juveniles or uses of force in schools. A review of the lower courts' treatment of this issue makes the high Court's lack of attention apparent.

The first two Sections below review Supreme Court precedents that bear on the application of the Fourth Amendment to seizures and uses of force in schools. Section A focuses on the Court's Fourth Amendment jurisprudence in schools, led by *New Jersey v. T.L.O.*; and Section B reviews *Graham v. Connor*, the case announcing the standard typically used to evaluate use-of-force claims.

Section C reviews appellate cases involving seizures and uses of force effected by law enforcement officers in schools. Section C also discusses a federal district court's finding regarding the Birmingham Police Department's use of mace on high school students. The review reveals a wide variety of decisional approaches in similar cases. For example, some rely heavily on *T.L.O.*, while some ignore it altogether. Overall, courts are failing to recognize that the school context and unique vulnerabilities of youth matter. Accordingly, courts are blind to the harms that law enforcement's presence can inflict on both school communities and youth.

A. T.L.O.*: The Supreme Court's First Foray into the Fourth Amendment in Schools*

In *New Jersey v. T.L.O.*, the Supreme Court considered whether the Fourth Amendment offered any protection to students against searches conducted by school officials in schools.[87] T.L.O. sought the suppression of incriminating evidence uncovered in a search of her purse "that implicated [her] in marihuana dealing[],"[88] and her later confession to selling marijuana in school. Though the Court initially granted certiorari to determine whether the exclusionary rule should extend to juvenile delinquency proceedings, it later broadened its inquiry to determine the applicable Fourth Amendment standard for searches conducted by school authorities.[89]

The Court grappled at some length with this question, but ultimately abandoned the traditional probable cause and warrant requirements for searches.[90] Instead, it adopted the balancing approach first articulated in *Camara v. Munic-*

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[86] Baradaran, *supra* note 28, at 3.
[87] New Jersey v. T.L.O., 469 U.S. 325 (1985).
[88] *Id.* at 328.
[89] *Id.* at 332–33.
[90] *Id.* at 337–45.

ipal Court, which addressed administrative (non-criminal) searches and rested on the overall reasonableness of the intrusion.[91] That reasonableness approach requires consideration of "the individual's legitimate expectations of privacy and personal security; [and] the government's need for effective methods to deal with breaches of public order."[92]

The Court next considered whether a cognizable privacy interest existed in the context of juveniles in public schools. It concluded that juveniles (in school) do, in fact, have legitimate expectations of privacy that could be violated by a search of their personal property.[93] It further considered the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[94] The majority highlighted the need for order-maintenance efforts in schools, concluding that "the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."[95]

Holding that it needed 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,"[96] the Court established that "[t]he school setting . . . requires some modification of the level of suspicion of illicit activity needed to justify a search."[97] Borrowing heavily—and without explanation—from its decision in *Terry v. Ohio*, which governs temporary stops,[98] the Court ultimately concluded that the appropriate standard was "reasonableness, under all the circumstances,"[99] as defined by a two-step test: (1) whether the action was justified at its inception; and (2) whether the search as actually conducted was reasonably related in scope to the circumstances that justified the interference in the first place.[100] The Court further concluded as follows:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is

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[91] *Id.* at 337 ("The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" (quoting Camara v. Municipal Court, 387 U.S. 523, 536–37 (1967))). For a useful description of the significance of the Court's shift in *Camara* to a balancing approach, see Frank Rudy Cooper, *Cultural Context Matters:* Terry*'s "Seesaw Effect,"* 56 OKLA. L. REV. 833, 852 (2003) (describing "groundbreaking" nature of *Camara* decision).

[92] *T.L.O.*, 469 U.S. at 337.

[93] *Id.* at 337–38.

[94] *Id.* at 339.

[95] *Id.*

[96] *Id.* at 340.

[97] *Id.*

[98] *Id.* at 341 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

[99] *Id.*

[100] *Id.* at 341.

> violating either the law or the rules of the school. Such a search will be permissible in its scope when 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.[101]

Thus, after *T.L.O.*, school officials need neither a warrant nor probable cause to conduct a search of a juvenile in school.

As numerous scholars have observed, *T.L.O.* left more questions unanswered than answered.[102] Particularly, although the Court identified a variety of factors that may be relevant to considering whether a search constitutes an unwarranted invasion of privacy, it failed to explain *how* those factors are relevant.[103] For example, does being younger or older make a search more or less intrusive? Are boys or girls more sensitive to having their belongings or bodies searched? How does the severity of an infraction contribute to the analysis of whether a search is reasonable? The *T.L.O.* Court answered none of these questions.

Since deciding *T.L.O.* in 1985, the Supreme Court has rarely accepted cases raising questions about the application of Fourth Amendment standards in schools and has provided virtually no guidance as to how *T.L.O.*'s two-step test should be applied. It has also never directly addressed the question of appropriate standards for seizures and uses of force in schools. In two cases, it considered whether random drug testing of athletes and participants in extracurricular activities respectively, complied with the Fourth Amendment.[104] It answered in the affirmative both times.[105]

First, in *Vernonia School District 47J v. Acton*, the Court addressed random suspicionless drug testing of athletes, and linked *T.L.O.* to the "special needs" doctrine in the Fourth Amendment realm.[106] In accordance with the typ-

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[101] *Id.* at 341–42 (footnotes omitted).

[102] *See* Feld, *supra* note 24, at 848; Gardner, *Strip Searching Students*, *supra* note 24, at 984; Gardner, *Student Privacy*, *supra* note 24, at 897–98; *see also* Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the* T.L.O. *School-Search Exception*, 66 N.Y.U. L. REV. 1077, 1078–79 (1991).

[103] Feld, *supra* note 24, at 858 (noting that "the Court did not explain the practical meaning of those limitations—age, sex, or the nature of the infraction" or how they applied in *T.L.O.* itself); Gardner, *Strip Searching Students*, *supra* note 24, at 984 ("While *Redding* offered possible elucidation of the nature of the infraction consideration, the Supreme Court has offered no guidance as to the meaning of the age and sex of the student factors." (footnotes omitted)); Gardner, *Student Privacy*, *supra* note 24, at 922–23 (critiquing *T.L.O.*'s failure to explain the age, sex, and nature of the infraction factors and offering possible explanations of them).

[104] Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[105] *Earls*, 536 U.S. at 825; *Vernonia School Dist. 47J*, 515 U.S. at 666.

[106] *Vernonia Sch. Dist. 47J*, 515 U.S. at 653 (noting that in schools, "the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for

ical mode of analysis in special needs cases,[107] it next identified the Fourth Amendment interest at issue—privacy—noting that the legitimacy of an alleged privacy interest turns on context.[108] In *Vernonia*, it held that the privacy interest was "not significant."[109]

Despite the focus on privacy, the Court also made two observations that apply with equal force to seizures and uses of force. *First*, "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school."[110] *Second*, "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[111]

On the other side of the balancing test, the Court considered the "nature and immediacy" of the government's interests.[112] There, the Court focused on the school district's interest in combating the "[ill] effects of a drug-infested school,"[113] which impacted the entire school community and were particularly pronounced given the potential "physical, psychological, and addictive effects of drugs."[114] In consideration of these facts, as well as "the relative unobtru-

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freedom to maintain order in the schools.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 340–41(1985))).

[107] The special needs doctrine grew from the Court's decision in *Camara*, and replaces the probable cause and warrant requirements with a balancing test in a variety of contexts "'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Id*. (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)). The Court cited numerous examples of such contexts. *See id*. at 653–54 (citing, *inter alia*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)) (allowing suspicionless checkpoints for the purpose of identifying drunk drivers); Treasury Emps. v. Von Raab, 489 U.S. 656 (1989) (upholding random drug testing for federal customs officers who carry arms or are involved in drug interdiction); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) (upholding suspicionless drug testing of railroad personnel involved in train accidents); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (allowing checkpoints near international borders to allow searches for unauthorized immigrants and contraband).

[108] *Vernonia Sch. Dist. 47J*, 515 U.S. at 654 (internal citation omitted) ("What expectations [of privacy] are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park.").

[109] *Id*. at 660.

[110] *Id*. at 655–56 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[111] *Id*. at 656.

[112] *Id*. at 660.

[113] *Id*. at 662–63 (noting that such effects were "visited not just upon the users, but upon the entire student body and faculty," and holding that it could not disturb the district court's findings that "'a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion,' that '[d]isciplinary actions had reached "epidemic proportions," and that 'the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture'").

[114] *Id*. at 661.

siveness of the search," the Court concluded that the drug-testing program passed Fourth Amendment muster.[115]

Although the *Vernonia* Court cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts,"[116] the next case addressing this issue, *Board of Education v. Earls*, found suspicionless drug testing of all students participating in extracurricular activities constitutional.[117] After noting that "[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults,"[118] the *Earls* Court concluded that the drug testing program was constitutional as well.[119]

In 2009, for the first time since *T.L.O.*, the Court considered a Fourth Amendment challenge to the search of a single student rather than a policy or widespread school practice affecting multiple students.[120] In *Safford Unified School District No. 1 v. Redding*, a thirteen-year-old girl challenged the legality of a strip search conducted because she allegedly possessed ibuprofen.[121] The Court applied the *T.L.O.* two-step analysis, including consideration of "the age and sex of the student."[122] Although the Court did not explain whether there is an age cutoff for strip searches or whether such searches are more appropriate for boys or girls, it did note that young people's "adolescent vulnerability intensifies the patent intrusiveness of the exposure."[123] Aside from a highly fact-bound analysis of the case at hand, the Court did not further expound on the meaning of the factors identified in *T.L.O.*[124]

In these cases, the Court has devoted much attention to the privacy interests of students—although the government's interests usually trump the students'. This focus on privacy makes it difficult to identify precisely how the Court would analyze a case involving a seizure or use of force in a school. As

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[115] *Id.* at 664–65.

[116] *Id.* at 665.

[117] Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 822 (2002).

[118] *Id.* at 831 (citing New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring)).

[119] *Id.* at 838.

[120] Safford Unified Sch. Dist. No. 1. v. Redding, 557 U.S. 364, 364 (2009).

[121] *Id.* at 368.

[122] *Id.* at 375.

[123] *Id.* (citing Brief for National Association of Social Workers et al. as *Amici Curiae*, 6–14). Justice Ginsburg made a similar observation. *See id.* at 382 ("Here, 'the nature of the [supposed] infraction,' the slim basis for suspecting Savana Redding, and her 'age and sex,' establish beyond doubt that Assistant Principal Wilson's order cannot be reconciled with this Court's opinion in *T.L.O.*" (Ginsburg, J., concurring in part and dissenting in part) (alteration in original) (quoting *T.L.O.*, 469 U.S. at 342)).

[124] *Id.* at 375–77 (holding that the search was not reasonable in scope because "the content of the suspicion failed to match the degree of intrusion," and there was no "indication of danger to the students from the power of the drugs or their quantity," nor "any reason to suppose that Savana was carrying pills in her underwear").

described further in Part III, the interests implicated by seizures and uses of force—dignity, autonomy, bodily integrity, and "locomotion"[125]—differ substantially from searches, which primarily implicate privacy. In the same vein, the Court has not addressed whether the governmental interests identified in *T.L.O.*, *Vernonia*, *Earls*, and *Safford*—primarily order-maintenance and combating illegal drug use—are relevant to Fourth Amendment analyses concerning seizures and uses of force rather than searches.

Nonetheless, the Supreme Court's holdings in *Vernonia* that "the nature of [Fourth Amendment] rights is what is appropriate for children in school,"[126] and that "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children"[127] would appear to apply in equal measure to cases involving seizures and uses of force. The lower courts seem, however, to have missed these critical holdings.

B. Graham v. Connor*: Setting the Standard for Excessive Force*

Aside from *T.L.O.*, *Graham v. Connor* has played the largest role in resolving Fourth Amendment excessive force challenges brought by students. Although the Supreme Court has never invoked *Graham v. Connor* in a case involving Fourth Amendment standards in schools, the lower courts frequently do so.

Graham v. Connor settled a lingering dispute in the federal courts: whether the Fourth Amendment or the Due Process Clause provided protection against the use of excessive force "in the course of making an arrest, investigatory stop, or other 'seizure' of [one's] person."[128] Rejecting a "generalized 'excessive force' standard,"[129] the Court located the right to be free from excessive force in the Fourth Amendment's guarantee of "the right 'to be secure in their persons . . . against unreasonable . . . seizures,'" rather than the Fourteenth Amendment's substantive due process standard.[130]

The Court further determined that the Fourth Amendment "requires 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,"[131] and ultimately, consideration of the totality of the circumstances.[132]

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[125] *See infra* notes 268–69 and accompanying text.

[126] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[127] *Id.* at 656.

[128] Graham v. Connor, 490 U.S. 386, 388 (1989).

[129] *Id.* at 394 (citing Tennessee v. Garner 471 U.S. 1, 7–22 (1985)).

[130] *Id.* The Court offered a limited explanation for its choice of the Fourth Amendment over the Due Process Clause: that "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." *Id.* at 395.

[131] *Id.* at 396 (citing *Garner*, 471 U.S. at 8; United States v. Place, 462 U.S. 496, 703 (1983)).

The Court identified three specific factors requiring consideration: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[133] It also concluded that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[134] Citing cases involving seizures rather than uses of force, the Court also declared that the "'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[135]

The Court offered no explanation for the adoption of an objective test in the use of force context, and, again citing a case involving a seizure rather than the use of force, simply declared that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[136] The Court ultimately announced that "subjective concepts like 'malice' and 'sadism' have no proper place" in the Fourth Amendment analysis of force.[137]

Since deciding *Graham*, the Supreme Court has rarely explained how to apply the standard it articulated.[138] In one of the few cases in which it directly decided the constitutionality of a use of force, the Court eschewed the *Graham* factors, and appeared to apply a general reasonableness test.[139] That said, lower courts continue to rely heavily on the *Graham* factors.

As numerous commentators have observed, the *Graham* "objective reasonableness" standard offers little direction to lower courts, police officers, and

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[132] *Id*. ("Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case[.]" (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979))).

[133] *Id*. (citing *Garner*, 471 U.S. at 8–9).

[134] *Id*. (citing Terry v. Ohio, 392 U.S. 1, 20–22 (1968)).

[135] *Id*. at 397 (citing Scott v. United States, 436 U.S. 128, 137–39 (1978); *Terry*, 392 U.S. at 21).

[136] *Id*. (citing *Scott*, 436 U.S. at 138).

[137] *Id*. at 399. The Court did note that an officer's intent in using force may be relevant to analyzing an officer's credibility in recounting the relevant circumstances. *Id*. at 399 n.12.

[138] The most common scenario the Court has addressed is the use of force in the context of a high-speed car chase by police officers that resulted in death or serious injury. *See* Mullenix v. Luna, 136 S. Ct. 305, 306–09 (2015) (per curiam); Plumhoff v. Rickard, 134 S. Ct. 2012, 2017, 2020 (2014); Scott v. Harris, 550 U.S. 372, 372 (2007). Other cases have addressed application of the *Graham* standard in the context of qualified immunity inquiries. *See, e.g*., City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015); Brosseau v. Haugen, 543 U.S. 194, 197 (2004) (per curiam).

[139] *Scott*, 550 U.S. at 383 ("[W]e must . . . slosh our way through the factbound morass of 'reasonableness.'").

any other party attempting to discern whether and when using force is appropriate.[140] Instead, "courts must 'slosh' their way through the 'factbound morass' without galoshes or a compass, which is to say, with almost no direction at all about what constitutes reasonable force."[141]

This observation unquestionably applies to cases concerning the use of force against students in schools. And, as explained below, lower courts frequently invoke *Graham* in cases involving uses of force in schools without considering whether the school context or youthfulness of the subject of force require any modification of the standard. This Article suggests that courts should rethink the "reasonableness" standard to ensure that those critical circumstances are part of the analysis.

C. What T.L.O. *and* Graham *Wrought: Confusion in the Lower Courts*

In the absence of guidance from the Supreme Court on how to address seizures and uses of force against juveniles in school, there is considerable confusion in the lower courts about how to appropriately address the thorny Fourth Amendment questions presented when law enforcement officers enter schools—whether schools are their usual workplaces, or they are responding to requests for assistance. A review of the cases of this kind reveals two common, but incorrect, assumptions: (1) that the use of law enforcement tactics in schools is positive, or at least benign, because such tactics maintain order and foster an environment conducive to learning; and (2) that seizures and uses of force as law enforcement tools can be used interchangeably among adults and children with the same effects and consequences. Both underlie an analytic approach that does not consider whether the rationales for those rules and standards appropriately account for the unique interests at stake in cases involving schools and youth.

A review of state and federal appellate cases involving seizures and uses of force effected by law enforcement officers in schools is below. This section also discusses a federal district court's findings regarding the use of mace on Birmingham high school students by the Birmingham Police Department.

1. Seizures by Law Enforcement Officers in Schools

Although the Supreme Court did not specify how its analysis in *T.L.O.* should apply to seizures, numerous federal courts considering Fourth Amendment challenges to seizures of students in schools have characterized their

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[140] *See, e.g.*, Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127 (2008); Jill I. Brown, Comment, *Defining "Reasonable" Police Misconduct:* Graham v. Connor *and Excessive Force During Arrest*, 38 UCLA L. REV. 1257, 1286 (1991).

[141] Harmon, *supra* note 140, at 1139–40.

treatment of such claims as following *T.L.O.*,[142] and state courts have followed suit.[143] The vast majority have done so without analyzing the differences be-

[142] *See* Ziegler v. Martin Cty. Sch. Dist., 831 F.3d 1309, 1322–23 (11th Cir. 2016) ("The initial detention of the students on the party bus for breathalyzer testing meets the *T.L.O.* standard of being justified at its inception, because it was reasonably related to the circumstances that caused the detention: to determine if students on the party bus had been drinking." (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1985))); C.B. v. City of Sonora, 769 F.3d 1005, 1034 (9th Cir. 2014) (en banc) (assumed "*T.L.O.*'s reasonableness standard applie[d]" and held that "[w]hen analyzing whether an individual's Fourth Amendment rights were violated, we must determine whether the seizure was reasonable under 'all the circumstances' " (quoting *T.L.O.*, 469 U.S. at 341)); Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1304 (11th Cir. 2006) ("[W]e apply the reasonableness standard articulated in *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42, 105 S.Ct. 733, 742–43, 83 L.Ed.2d 720 (1985), to school seizures by law enforcement officers."); Shuman *ex rel.* Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141, 147–48 (3d Cir. 2005) (citing decisions by the Fifth, Seventh, Ninth, and Tenth Circuits and holding, "[w]e join these courts of appeals in finding seizures in the public school context to be governed by the reasonableness standard, giving special consideration to the goals and responsibilities of our public schools"); Wofford v. Evans, 390 F.3d 318, 326 (4th Cir. 2004) ("The facts of *T.L.O.* involved only a search. But the policies underlying that decision easily support its extension to seizures of students by school officials. . . . We thus address appellants' claim of illegal seizure under the rubric announced in *T.L.O.*"); Doe *ex rel.* Doe v. State of Hawaii Dep't. of Educ., 334 F.3d 906, 909 (9th Cir. 2003) (noting that *T.L.O.* "considered the reasonableness of a search in a school," and citing it to analyze "the reasonableness of the seizure . . . in light of the educational objectives [the teacher] was trying to achieve"); Milligan v. City of Slidell, 226 F.3d 652, 654–55 (5th Cir. 2000) ("Because this case involves the rights of students in a public school, a full bore *Terry* analysis is inappropriate. . . . The reasonableness inquiry must take into account the schools' 'custodial and tutelary responsibility for children.' Furthermore, students in the school environment have a 'lesser expectation of privacy than members of the population generally.' " (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656–57 (1995))); Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1013 (7th Cir. 1995) ("[I]f, as the Supreme Court recognized in *T.L.O.*, discipline is crucial to education and education . . . is necessary for freedom, depriving students of some liberty is linked to the ultimate liberation of the student. Moreover, flexibility in discipline is necessary to preserve the informality of the student-teacher relationship." (citing *T.L.O.*, 469 U.S. at 340)); Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1079 (5th Cir. 1995) ("[W]hile school officials are subject to the limitations of the fourth amendment, the reasonableness of seizures must be determined in light of all of the circumstances, with particular attention being paid to whether the seizure was justified at its inception and reasonable in scope."); Edwards *ex rel.* Edwards v. Rees, 883 F.2d 882, 884 (10th Cir. 1989) ("We believe that the same considerations which moved the Supreme Court to apply a relaxed Fourth Amendment standard in cases involving school searches support applying the same standard in school seizure cases.").

[143] Hunt v. State, 69 A.3d 360, 366 (Del. 2013) (footnotes omitted) (following citation of *T.L.O.*, describing standard for seizures as follows: "Several appellate courts, including the Third Circuit Court of Appeals, have held that seizures in public schools are valid if reasonable, 'giving special consideration to the goals and responsibilities of our public schools,' especially with regard to disciplinary matters. A child's age is one of the circumstances to be considered in evaluating the reasonableness of a seizure."); *In re Randy G.*, 28 P.3d 239, 246 (Cal. 2001) (citing *T.L.O.*, but holding that "detentions of minor students on school grounds do not offend the Constitution, so long as they are no arbitrary, capricious, or for the purposes of harassment"); M.D. v. State, 65 So.3d 563, 566 (Fla. Dist. Ct. App. 2011) ("As the Supreme Court noted in *T.L.O.*, the critical determination under the Fourth Amendment is whether the actions of the school officials were reasonable in light of all the circumstanc-

tween searches and seizures, instead sometimes modifying (modestly) *T.L.O.*'s two-part test, which requires inquiry into whether a search was justified at its inception and reasonable in scope.[144]

Courts have not generally distinguished the standards to be applied in consideration of the actor effectuating the seizure, for example, a teacher who taped a student to a tree,[145] or a SRO (there, a sheriff's deputy) who handcuffed an eleven-year-old girl in response to misbehavior.[146] Only a handful of cases addressing the standards for seizures in schools involved law enforcement personnel rather than school officials.

Among the many state and federal appellate cases addressing Fourth Amendment claims regarding seizures in schools, four that illustrate the variety of approaches to these cases are described below. Three claim to be following *T.L.O.* in three different ways, and attempt to account for the uniqueness of the school context in identifying the appropriate standard, while the other does not even cite it. Only one considers the young age of the student seized as a factor in determining the constitutionality of the seizure. In sum, the cases reflect the lower courts' divergent approaches and illustrate the incoherence of the jurisprudence in this area.

The Eleventh Circuit has declared that the *T.L.O.* two-step approach applies in cases involving seizures as well as searches.[147] In *Gray ex rel. Alexander v. Bostic*, the court considered the claim of a nine-year-old girl who said something disrespectful to a coach during gym class—characterized by the court as a "verbal threat,"[148] even though the coach to whom the statement was directed said that she did not feel threatened by the student,[149] and another

es."); T.S. v. State, 863 N.E.2d 362, 375 (Ind. Ct. App. 2007) (citing *T.L.O.* and holding "we conclude that the proper test for determining whether a school police officer was justified in removing a student from his or her class is whether such an intrusion was reasonable"); J.D. v. State, 920 So.2d 117, 119, 122 (Fla. Dist. Ct. App. 2006) (describing *T.L.O.* as "the starting point for the Fourth Amendment analysis" and analyzing seizure by reviewing "[w]hat is reasonable under all of the circumstances"); People v. Kline, 824 N.E.2d 295, 299–300 (Ill. App. Ct. 2005) (citing *T.L.O.* and holding that reasonable suspicion standards applies to seizures in schools); State v. Crystal B., 24 P.3d 771, 774 (N.M. Ct. App. 2000) (citing *T.L.O.* for the proposition that "the legality of a search of a student depends on the reasonableness, under all the circumstances, of the search," and appearing to apply reasonableness standard to seizure claim).

[144] The only major exception is the Seventh Circuit, which, when analyzing the seizure of a student, considered how searches and seizures differ, particularly in the school context. *Wallace*, 68 F.3d at 1014. The court concluded that "in the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent." *Id.*

[145] *Doe*, 334 F.3d at 907.

[146] *Gray*, 458 F.3d at 1301.

[147] *Id.* at 1305.

[148] *Id.* ("It is undisputed that Deputy Bostic witnessed Gray threaten to do something physically to her teacher.").

[149] *Id.* at 1302.

coach told the SRO who overheard the "threat" that the officer's intervention was unnecessary.[150] In response, the SRO took the girl outside of the gym and handcuffed her, saying "[T]his is how it feels when you break the law," and "[T]his is how it feels to be in jail."[151] The officer reportedly detained and handcuffed the girl "'to impress upon her the serious nature of committing crimes that can lead to arrest, detention or incarceration,' and 'to help persuade her to rid herself of her disrespectful attitude.'"[152]

Invoking *T.L.O.*'s two-step analysis, the court asked (1) whether the seizure was justified at its inception, and (2) whether it was reasonable in scope.[153] For the first prong, it labeled the SRO's initial action—"stopping her, and asking her questions"—an "investigatory stop,"[154] announcing that its propriety turned on "reasonableness under the circumstances."[155] The court held that the SRO's "investigatory stop" met this standard because the student had issued a "verbal threat,"[156] which is a criminal violation under Alabama law.[157]

For the second prong, the court relied heavily on *T.L.O.* to identify the appropriate standard, simply substituting the word "seizure" for "search": "'[A seizure] will be permissible in its scope when the measures adopted are reasonably related to the objectives of the [seizure] and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[158] Using slightly different language, the court then somewhat confusingly described the relevant query as "whether the handcuffing of nine-year-old Gray was reasonably related to the *scope of the circumstances* which justified Deputy Bostic's initial interference and was not excessively intrusive."[159] Applying this standard, it concluded that the seizure was unconstitutional.[160] Citing federal criminal cases involving adults outside of the school context, the court observed that handcuffing is typically permitted during investigatory stops,[161] but

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[150] *Id.* at 1301.

[151] *Id.* (alteration in original).

[152] *Id.*

[153] *Id.* at 1305.

[154] *Id.*

[155] *Id.* ("[U]nder *T.L.O.*, the level of suspicion in a school setting needed to justify a search or an investigatory stop is only reasonableness under the circumstances.").

[156] *Id.*

[157] *Id.* (citing ALA. CODE § 13A-11-8 (2018)).

[158] *Id.* at 1305–06 (alterations in original) (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

[159] *Id.* (emphasis added).

[160] *Id.* at 1305–06.

[161] *Id.* ("[D]uring an investigatory stop, an officer can still handcuff a detainee when the officer reasonably believes that the detainee presents a potential threat to safety." (citing United States v. Hastamorir, 818 F.2d 1551, 1557 (11th Cir. 1989))); United States v. Blackman, 66 F.3d 1572, 1576–77 (11th Cir. 1995); United States v. Kapperman, 764 F.2d 786, 790–91 & n.4 (11th Cir. 1985).

reasoned that the student's young age, the lack of a threat to safety, and the punitive purpose of the handcuffing made the handcuffing unreasonable.[162]

The Eleventh Circuit's analysis reflects a hybrid approach. It both formally embraced the importation of traditional criminal procedure norms and concepts in the school context—labeling a sheriff's deputy taking a nine-year-old girl aside to discuss a disrespectful statement an "investigatory stop" of a "verbal threat"—and modified the *T.L.O.* two-step approach to determine the overall reasonableness of the encounter, including consideration of the officer's subjective purpose in handcuffing the student.[163] This was a notable departure from typical Fourth Amendment analyses of seizures.[164] Overall, the Eleventh Circuit recognized that this departure was appropriate given the school context and age of the girl subjected to the seizure,[165] but it did not grapple with the differing interests at stake for seizures instead of searches in identifying the appropriate standard.

In *C.B. v. City of Sonora*, the Ninth Circuit articulated a different standard for seizures in schools, invoking *T.L.O.*, but not its two-step analysis.[166] There, the circumstances appear relatively benign: an eleven-year-old boy, who was described to police officers as a "runner" who had not taken his medication and was "out of control," sat quietly in a schoolyard, and did not respond to officers' questions.[167] Although the school staff at the scene did not ask for him to be removed, the officers did so, taking him away, handcuffed, in the back of a police vehicle.[168] Sitting *en banc*, the court fractured badly; according to the majority, "[w]hen analyzing whether an individual's Fourth Amendment rights were violated [in school], we must determine whether the seizure was reasonable under 'all the circumstances.'"[169] Relying in part on the boy's "resist[ance]"—"ignoring their questions"[170]—the majority concluded that the defendants were entitled to qualified immunity because the plaintiff "c[ould]not

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[162] *Gray*, 458 F.3d at 1306. ("[A]t the time Deputy Bostic handcuffed Gray, there was no indication of a potential threat to anyone's safety. . . . Deputy Bostic's handcuffing of Gray was his attempt to punish Gray in order to change her behavior in the future."); *id.* ("[T]he handcuffing was excessively intrusive given Gray's young age and the fact that it was not done to protect anyone's safety.").

[163] *Id.* at 1307.

[164] *See* Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65, 75 (2017) ("A search or seizure is lawful provided that the objectively observable facts give rise to individualized suspicion. . . . [I]f the objectively observable facts supported individualized suspicion, it does not matter that the investigating officer searched without subjectively believing that there was individualized suspicion.").

[165] *Gray*, 458 F.3d at 1306.

[166] C.B. v. City of Sonora, 769 F.3d 1005, 1034–35 (9th Cir. 2014) (en banc) (Smith, M., J., concurring in part, dissenting in part, and writing for the majority for Part I of the opinion).

[167] *Id.* at 1034.

[168] *Id.* at 1031, 1035.

[169] *Id.* at 1034 (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

[170] *Id.*

show that a reasonable officer would have understood that taking [the plaintiff] into temporary custody was unreasonable, and therefore unconstitutional."[171]

The Ninth Circuit thus identified *T.L.O.*'s demand for reasonableness as the relevant standard but ignored entirely the two-part test developed for searches without explanation. Because it did not identify any objective criteria to guide its analysis, the Ninth Circuit's decision offered virtually no guidance to schools, officers, or other courts on how to analyze whether a student's seizure in school constitutes a Fourth Amendment violation. Instead, the majority focused on its concern that finding the officers liable for the seizure in *C.B.* would effectively require officers to undertake investigations when called to schools—a requirement it deemed "unworkable"[172] without explaining why investigations would be necessary or why they would be unworkable. It also expressed concern about the "risk [of] personal financial liability"[173] for officers, while failing to address the infringement on the interests of the seized student and impact of unnecessary police seizures on the plaintiff or any other grade-school students.

The Tenth Circuit took a totally different approach, ignoring *T.L.O.* in its entirety. In *A.M. ex rel. F.M. v. Holmes*, the underlying facts are remarkable: a seventh-grader who "generated several fake burps," that "allegedly disrupt[ed] his physical-education class,"[174] was handcuffed at school and transported to a precinct because he allegedly violated a statute barring "'willfully interfer[ing] with the educational process of any public . . . school.'"[175] The court used a standard Fourth Amendment analysis to determine that the arresting officer was entitled to qualified immunity because he reasonably determined that probable cause to arrest existed.[176] The Court's analysis boiled down to the following question: "'[W]hether [the officer] possessed knowledge of evidence that would provide probable cause to arrest [the individual] on *some* ground.'"[177] Resting on its broad interpretation of the statute that barred "interfer[ing] with the educational process,"[178] it concluded that the officer did possess the required knowledge.[179]

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[171] *Id.* at 1034. The majority was not explicit as to whether it was deciding that that the officers were entitled to qualified immunity because there was no constitutional violation, or whether the right at issue was not clearly established at the time of the alleged violation. Notably, this analysis disregarded the Ninth Circuit's previous command that "[i]n applying the Fourth Amendment in the school context, the reasonableness of the seizure must be considered in light of the educational objectives [the teacher/administrator] was trying to achieve." Doe *ex rel.* Doe v. Hawaii Dep't of Educ., 334 F.3d 906, 909 (9th Cir. 2003).

[172] *C.B.*, 769 F.3d at 1035.

[173] *Id.*

[174] A.M. v. Holmes, 830 F.3d 1123, 1129 (10th Cir. 2016).

[175] *Id.* at 1139 (quoting N.M. STAT. ANN. § 30-20-13(D)).

[176] *Id.* at 1150.

[177] *Id.* at 1139 (quoting Apodaca v. City of Albuquerque, 443 F.3d 1286, 1289 (10th Cir. 2006)).

[178] *Id.* at 1142 ("The ordinary meaning of these statutory terms would seemingly encompass F.M.'s conduct because F.M.'s burping, laughing, and leaning into the classroom stopped the

Aside from its astonishing facts, this case is noteworthy because the court did not even consider the school setting or the student's young age. Instead, with no mention of *T.L.O.*, the Tenth Circuit fully embraced the traditional qualified immunity inquiry in a case involving an arrest, requiring the interpretation of a criminal statute without regard for the atypical setting or arrestee.[180]

In a sharp split with the federal courts, the Supreme Court of California cited *T.L.O.* and *Vernonia*, but effectively disregarded the core principles announced in both cases.[181] There, a school security officer observed a student acting suspiciously—by being in an area where students are not allowed to gather, and "fix[ing] his pocket very nervously"—followed the student to class, and asked him to leave class to speak with her in the hallway.[182] The officer asked him repeatedly if he had "anything on him."[183] A consented-to "patdown search" revealed a knife in the student's pocket.[184]

Citing *T.L.O.*, *Vernonia*, and *Terry*, the court concluded that the Fourth Amendment required "reasonableness" to assess the constitutionality of a seizure in school, accomplished by "'balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'"[185] Acknowledging that seizures implicate different interests than searches, it concluded that seizures create only a "trivial" intrusion on students because "the minor is not free to move about during the school day."[186] Ultimately, the court replaced *T.L.O.*'s demand for reasonableness with its own conclusion that seizures are constitutional as long as they are not "arbitrary, capricious, or for the purpose of harassment."[187]

The Supreme Court of California's conclusion rests in large part on two assumptions: (1) students do not have a substantial interest in freedom of move-

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flow of student educational activities, thereby injecting disorder into the learning environment, which worked at cross-purposes with [the plaintiff's teacher]'s planned teaching tasks."). The staggering scope of routine (mis)behavior encompassed by this interpretation is beyond the scope of this article and worthy of separate treatment.

[179] *Id.* at 1150 ("[I]t would not have been clear to a reasonable officer . . . that [the] arrest of [the plaintiff] under N.M. Stat. Ann. § 30-20-13(D) would have been lacking in probable cause and thus violative of [the plaintiff's] Fourth Amendment rights.").

[180] Then-Judge Gorsuch responded to the ninety-four-page opinion in a short and stinging dissent that technically rested on a disagreement over the meaning of a New Mexico statute, but also suggested that he was troubled by the aggressive use of arrest to address fake burps by a seventh grader in gym class. *See id.* at 1169–70 (Gorsuch, J., dissenting).

[181] *In re Randy G.*, 28 P.3d 239, 245 (Cal. 2001).

[182] *Id.* at 241.

[183] *Id.* at 242.

[184] *Id.*

[185] *Id.* at 245 (quoting Terry v. Ohio, 392 U.S. 1, 20–21 (1968)).

[186] *Id.* at 246.

[187] *Id.* ("Were we simply to extend [the reasonable suspicion] standard to the school setting, we would have failed utterly to accommodate the special needs existing there. Therefore, we conclude instead that detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment.").

ment in school, and (2) officers in schools are school personnel who do not act as law enforcement agents. For the first assumption, the court offered a thorough recounting of the ways in which students' movement is restricted in schools.[188] This review led it to conclude that the intrusion created by a seizure was "trivial" because "the minor is not free to move about during the school day."[189] This is, at best, a cramped notion of students' freedom of movement in school. While some schools do sharply limit the ability of students to move around, a seizure—perhaps accomplished by handcuffing—cannot seriously be thought to be a reasonable response to a student simply being out of place—for example, in a hallway without a pass.

For the second assumption, the court posited that the standard for seizures should be devised with the understanding that criminal investigation is not usually the aim of school personnel—including the officer who detained and searched the student in that case—to interrupt students' freedom of movement.[190] The court painted a picture of "school security officers" and traditional school staff as being part of one team that is separate and apart from law enforcement.[191] But this is simply not an accurate representation of how most law enforcement officers function in schools, where they are typically titled "school resource officers" and are full-fledged members of local police or sheriff's departments. Moreover, the court failed to explain why its conclusion that the officer did not act "with or at the behest of law enforcement agencies" was relevant to defining Fourth Amendment rights.[192] In short, the Supreme Court of California did not rely on sound evidence of actual practices in the school where the arrest at issue took place or acknowledge the diversity of school policing practices in defining the Fourth Amendment rights of California's schoolchildren.

Overall, the Supreme Court of California's analysis paid special attention to the school context but painted a portrait of an extraordinarily punitive environment—where a seizure by a school security officer may be deemed reasonable for virtually any reason—that most Americans would not recognize. Fur-

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[188] *Id*. at 245 ("School personnel, to maintain or promote order, may need to send students into and out of classrooms, define or alter schedules, summon students to the office, or question them in the hall."); *id*. at 246 (noting that a school can "require the minor's presence on campus during school hours, attendance at assigned classes during their scheduled meeting times, appearance at assemblies in the auditorium, and participation in physical education classes out of doors").

[189] *Id*. at 246.

[190] *Id*. at 245 ("[A]s the high court has observed, school officials 'are not in the business of investigating violations of the criminal laws . . . and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence.' " (quoting Skinner v. Railway Labor Execs.' Assn., 489 U.S. 602, 623 (1989))). This observation is somewhat ironic given that the court explores this topic in the context of a juvenile delinquency proceeding against a student arrested in school by a school police officer for violating the penal code. *Id*. at 247 n.3.

[191] *Id*. at 247.

[192] *Id*. at 247 n.3.

ther, it did not pay heed to the notion that the costs imposed by seizing youth are different from those when seizing adults.

In sum, appellate courts have described the standard for seizures in schools as one with limited constitutional protections for students, with the Fourth Amendment providing less robust protections for students in schools than for individuals in other contexts. The courts have been less uniform in offering a method to determine *how* those Fourth Amendment standards should be different. Some courts have embraced *T.L.O.*, at times modifying its two-step analysis, while others have failed to even cite it. The result is a hodgepodge of standards across the country, which leaves students, schools, and police with an uncertain understanding of how the Fourth Amendment applies in schools.

2. Uses of Force by Law Enforcement Officers in Schools

Courts have expounded upon the relevant Fourth Amendment standards for claims that students have been subjected to excessive force rather haphazardly. Some courts blindly applied the standards for excessive force claims that apply to adult arrests. Others identified the school context as relevant to the analysis, but ultimately declined to articulate a standard for the use of force distinct from the standard that applies when law enforcement officers use force on adults. Some courts eschewed the Fourth Amendment entirely when confronting claims alleging the use of excessive force by educators, instead applying Fourteenth Amendment standards.[193]

Of the three federal circuits that have considered the Fourth Amendment standards that apply when law enforcement officers use force against students in school, only one has articulated a standard that attempts to adhere to the principles announced in *T.L.O.* Instead, most courts analyze use of force claims under the standard announced by the Supreme Court in *Graham v. Connor*: "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[194]

A recent Alabama federal district court case concerning a systemic challenge to police practices in schools provides a useful example of how many courts have eschewed the modifications to the standards for uses of force

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[193] *See, e.g.*, T.W. v. Sch. Bd. of Seminole Cty., Fla., 610 F.3d 588, 598 (11th Cir. 2010) ("'[E]xcessive corporal punishment, at least where not administered in conformity with a valid school policy authorizing corporal punishment . . . may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior.'" (quoting Neal *ex rel.* Neal v. Fulton Cty. Bd. of Educ., 229 F.3d 1069, 1075 (11th Cir. 2000))); Gottlieb v. Laurel Highlands Sch. Dist., 272 F.3d 168, 171–72 (3d Cir. 2001). For a thorough analysis of the implications of reviewing claims alleging excessive force by educators under the Due Process Clause rather than the Fourth Amendment, see Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397, 417–18 (2001).

[194] Graham v. Connor, 490 U.S. 386, 397 (1989).

against juveniles in schools, and instead applied standards developed in the context of street-policing involving adults. It is discussed in depth below, along with the three federal circuit court decisions analyzing uses of force by law enforcement officers in schools. They are emblematic of the confusion surrounding the treatment of uses of force in schools in the lower courts.

a. The Birmingham Police Department on Trial: Mace in High Schools

J.W. v. Birmingham Board of Education, a federal class action, challenged the Birmingham Police Department's practice of using mace against high school students.[195] The plaintiffs alleged that Birmingham Police Department officers violated their Fourth Amendment rights when they used Freeze+P, a brand of mace "described by its manufacturer as 'the most intense [ ] incapacitating agent available today.' "[196] Freeze+P causes "severe pain," and was "designed to temporarily incapacitate an individual by causing pain and intense tissue irritation," such as "burning of the eyes, skin, mouth, and airway, tearing, reflexive closing of the eyes, coughing, gagging, and difficulty breathing."[197]

At its core, the legal analysis the court used to evaluate the plaintiffs' claims was the framework articulated in *Graham v. Connor*, and its progeny in the Eleventh Circuit.[198] The *J.W.* court stated that the Fourth Amendment required a balancing of the plaintiff's interests and " 'the countervailing government interests at stake.' "[199] It then cited two Eleventh Circuit cases for the proposition that courts should consider the " 'need for the application of force' " by "follow[ing] the factors laid out in *Graham*—'the severity of the crime, the danger to the officer, and the risk of flight.' "[200] It next discussed a leading

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[195] J.W. v. Birmingham Bd. of Educ., 143 F. Supp. 3d 1118 (N.D. Ala. 2015). The case is a rarity in the universe of federal cases addressing the Fourth Amendment rights of students in schools in two ways: (1) the plaintiffs challenged the systemic practices of a police department in schools, rather than a single incident; and (2) the district court held a full trial on the merits. During the twelve day trial, the court heard testimony from, among others, eight plaintiffs who recounted harrowing experiences during their encounters with police officers in their high schools, experts on law enforcement practices, the psychological impact of the use of physical force against schoolchildren, and the physical effects of mace on children. *Id.* at 1127–35 (recounting plaintiffs' testimony); *id.* at 1137–40 (describing opinions of medical and psychological experts); *id.* at 1135 (recounting testimony of law enforcement expert).

[196] *Id.* at 1125. One component of the plaintiffs' claims was that officers who used mace on high school students failed to decontaminate them appropriately, prolonging the pain and burning that flows from the use of mace. *Id.* at 1151–58.

[197] *Id.* at 1137.

[198] *Id.* at 1143 (citing Graham v. Connor, 490 U.S. 386, 388 (1989)) ("Claims alleging that an officer used excessive force during the course of an arrest or other 'seizure' are analyzed under an objective reasonableness standard.").

[199] *Id.* (citing *Graham*, 490 U.S. at 396).

[200] *Id.* The court's entire recitation of the standard is as follows:

> If "the nature and quality of the intrusion on the [plaintiffs'] Fourth Amendment interests" outweigh "the countervailing government interests at stake," the seizures violated the plaintiffs'

Eleventh Circuit case involving the use of mace, which articulated a bright-line rule about when the use of mace is justified: " 'Courts have consistently concluded that using pepper spray is reasonable . . . where the plaintiff was either resisting arrest or refusing police requests, such as requests to enter a patrol car or go to the hospital.' "[201] It further described the Eleventh Circuit's standards for the use of mace, noting that "in situations where the suspect faces only minor charges, does not pose a risk to anyone's safety, and is not resisting arrest or attempting to flee, an officer's use of chemical spray is generally excessive."[202]

The "final consideration" the court identified as relevant to the Fourth Amendment analysis was that "the defendant S.R.O.s inflicted the alleged excessive force at issue here on students in schools."[203] Noting that "courts have routinely determined that under certain circumstances, public school students enjoy *reduced rights* pursuant to the First and Fourth Amendments,"[204] the court next recited the *T.L.O.* standard for the constitutionality of searches in schools settings,[205] and noted that "[t]he Eleventh Circuit has extended this rule to seizures by school-based police officers."[206]

Ultimately, the court described the question of whether *T.L.O.* or *Graham* applied as "largely academic" because it would reach the same result on the plaintiffs' claims whether it utilized "*T.L.O.*'s reasonable-under-the-

constitutional rights. *Graham*, 490 U.S. at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

In the Eleventh Circuit, courts determine whether the "nature and quality of the intrusion" on Fourth Amendment interests surpasses the government interests at stake by considering "1) the need for the application of force, 2) the relationship between the need and the amount of force used, and 3) the extent of the injury inflicted." Vinyard v. Wilson, 311 F.3d 1340, 1347 (11th Cir. 2002) (citing Leslie v. Ingram, 786 F.2d 1533, 1536 (11th Cir. 1986)). To evaluate the need for the application of force, courts follow the factors laid out in *Graham*—"the severity of the crime, the danger to the officer, and the risk of flight." *Ferraro*, 284 F.3d at 1198. The guiding principle in excessive force cases is that " 'gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force.' " Brown v. City of Huntsville, 608 F.3d 724, 738 (11th Cir. 2010) (quoting *Hadley*, 526 F.3d at 1330).

J.W., 143 F. Supp. 3d at 1143.

[201] *Id.* at 1144 (quoting *Vinyard*, 311 F.3d at 1348).

[202] *Id.* at 1144–45 (citing Hawkins v. Carmean, 562 F. Appx. 740, 743 (11th Cir. 2014); Fils v. City of Aventura, 647 F.3d 1272, 1288–89 (11th Cir. 2011); *Brown*, 608 F.3d at 739–40; Howell v. Sheriff of Palm Beach Cnty., 349 F. Appx. 399, 405 (11th Cir. 2009); Reese v. Herbert, 527 F.3d 1253, 1274 (11th Cir. 2008)).

[203] *Id.* at 1145.

[204] *Id.* (emphasis added) (citing Morse v. Frederick, 551 U.S. 393, 410 (2007); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–66 (1995); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988); Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 686 (1985); New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

[205] *Id.* (" '[A] search will be permissible in its scope when 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.' " (quoting *T.L.O.*, 469 U.S. at 342)).

[206] *Id.* (citing Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1305 (11th Cir. 2006)).

circumstances test," or *Graham*'s.[207] As a result, the court did not clearly identify the applicable Fourth Amendment standard.

With respect to the specific incidents at issue, the court concluded that two of the eight plaintiffs had been subjected to excessive force when SROs sprayed them with mace.[208] Both students were restrained at the time the mace was used—one in handcuffs,[209] the other pinned against a set of lockers by two adult men[210]—and were being minimally disruptive, one simply crying hysterically.[211] Both were charged with only minor offenses, and both experienced "a great deal of physical pain."[212]

The court deemed the use of mace "reasonable" and compliant with Fourth Amendment standards against the remaining six plaintiffs. One student had been fighting with a classmate, and pulled away from "someone [who] grabbed her from behind."[213] Although she was not aware that the person grabbing her was a police officer, the "resistance" she offered made the use of mace reasonable.[214] Another student had fought with a classmate in a cafeteria and grabbed the classmate's hair.[215] The use of mace was reasonable because the police officers on the scene could not manage to break up the fight before they used the mace.[216] And, in express reliance on a prior Eleventh Circuit case,[217] the district court concluded that a police officer acted reasonably when he maced a third plaintiff—a seventeen-year-old girl "who was 5'4" and weighed only 110 pounds"[218]—because she "pull[ed] away" from a police officer, "who was 6'1" and weighed 240 pounds," and "actively attempted to charge at [the school principal] who . . . was out of harm's way."[219] Yet another student, whose interaction with police officers stemmed from allegations that she was smoking in the bathroom, "swung her book bag at [the police officer], hitting him with it, and ran out of the front door."[220] After the officer tackled her and she fell into shrubbery, she was maced as she "was lying face down on the ground with [the officer] on top of her," and "resisted [the officer]'s attempts to handcuff her."[221] Because of "[the Eleventh C]ircuit's general principal [*sic*] that fleeing

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[207] *Id*. at 1147.
[208] *Id*. at 1147–48.
[209] *Id*. at 1147.
[210] *Id*.
[211] *Id*. at 1131, 1147.
[212] *Id*. at 1147–48.
[213] *Id*. at 1127.
[214] *Id*. at 1148. This conclusion was the law of the case following an earlier appeal. *Id*.
[215] *Id*. at 1128–29, 1149.
[216] *Id*. at 1149.
[217] *Id*. at 1148 (citing Brown v. City of Huntsville, 608 F.3d 724, 739 (11th Cir. 2010)).
[218] *Id*.
[219] *Id*.
[220] *Id*. at 1133–34.
[221] *Id*. at 1134.

from law enforcement justifies the use of chemical spray," the court concluded that the use of mace was not excessive force.[222]

Because the plaintiffs sought to hold the municipality liable for the constitutional violations, the court considered evidence of the Birmingham Police Department's systemic mace practices in the city's high schools.[223] A review of 110 use of force reports concerning the use of mace over eight years uncovered a "recurring theme":[224] "SROs using Freeze +P to subdue students who, to be sure, [we]re loudly misbehaving, but who d[id] not pose an immediate threat of physical harm to other students and school staff, the officers, or themselves."[225] At least eleven students were maced "solely for verbal noncompliance."[226] With the extensive trial record in mind, the *J.W.* court found injunctive relief was necessary to remedy the ongoing unconstitutional practices of the Birmingham Police Department.[227]

This case offers a prime example of a court incorporating Fourth Amendment standards that apply to street-policing practices in the school context involving youth. This approach demonstrates the court's disregard of the different impact that policing practices have on youth rather than adults. Although the court seemed mindful of the negative impact that the Birmingham Police Department's frequent use of mace had on students and the school climate generally, its Fourth Amendment analysis did not reflect that understanding.

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[222] *Id.* at 1148–49. In addition, the court concluded that the police department's failure to decontaminate six of the eight plaintiffs after they were maced constituted excessive force. *Id.* at 1126. Notably, "with regard to most of the plaintiffs, the defendants did absolutely nothing . . . to ease the plaintiffs' pain." *Id.* at 1156. The court did not separately analyze whether handcuffing in some or all of the cases constituted excessive force.

[223] *Id.* at 1168–72. The Birmingham Police Department appears to have maintained a single use of force policy that applied to all officers, whether they were working as S.R.O.s in schools or patrolling the streets. It provided Birmingham police officers with broad authority to use force, allowing its use, for example, " 'to stop potentially dangerous and unlawful behavior . . . and in the process of effecting lawful arrest or detention when the subject offers resistance.' " *Id.* at 1135. Assigning levels to both resistance and types of force, it allowed a two-level disparity between resistance and force, which in practice meant that "chemical spray, a Level 4 use of force, [wa]s a permissible response to verbal noncompliance, which is Level 2 resistance." *Id.* at 1169. It did not require consideration of factors such as:

> the seriousness of the crime committed by the subject, the subject's size, age and weight, the apparent physical ability of the subject, the number of subjects present, the weapons possessed or available to the subject, whether the subject has a known history of violence, whether innocents or potential victims are present in the area, and whether evidence is likely to be destroyed.

Id. at 1136.

[224] *Id.* at 1169.

[225] *Id.*

[226] *Id.* at 1176. ("[T]he defendant S.R.O.s readily admit that they consider the use of Freeze +P as an appropriate response to students who refuse their commands, for example, to stop crying, or who simply challenge them by backtalking or cursing at them.").

[227] *Id.* at 1178–79.

b. The Circuit Courts: Divergent Results

The Sixth, Ninth, and Tenth Circuits have resolved cases using analyses similar to that of the Alabama district court in the *J.W.* case. In three cases, students claimed excessive force because law enforcement officers handcuffed them.[228] In another, the plaintiff alleged that the use of a "twist-lock"—"a 'control hold' in which the officer twists the suspect's hand to place 'tension on the arm to get [him] to comply' "[229]—violated his Fourth Amendment rights.[230] In all of them, the courts relied primarily on *Graham v. Connor* to identify the appropriate standard.

The Sixth and Tenth Circuit cases all involved examples of typical misbehavior for seventh and fifth graders, respectively: a seventh grader who ran out of the principal's office when questioned about detentions for fighting;[231] a fifth grader who took an iPad from school (and attempted to return it);[232] and a seventh grader who "generated several fake burps" that "allegedly disrupt[ed] his

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[228] *See* A.M. v. Holmes, 830 F.3d 1123, 1129–30, 1151 (10th Cir. 2016); C.B. v. City of Sonora, 769 F.3d 1005, 1010 (9th Cir. 2014) (en banc); Neague *ex rel.* Neague v. Cynkar, 258 F.3d 504, 506 (6th Cir. 2001).

[229] Hawker v. Sandy City Corp., 591 F. Appx. 669, 670 (10th Cir. 2014) (alteration in original). The court also noted that:

> [its] case law describes the twist-lock as a technique in which an officer grabs a suspect's hand and twists to tighten up the arm. The maneuver allows the officer to twist the arm further if the suspect begins to fight or otherwise resist. The idea is to painfully, but without intentional injury, distract the suspect from what he is doing (fighting or resisting).

Id. at 670 n.1.

[230] *Id.* at 673.

[231] *Neague*, 258 F.3d at 505–06. A more detailed description of the incident is as follows: The plaintiff, a seventh grader who was called to the principal's office because he had been involved in two fights and ordered to attend detention on three Saturdays. *Id.* at 505. Upon questioning about a letter from the plaintiff's mother objecting to the detentions, the plaintiff cursed at the principal and used other profane language, "knocked [a] tape recorder out of [the principal's] hands, ducked under the principal's arm, and ran out of the office." *Id.* at 506. The principal responded by having his secretary call the police. *Id.* Upon arrival, the responding officers approached the plaintiff in the cafeteria, and ultimately returned him to the principal's office. *Id.* Once there, the police sergeant handcuffed him at the principal's request. *Id.*

[232] *Hawker*, 591 F. App'x at 670. The factual background was described in cogent detail by Judge Lucero in his published concurrence:

> A nine-year-old child has admittedly taken an iPad from school. His grandmother, commendably, sees the iPad at home and admonishes and directs him to return it to his school. So far, so good. In the process of returning the iPad, things go awry. The principal sees the child with the iPad, and after the child refuses to give it up, a school employee grabs it from his hands. A struggle ensues, with the child attempting to hit, kick, and head-butt three school employees, who eventually restrain him. When his grandmother is called, the child calms down. A police officer is also called, and the principal tells the officer she wants theft charges filed. While the child's grandmother looks on, the officer grabs the 67-pound child by the arm and yanks him off the floor, and then, after the child grabs the officer's arm, the officer puts him in a twist-lock, slams him against the wall, and handcuffs him.

Hawker v. Sandy City Corp., 774 F.3d 1243, 1243 (10th Cir. 2014) (Lucero, J., concurring).

physical-education class."[233] Yet both courts invoked *Graham v. Connor* and other cases involving adult arrests as setting the standards for excessive force cases involving juveniles in school, and neither court cited *T.L.O.* in its analyses.[234]

The Sixth Circuit determined that the case before it turned on whether the force was "objectively reasonable."[235] It also "ma[de] explicit" what was implied in another case: "[W]hen there is no allegation of physical injury, the handcuffing of an individual incident to a lawful arrest is insufficient as a matter of law to state a claim of excessive force under the Fourth Amendment."[236] That is, the Sixth Circuit decided that *all* claims of excessive force under the Fourth Amendment require a showing of physical injury.

The Tenth Circuit case involving the use of a twist-lock, which was unpublished and accompanied by a published concurrence decrying the outcome,[237] also relied heavily on *Graham* and never cited *T.L.O.*[238] Quoting *Graham*, the majority concluded that the appropriate analysis "turn[ed] on whether [the officer]'s use of the twist-lock was 'objectively reasonable' in light of the facts and circumstances confronting [her], without regard to [her] underlying intent or motivation."[239] That said, it did recognize the student's age and size—nine years old and sixty-seven pounds—as relevant factors.[240] But "these factors alone d[id] not render force used against him unreasonable per se."[241] Instead, the court reasoned that because the plaintiff "had been physically combative towards the school employees prior to [the officer's] arrival, requiring the efforts of three individuals to restrain him,"[242] and he "grabbed [the officer]'s arm, an action a reasonable officer could objectively view as an act of violent resistance,"[243] the twist-lock—which resulted in a "possible hairline fracture to his left clavicle (collarbone)," as well as "anxiety and post-traumatic stress"[244]—did not constitute a Fourth Amendment violation.[245]

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[233] *A.M.*, 830 F.3d at 1129. The factual background of this case is described above. *See supra* notes 174–75 and accompanying text.

[234] *A.M.*, 830 F.3d at 1151–56; *Hawker*, 591 F. App'x at 674–75 & n.8; *Neague*, 258 F.3d at 507–08.

[235] *Neague*, 258 F.3d at 507 (quoting Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir. 1993)).

[236] *Id.* at 508.

[237] *Hawker*, 774 F.3d at 1243 (Lucero, J., concurring).

[238] *See Hawker*, 591 F. App'x at 674–75.

[239] *Id.* at 674 (alteration in original) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).

[240] *Id.* at 675.

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.* at 671.

[245] *Id.* at 675. Judge Lucero, who would have dissented, "[b]ut for the current state of the law," agreed with this conclusion, but lamented that the jurisprudence "stems from what [he] consider[ed] to be an improperly and inadequately developed state of the law for treating childhood criminal behavior." *Hawker*, 774 F.3d at 1243 (Lucero, J., concurring).

The second Tenth Circuit case, *A.M. ex rel. F.M. v. Holmes*, discussed in Section II.C.1,[246] involved an arrest and handcuffing for fake burping that allegedly interfered with "the educational process" of a public school.[247] There, the court rested its decision to deny the plaintiff's claim on the second prong of the qualified immunity standard.[248] Therefore, the relevant inquiry was whether there was "clearly established law indicating that F.M.'s minor status could negate Officer Acosta's customary right to place an arrestee in handcuffs during the arrest."[249] Answering "no," the court did not even mention *T.L.O.*, and instead cited cases it read to allow the handcuffing of all arrestees.[250] Accordingly, it failed to tie the legal standard in any way to the plaintiff's status as a thirteen-year-old seventh-grader, or the school setting in which the use of force took place.[251]

Finally, like the district court in *J.W.*, the Ninth Circuit considered whether *T.L.O.* or *Graham* dictated the standard for analyzing the plaintiff's excessive force claim stemming from his handcuffing and determined that the result would be the same regardless of the standard.[252] The court did not employ the two-step *T.L.O.* approach. Instead, it simply assessed "reasonableness," and concluded that the handcuffing was not reasonable because the "use of handcuffs on a calm, compliant, but nonresponsive 11-year-old child was unreasonable under either [the *T.L.O.* or *Graham*] standard."[253]

These cases reveal that federal courts have been unwilling to grapple with the distinctions between uses of force by law enforcement officers in schools and on the streets, as well between juveniles and adults. Although some courts have concluded that application of *Graham* or *T.L.O.* would yield the same result, they have expressed strong hesitation to declare that one standard should take precedence over the other. They have not, therefore, considered whether the Supreme Court's identification of the unique interests at play in schools should play a role in determining the appropriate Fourth Amendment standards. They have also ignored the unique vulnerabilities of youth in determining whether the use of mace, handcuffs, or other types of physical force against students meet constitutional muster.

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[246] *See supra* Section II.C.1.

[247] A.M. v. Holmes, 830 F.3d 1123, 1130 (10th Cir. 2016).

[248] *Id.* at 1152.

[249] *Id.*

[250] *Id.* at 1154–55 (citing, *inter alia*, Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Petersen v. Farnsworth, 371 F.3d 1219 (10th Cir. 2004); Fisher v. City of Las Cruces, 584 F.3d 888 (10th Cir. 2009); Hedgepeth *ex rel.* Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148 (D.C. Cir. 2004)).

[251] *Id.* at 1151–56.

[252] C.B. v. City of Sonora, 769 F.3d 1005, 1030 (9th Cir. 2014) (en banc). As noted above, the officers were told that the boy was a "runner" who hadn't taken his medication when they arrived at a schoolyard, where they encountered the boy sitting quietly. *Id.* at 1034.

[253] *Id.* at 1030.

In sum, courts have applied a variety of standards to claims brought by youth alleging that they were victims of unconstitutional seizures or excessive force at the hands of law enforcement officers in schools. Some courts have declared the existence of probable cause sufficient to justify a seizure, while others have looked more broadly into the reasonableness of the officers' actions. For example, the Ninth Circuit has adopted a case-by-case reasonableness approach for evaluating seizures,[254] the Eleventh Circuit has employed a case-by-case analysis of whether a seizure was "'justified at its inception'"—turning on whether the reasonable suspicion of criminal activity was present—and "'reasonably related in scope,'"[255] and the California Supreme Court has held that seizures are permissible unless arbitrary and capricious.[256] In response to claims of excessive force, some courts have ignored *T.L.O.* entirely, while others have mentioned it, but focused on the *Graham* standard.[257] Most have not interpreted *T.L.O.* or the Supreme Court's other cases considering the scope of students' constitutional rights in schools to require an adjustment to the usual standards—except the occasional observation that students have reduced Fourth Amendment rights in schools.

As noted in Part I, these cases reveal two common and erroneous assumptions in Fourth Amendment jurisprudence concerning seizures and uses of force in schools. First, courts assume that law enforcement tactics have a positive, or at least benign, impact on schools and students. Second, based on the assumption that Fourth Amendment rules should be uniform and that the interests and vulnerabilities of adults and youth are the same, courts have imported rules and standards (ancillary to the Fourth Amendment's core demand of reasonableness) developed in cases involving adults to those involving youth in schools—especially with regard to uses of force.[258] Both assumptions demonstrate a failure to consider whether the rationales for those rules and standards appropriately account for the unique interests at stake in cases involving schools and youth.

These errors reflect a puzzling paradox of Fourth Amendment jurisprudence involving seizures and uses of force in schools: a simultaneous recognition (by most courts) that school policing is different from street-policing, but a refusal to alter the standards applied to better fit the different environment. This paradox should not stand. Instead, courts should put aside the standards that govern street-policing when adjudicating cases involving seizures and uses of force in schools and recalibrate their definition of "reasonableness" to account

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[254] *Id.*

[255] Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1304 (11th Cir. 2006).

[256] *In re Randy G.*, 28 P.3d 239, 246 (Cal. 2001).

[257] *See, e.g.*, J.W. v. Birmingham Bd. of Educ., 143 F. Supp. 3d 1118, 1143 (N.D. Ala. 2015).

[258] Examples of such rules include such as a requirement of physical injury, or an effective safe harbor for handcuffing an arrestee when probable cause of some crime exists, regardless of age or context. *See supra* notes 177–80, 235–36 and accompanying text.

appropriately for the relevance of the school setting and the unique vulnerability of juveniles to be harmed as a result of seizures and uses of force. I offer such an approach that accounts for these salient characteristics in Part III.

III. RECALIBRATING REASONABLENESS TO ASSESS SEIZURES AND USES OF FORCE IN SCHOOLS

This Article proposes that courts rethink their approach to analyzing seizures and uses of force of youth in schools. It provides a definition of reasonableness that is rooted in Supreme Court precedent, accounts for the needs of schools and students, and is readily administrable. This approach addresses the chief flaws of the jurisprudence in this area by recognizing both the longstanding recognition that the school context is unique and that youth are especially vulnerable to the harmful effects of seizures and uses of force.

This section proceeds in two parts. Section A expounds on the core principles announced by the Supreme Court in *T.L.O.* and *Vernonia* that should influence how the Fourth Amendment applies in the school setting. In addition, this Article suggests that the "age matters" principle articulated by the Supreme Court in other criminal procedure contexts should be used to answer Fourth Amendment questions as well. Section B sets forth an amended reasonableness framework for evaluating seizures and uses of force in schools under the Fourth Amendment. Specifically, it proposes that seizures and uses of force should be judged under a standard of reasonableness under all the circumstances that requires consideration of several enumerated criteria that are necessary for defining reasonableness regarding the treatment of youth in schools. This approach is faithful to precedent and cabins the devolution of "reasonableness" into a meaningless morass that is effectively no standard at all.

A. T.L.O. *Takeaways*

T.L.O. directly addressed only searches but announced two principles, amplified in later cases, which are useful in identifying the appropriate standard for judging seizures and uses of force in schools under the Fourth Amendment. First, given that adjustment of the usual Fourth Amendment standards is necessary because school is a unique environment, determining "reasonableness under all the circumstances" requires balancing an individual's interests with governmental interests and recognizing that the infringement of the student's interests should be limited to that which is necessary to accommodate the government's interest. Second, age is relevant to determining reasonableness when evaluating Fourth Amendment issues involving children in schools.

1. The School Context Shapes the Meaning of Reasonableness

In *T.L.O.*, the Court discussed the unique need to maintain order in schools as the key to defining reasonableness in the school context.[259] Given that need, the Court held that the school context required deviation from the usual warrant requirement for searches.[260] As noted in Section II.A, the Court further expounded on its "school is different" thesis in *Vernonia*, when it considered the constitutionality of a drug-testing program for student-athletes, more clearly stating that "the nature of [constitutional] rights is what is appropriate for children in school."[261] It held as follows: "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[262]

However, the Court has never announced that the uniqueness of the school environment means that categorically *lower* constitutional protections apply. Although it has approved searches that would not usually pass constitutional muster largely because they took place in schools, it has never indicated that such approval would always be forthcoming. Instead, consideration of the unique interests at play in schools is essential to defining reasonableness and should sometimes lead to greater protection for students against seizures and uses of force than would typically exist.

Thus, determining "reasonableness under all the circumstances" requires both balancing an individual's interests with governmental interests *and* recognition that when "schools' custodial and tutelary responsibility for children"[263] is at play, the government's power must be limited so that it fits educational interests.[264] Identifying the specific interests of both the individual and school in defining educational interests is particularly important.

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[259] New Jersey v. T.L.O., 469 U.S. 325, 338–39 (1985).

[260] *Id.* at 340 ("It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment[.]"); *see also id.* ("The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search.").

[261] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995).

[262] *Id.*

[263] *Id.*

[264] Kathryn Urbonya has made a similar argument in the context of exploring the Fourth Amendment standards that should apply specifically to school officials who use force against students. She explained:

> The unique context of the public schools, in which officials exercise neither criminal law enforcement powers nor parental powers but rather "custodial" and "tutelary" powers, thus complicates the Fourth Amendment analysis of reasonableness. The reasonableness of physical force becomes intertwined with the school's power to exercise limited custody and requires an "objective" examination of whether the force used was reasonable under the particularized circumstances confronting a given school official and whether it furthered the purpose for which it was used.

Urbonya, *supra* note 193, at 424–25 (footnotes omitted).

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.[265] And the Court has identified the school's interest in maintaining an orderly environment where rules are followed as the countervailing interest.[266] But, when seizures and uses of force are at issue, other interests are at stake.

Beginning with the student's interests, it is critical not to conflate the interests implicated by searches, seizures, and uses of force. Searches primarily implicate privacy and dignitary interests; seizures affect a person's dignity, as well as autonomy, bodily integrity, and "locomotion."[267] The interests implicated by uses of force bear a much stronger resemblance to those implicated by seizures, and are effectively derivative of them, but some are implicated to a stronger degree. For example, a use of force that results in pain or physical injury more directly implicates a student's interest in bodily integrity than a seizure accomplished with little or no force, such as confining a student to a room.[268]

Courts rarely take note of these different interests in Fourth Amendment analyses concerning seizures or uses of force, and scholars have paid scant attention to doctrine concerning seizures as well.[269] As recounted in Section II.C, numerous courts have followed this unfortunate course when deciding cases stemming from encounters in schools. But *T.L.O.*, its progeny, and logic all suggest that courts addressing Fourth Amendment questions in schools should not ignore these differences. Instead, courts should recalibrate reasonableness to fit the context and subjects (students) in play.

A standard that also accurately reflects the government's interests in effecting seizures and uses of force in schools is necessary. As noted above, in *T.L.O.*

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[265] *See, e.g.*, Vernonia, 515 U.S. at 654 ("The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes."); New Jersey v. T.L.O., 469 U.S. 325, 338–40 (1985).

[266] *T.L.O.*, 469 U.S. at 340 ("How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place?"); *see also* Vernonia, 515 U.S. at 661 (characterizing governmental interest as "[d]eterring drug use").

[267] *See* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 357–58 (1998); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1328–30 (1990) Gouldin, *supra* note 23, at 59.

[268] Moreover, as Alexander Reinert has suggested, collective interests as well as individual interests should be recognized in Fourth Amendment analyses. *See* Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1478 (2010). In the school context, this would allow recognition of the harm that befalls the entire school community when seizures and uses of force are used. This harm is intensified when it occurs in a public setting, e.g., such as a perp-walk down a school hallway. *Id.* at 1489 ("A public Fourth Amendment intrusion leaves an impression, especially one that is perceived as wrongful or unjustified.").

[269] As noted above, this lack of attention has led Lauryn Gouldin to label seizure doctrine a "neglected sibling." Gouldin, *supra* note 23, at 59.

and related cases, the Supreme Court appears to define the government's key interest as, above all, order maintenance. It has posited that maintaining order is necessary "to maintain an environment in which learning can take place[.]"[270] But seizures and uses of force are not always necessary to achieve order. Indeed, their use can be detrimental to that goal. In concluding otherwise, the Court has been engaged in "blind balancing," that is, "the process of decision making based simply on common sense and a gut assessment of risk, without consideration of data, evidence, or empirical studies."[271] To avoid this pitfall, courts should be attentive to evidence of how seizures and uses of force actually relate to government interests.

Seizures and uses of force in schools should not be viewed as necessarily having a beneficial effect on the school environment. As recounted in Section I.A, several studies have revealed that a law enforcement presence in schools typically leads to the criminalization of normal adolescent behavior, which impacts the climate of the entire school.[272] Moreover, students can be injured not just when they themselves are at risk of physical violence at the hands of law enforcement, but when their classmates are as well. For example, as the trial in the *J.W.* case in Birmingham revealed, uses of force in schools can directly impact unintended targets, like mace temporarily debilitating students or teachers who happen to be in the area.[273] And the forceful removal of a student from a classroom can be traumatizing for student-witnesses, like in Columbia, South Carolina.[274] Given that social science literature reveals that a school's entire environment can be rendered toxic by the use of aggressive security measures such as metal detectors, we should expect sometimes violent seizures and uses of force to do so as well.[275]

For these reasons, the two-step analysis the Court used in *T.L.O.* to define "reasonableness, under all the circumstances" when considering a search—"'whether the . . . action was justified at its inception,'"[276] and "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place'"[277]—is not well-suited to analyze seizures and uses of force in schools. It does not account for the unique interests at play when seizures and uses of force are at issue, making replacement of the word "search" with "seizure"[278] inadequate.

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[270] *T.L.O.*, 469 U.S. at 340.
[271] Baradaran, *supra* note 28, at 3.
[272] *See supra* Section I.A.
[273] J.W. v. Birmingham Bd. of Educ., 143 F. Supp. 3d 1118, 1128–29 (N.D. Ala. 2015).
[274] *See supra* note 4 and accompanying text.
[275] *See supra* notes 46–71 and accompanying text.
[276] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
[277] *Id.* (quoting *Terry*, 392 U.S. at 20).
[278] *See supra* note 158 and accompanying text.

In particular, the variation in types of seizures and uses of force makes *T.L.O.*'s two-step analysis a particularly poor fit. As cases described in Part II make clear, seizures take many forms—from confining a student to an office for a short period of time, to handcuffing in a school hallway. Additionally, such seizures often escalate to involve the use of force. When a school resource officer confronts a student in the hallway, tells her to stop, the student stops, and the officer then maces her because she is too loud for the officer's taste, how does one define the "inception" of the action? Does the seizure—accomplished by the student's compliance with the order to stop—mark the inception of the action? Or the deployment of mace? In contrast, it is typically much easier to identify the inception of a search.

Similarly, determining whether a seizure "as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place," would often be no easy task. This is because the circumstances that may justify seizures in the first place do not account for the escalation that, unfortunately, often takes place. That is, it may well be the course of conduct that unfolds *after* the seizure that determines whether the use of force is appropriate. To take the prior example, the justification for an initial seizure may have little or no bearing on whether the subsequent use of force, like a twist-lock or a Taser—with its attendant pain and trauma—is justified. In the other direction, if a seized student fails to comply with further instructions and takes actions that disrupt school proceedings and create danger to herself or others, force *may* become appropriate.

2. *Age Matters in Determining Reasonableness*

Another key principle identified in *T.L.O.*—that age is relevant to determining whether a law enforcement action has met the Fourth Amendment's demand for reasonableness—offers further insight into how seizures and uses of force in schools should be judged. As previously noted, *T.L.O.* itself did not specify *why* that factor mattered or *how* it should factor into the analysis.[279] The Court's decisions in other constitutional contexts, which recognize that the significant differences between juveniles and adults require alternative standards for the two, provide some direction.

In a series of cases concerning the sentencing of juvenile offenders, the Court has categorically decided that the Eighth Amendment bars the death penalty and sentencing schemes that mandate life without the opportunity for parole for juveniles found guilty of both homicides and non-homicides.[280] Central to the Court's analyses in those cases was that juvenile offenders are less cul-

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[279] *See supra* notes 102–03 and accompanying text.

[280] Miller v. Alabama, 567 U.S. 460, 479 (2012) ("We . . . hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."); Graham v. Florida, 560 U.S. 48, 82 (2010); Roper v. Simmons, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

pable than adults because of their "lack of maturity and an undeveloped sense of responsibility,"[281] "often result[ing] in impetuous and ill-considered actions and decisions."[282] It also observed that juveniles "'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed,'"[283] and that "parts of the brain involved in behavior control continue to mature through late adolescence."[284] Citing its longstanding precedent that "a sentencer ha[s] the ability to consider the 'mitigating qualities of youth,'"[285] it reiterated that "'youth is more than a chronological fact.'"[286] Distinct from adulthood, "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'"[287] In consideration of all of these characteristics, it concluded that juveniles are "less deserving of the most severe punishments."[288]

Similarly, in *J.D.B. v. North Carolina*, the Supreme Court focused on whether a juvenile criminal defendant's age could be considered in an analysis of whether the juvenile was "in custody" at the time of police questioning.[289] This objective inquiry has two parts: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave."[290] Noting that "'[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults,"[291] it concluded that consideration of a juvenile's age could be considered "so long as the child's age was known to the officer at the time of the police questioning, or would have been objectively apparent to a reasonable officer."[292]

In short, the Court has been clear that "age matters."[293] Numerous scholars have interpreted the Court's analyses in these cases to signal "the dawning of a new constitutional principle: 'Juveniles are different.'"[294] This concept has

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[281] *Roper*, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[282] *Id.*

[283] *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569–70).

[284] *Id.*

[285] *Miller*, 567 U.S. at 476 (quoting Johnson v. Texas, 509 U.S. 350 (1993)).

[286] *Id.* (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

[287] *Id.* (quoting *Johnson*, 509 U.S. at 368).

[288] *Graham*, 560 U.S. at 68.

[289] J.D.B v. North Carolina, 564 U.S. 261, 271–72 (2011).

[290] *Id.* at 270 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

[291] *Id.* at 274 (alteration in original) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

[292] *Id.* at 277.

[293] Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court's "Age Matters" Jurisprudence*, 46 LOY. L.A. L. REV. 933, 935 (2013).

[294] Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 458, 463 (2012) (internal quotation marks and citation omitted) (arguing that "juveniles have a substantive constitutional right to be sentenced as juveniles and that mandatory sentencing schemes designed for adults may not be automatically imposed on juveniles without courts first conducting a sentencing hearing at

found a home in numerous doctrines and should play a central role in establishing the meaning of "reasonableness" under the Fourth Amendment, particularly seizures and uses of force against juveniles in school.

The unique vulnerabilities of juveniles further support adopting this approach in the Fourth Amendment context. As detailed in Section I.B, juveniles are cognitively, psychosocially, and neurologically different than adults in ways that make them prone to act out, without the intention of being disruptive.[295] And, although all arrestees and those subject to the use of force experience physical and mental harm, such harm is likely to be exacerbated among K–12 school students, particularly those who have experienced trauma.[296] Thus, seizures and uses of force, like sentencing and interrogation practices, affect youth differently as well.

Taken together, these principles reveal that *T.L.O.* and its progeny should not be read to categorically demand *less* Fourth Amendment protection for students in school without regard for whether a search or seizure is at issue. The Supreme Court has simply never commanded that the analysis of Fourth Amendment protection required in the school context should be a one-way downward ratchet. That said, the *T.L.O.* analysis left unanswered questions about how Fourth Amendment analyses of seizures and uses of force should be analyzed. The proposed standard set forth below attempts to fill in the gap.

B. Objective Criteria to Identify Unconstitutional Seizures and Uses of Force in Schools

To reflect the Supreme Court's admonitions that both context and age matter, courts should expressly consider the following factors in determining whether a seizure or use of force effectuated against a student in school passes constitutional muster: 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. A reasonableness test requiring consideration of these factors recognizes both the sensitivity of the school context and the unique vulnerabilities of juveniles. These factors also reflect differences between searches and seizures, thus addressing and remedying a common error

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which prosecutors must bear the burden of proving that the juvenile deserves the sentence"); *see also, e.g.*, Fedders & Langberg, *supra* note 293, at 948–49 (arguing that the "age matters" cases "collectively stand for the proposition that the status of being young entitles a minor to different treatment from, and heightened protections against, the state in juvenile and criminal justice settings"); Forman, *supra* note 24, at 308–09, 368. (arguing, following *Graham v. Florida*, that the Fourth Amendment standard for searches in schools should account for the "development interest" of youth such that students' Fourth Amendment rights become "a tool for democratic socialization").

[295] *See supra* notes 72–81 and accompanying text.

[296] *See supra* notes 82–85 and accompanying text.

courts have made in judging the constitutionality of seizures and uses of force.[297]

This recalibrated reasonableness standard expressly considers the circumstances that are particularly salient in the policing of youth in schools and better accounts for right of youth to be free from unreasonable seizures than the rigid and formalistic approach the Supreme Court has typically utilized in non-school cases. With respect to seizures, the usual standards allow seizures for any supposed infraction, no matter how trivial.[298] This approach has been subjected to substantial criticism,[299] but the externalities that flow from this approach are magnified in the school context and have not previously been explored in scholarship. Handcuffing students in school is not a minor inconvenience. Especially for young children, it is a traumatizing experience.[300] And the negative impacts that adults suffer from arrests—humiliation and physical pain at the very least—also apply to youth.[301]

In addition, the breadth of infractions or offenses that could result in seizures and handcuffing is simply staggering. This is already true for virtually all Americans, but the overlay of school disciplinary rules creates an even greater range of offenses that regulate student behavior.[302] Given the potential harms that are unique to youth, mere commission of an infraction—or suspicion of one—should not automatically make a seizure permissible.

It is therefore necessary to account for the severity of the infraction or crime at issue and the likelihood that an infraction or crime has occurred when

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[297] It is worth noting what this proposed standard does not address: race. All available evidence suggests that seizures and uses of force in school fall more heavily on black and Latino students than others. In addition, as noted in Part I, psychological research suggests that black children in particular are less likely to be accorded a presumption of innocence than their white peers. *See supra* notes 56–57 and accompanying text. These disparities and dynamics are extremely troubling and deserving of further study and attention. Given that the Supreme Court rejected the notion that race is relevant to Fourth Amendment analyses of seizures more than twenty years ago in *Whren v. United States*, 517 U.S. 806 (1996), this Article does not attempt to devise a standard that incorporates race. For excellent critiques of *Whren* and the Supreme Court's treatment of race in Fourth Amendment cases generally, see Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); *see also* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

[298] *See generally* Virginia v. Moore, 553 U.S. 164 (2008); Atwater et al. v. City of Lago Vista et al., 532 U.S. 318 (2001).

[299] *See, e.g.*, Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 329, 331 (2002); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 420 (2002).

[300] *See supra* notes 82–84 and accompanying text.

[301] *See supra* notes 82–83 and accompanying text.

[302] Justice Stevens's dissent in *T.L.O.* recognized this dynamic in 1985. *See* New Jersey v. T.L.O., 469 U.S. 325, 378–82 (1985) (Stevens, J., dissenting).

addressing seizures in schools. While this concept has proven controversial,[303] it is one that the Supreme Court embraced in both *T.L.O.* and *Graham*.[304] Given recognition that the seriousness of the infraction (or crime) at issue is relevant to the Fourth Amendment analysis, it certainly requires consideration in evaluations of seizures and uses of force against juveniles in school.

Any episode involving violent behavior can fairly be described as serious, but mere rule violations that do not threaten safety should not be described as such. For example, fake burping and refusing to put away a cell phone in class would, for example, fit into the non-serious category, weighing against effectuating a seizure, particularly through forceful means. Indeed, it is difficult to understand why a law enforcement response would ever be appropriate with regard to such misbehavior. Typical juvenile misbehavior that is somewhat more serious should not weigh heavily in favor of using seizures or uses of force even if it could technically be described as a crime. For example, one could likely characterize participation in a food fight or hair pulling as assault,[305] but doing so would ignore the fact that such behavior is entirely normal given juveniles' social and emotional development.[306] It would also ignore the fear and distrust that befall an entire school community when spontaneous outbursts result in overly harsh punishments.

The same arguments apply to uses of force. Any person who is punched, Tasered, or maced suffers; but the risk of traumatizing youth by using such tactics is especially great.[307] The question of age, stature or size, the likelihood of inflicting harm or trauma, and known disabilities or vulnerabilities are particularly important in considering uses of force. Handcuffs are less likely to be necessary to restrain a six-year-old than a sixteen-year-old, who, if engaging in behavior that disrupts a class or school, can likely be restrained in less restrictive ways. Similarly, when an SRO breaks up a fight between two skinny fourteen-year-old girls, there are certainly more reasonable ways to end the fight besides using a Taser or mace.

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[303] *See, e.g.*, Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 26–34 (2011) (arguing that courts should employ a three-tier hierarchy of crimes, "grave," "serious," and "minor," and use a reasonable person test to determine crime severity); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843–44 (2001) (arguing that Fourth Amendment jurisprudence should account for crime severity); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1967–70 (2004) (suggesting that options for making crime-severity distinctions include evaluating a crime's objective characteristics).

[304] Graham v. Connor, 490 U.S. 386, 396 (1989) (holding that "severity of the crime" is one factor relevant to determining whether the use of force effected is objectively reasonable); *T.L.O.*, 469 U.S. .at 342, 342 n.9 (holding that reasonableness of a search would be determined in part, by considering "the nature of the infraction").

[305] Some law enforcement agencies have done so. *See* Gates, *supra* note 30; Saulny, *supra* note 30.

[306] *See supra* notes 72–80 and accompanying text.

[307] *See supra* notes 82–85 and accompanying text.

The necessity of intervention is also an important consideration that courts have typically shied away from examining. Phrased differently, a court should consider whether the seizure or use of force at issue was the least restrictive alternative available to address the situation. An inquiry into the purpose of the enforcement action and the seriousness of the crime or infraction may address these questions. For example, uses of force undertaken for purely punitive purposes could not possibly be thought to be necessary to further any governmental interest.

It is also noteworthy that the proposed standard accounts for the substantial variety in the roles that law enforcement officers play in schools. As explained in Part I, some police officers and sheriff's deputies regularly patrol school hallways, while others respond only when called from either within or outside of the school.[308] Some school security staff are employed by school districts and have no formal connection to any law enforcement agency, while others are agents of police departments who receive less pay and training than their police officer counterparts. This proposed standard provides flexibility for courts confronting law enforcement actors who technically hold a variety of roles. These distinctions should not make a difference in assessing the constitutionality of a seizure or use of force. The harm that befalls a student who is handcuffed or punched (and that student's classmates) does not differ because of the job title of the government agent who secured the handcuffs or delivered the punch. That job title should not, therefore, be determinative of the propriety of a seizure or use of force.[309]

This approach accords with the principles identified in *T.L.O.* and the other case law identified above and provides sufficient flexibility to account for the evolving understanding of schools' "'tutelary' as well as 'custodial'" roles identified by the Supreme Court in *Vernonia*.[310] As educators and scholars continue to learn more about the impact of different disciplinary and school security practices on school climate and students, it allows courts the flexibility to ac-

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[308] Some police or school security officers are stationed at a post within a school, perhaps at an entrance, and generally remain at their post unless called to respond to an incident. Others respond to schools following 911 or similar calls. *See supra* notes 40–43, 58–59 and accompanying text.

[309] This standard also eliminates confusion regarding the role of school staff in determining the reasonableness of an enforcement action. Some law enforcement officers reportedly believe that the presence of school personnel creates a safe harbor from Fourth Amendment liability. For example, the New York Times recently reported that a Georgia sheriff's department conducted invasive searches, in some case strip searches, of hundreds of high school students. *See* Jacey Fortin, "*How Far Can They Go?" Police Search of Hundreds of Students Stokes Lawsuit and Constitutional Questions*, N.Y. TIMES (June 13, 2017), http://www.nytimes.com/2017/06/13/us/georgia-police-patdown-students.html [https://perma.cc/MVQ8-68AZ]. When asked why he thought the searches were permissible, the sheriff replied that the searches passed muster because school administrators were present. Although that case involved a search rather than a seizure, it reflects confusion regarding the significance of a school staff member's presence.

[310] *See* Urbonya, *supra* note 193, at 416–17.

count for changing understandings of what schools' tutelary and custodial powers are. That is, a reasonableness standard utilizing the factors identified above can account for the findings of social scientists about how the different ways that schools carry out their tutelary powers impact students.

Like all reasonableness standards, this proposal is subject to criticism. Reasonableness standards in Fourth Amendment jurisprudence have been seriously questioned for decades.[311] With particular regard to its application to the use of force, "reasonableness" has been aptly characterized as an empty vessel into which a judge's predilections and biases can easily fit.[312] To some extent, these critiques apply to any standard involving reasonableness, including the one suggested here.

The proposed standard also leaves some questions unanswered. For example, when multiple factors point in different directions, how should a court determine whether the Fourth Amendment is violated? The answer remains the same as it has for generations of courts grappling with the application of reasonableness standards: by considering the totality of the circumstances. It is the proposed standard's non-formulaic nature that makes its application somewhat unpredictable, but flexible enough to allow for the myriad circumstances that may give rise to Fourth Amendment inquiries involving seizures and uses of force in schools.[313]

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[311] *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 352 (1974); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978 (2004); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1642 (1998); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1135 (2012); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1173 (1988); Baradaran, *supra* note 28, at 1.

[312] *See* Harmon, *supra* note 140, at 1130 (arguing that *Graham*'s objective reasonableness standard "has largely left judges and juries to their intuitions" in deciding use of force cases).

[313] It is also worth noting that the proposed standard does not address the major hurdle that all civil rights plaintiffs face: qualified immunity. Under that doctrine, even when a constitutional violation has occurred, a plaintiff establishes the liability of an individual officer only when the right at issue was "clearly established" at the time of the violation. *See* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015). Because meeting that standard depends on the specificity with which the right is defined, officers are often able to avoid liability in Fourth Amendment cases. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519–22 (2016). But qualified immunity is not available to municipalities, making recovery possible when a plaintiff alleges that the constitutional harm it has suffered was due to a municipal policy. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980). Courts also have the option of determining whether a constitutional violation has occurred before determining whether the right at issue was clearly established. *See* Pearson v. Callahan, 555 U.S. 233 (2009); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 926–40 (2015) (noting that courts often first determine whether the right was clearly established). Accordingly, qualified immunity will not necessarily be a bar to liability under the proposed standard.

But the considerations required by the proposed standard also answer one of the chief critiques of reasonableness tests: it rejects a false equivalence between the interests of individuals subjected to seizure or use of force on one hand, and the government's interests on the other. Instead, it recognizes that the government has an interest not only in order in schools, but also the establishment of a school climate that facilitates education for all students—even ones who have misbehaved. It also has the substantial benefit of accounting for the exceptional context of the school environment and the vulnerable population law enforcement officers encounter there, thereby offering appropriate protection for the weighty constitutional interests at stake.

When some of the cases identified in Section II.C are reconsidered in conformance with this approach the results are more faithful to the principles announced in *T.L.O*. For example, *Gray v. Bostic*, the case involving the handcuffing of nine-year-old girl following her verbal threat to "'do something' physically" to her gym teacher,[314] would not result in a reasonable seizure under the proposed standard. The alleged infraction was not serious and, given that the teacher subjected to the "threat" continued teaching his class and another teacher present at the scene said she would handle the situation,[315] the sheriff deputy's initial detention of the student was plainly unnecessary. The handcuffing that followed exacerbated the Fourth Amendment harm. Although the student posed no threat to the deputy, any other student or staff member, or orderliness in general, the deputy handcuffed the sixty-seven-pound girl to show her "how it feels to be in jail" and to "help persuade her to rid herself of her disrespectful attitude."[316] The deputy's purely punitive purpose underscores the conclusion that this law enforcement intervention was completely unwarranted, especially given the humiliation and pain likely suffered by the nine-year-old who was handcuffed in her school lobby. The result under the proposed standard is effectively the same as what the court reached, but the analysis is more straightforward and easier to apply. The Eleventh Circuit held that the deputy could not be faulted for temporarily detaining the student while he investigated a "verbal threat," but that the handcuffing violated the Fourth Amendment because it exceeded the "scope of the circumstances" that led the seizure in the first instance. Application of the proposed standard instead accounts for the needlessness of the entire interaction, the punitive purpose of the detention, and the harm visited upon the student subject to the handcuffing, as well as the harm felt by other students who witnessed and were likely frightened by it.

Similarly, application of the proposed standard to the Birmingham mace case would also have a more sensible result. There, the court effectively found that the Birmingham Police Department violated the Fourth Amendment only

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[314] Gray *ex rel*. Alexander v. Bostic, 458 F.3d 1295, 1301 (11th Cir. 2006).
[315] *Id*.
[316] *Id*.

when it used mace on students who were speaking or crying while standing still. If a student moved at all, she was deemed to have "resisted," and the use of mace was "reasonable," no matter the student's age or size. Given the intense physical pain that the use of mace creates, this is not a just, fair, or *reasonable* result. Application of the proposed standard would recognize as much.

In identifying specific objective factors relevant to determining reasonableness of seizures or uses of force in school, this Article advances an analytical standard that is, theoretically, both sound and workable. This approach has the benefit of bringing order to the doctrine, where there has been virtually none, and provides courts with sufficient flexibility to address cases arising from myriad circumstances, while limiting the room for judicial biases and predilections about notions of orderly schools to determine outcomes.

CONCLUSION

The Fourth Amendment standard for addressing seizures and uses of force in schools offers an important lens through which the school-to-prison pipeline can and should be analyzed. This area has been neglected by both courts and scholars, and, in the absence of specific guidance from the Supreme Court, lower courts appear to feel duty-bound to hew closely to rules announced in completely different contexts when confronted with these cases. To date, the jurisprudence in this area provides little direction to school districts and law enforcement agencies nationwide about the limits of police authority in schools and often rests on faulty assumptions about the role of law enforcement tactics in schools.

This Article attempts to correct these deficiencies by offering a recalibrated reasonableness standard accounting for the Supreme Court's central lessons in *T.L.O.* that both the school environment and age matter. It also addresses the specific factors relevant to determining the propriety of seizures and uses of force—ranging from handcuffing, bear hugs, and seclusion to twist-locks, Tasers, mace, and the other law enforcement tactics that should have, at best, a limited presence in schools. By demanding adherence to the Fourth Amendment's "fundamental command" of reasonableness, this proposed standard guarantees fair consideration of individual circumstances, sometimes impeded by bright-line rules and, most importantly, ensures substantive judicial review of practices that sometimes harm some of the most vulnerable among us: schoolchildren.

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