

## SCHOOL HOUSE GATES: PLEASE REMOVE YOUR RIGHTS

KIMBERLY DAVIS

### TABLE OF CONTENTS

I. INTRODUCTION.....	353
II. SCHOOLS’ SOURCE OF AUTHORITY .....	355
III. UNITED STATES SUPREME COURT AND OREGON SUPREME COURT ACTIONS .....	355
IV. THE RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.....	357
V. THE SCHOOL-SAFETY EXCEPTION .....	360
VI. SCHOOL CLIMATE AND RISK PREVENTION STRATEGIES .....	363
VII. SCHOOL POLICIES .....	365
VIII. SCHOOL-TO-PRISON PIPELINE.....	367
IX. IT DOESN’T ADD UP.....	370
X. BETTER POLICY .....	371

### I. INTRODUCTION

Violence in schools and among youths is an issue of great concern. School shootings have rocked the headlines of newspapers and are featured as the breaking story on television news programs at an alarming rate.<sup>1</sup> Accordingly, Congress has responded with legislation such as the “Gun-Free School Act.”<sup>2</sup> Schools also responded by initiating policies such as “Zero-Tolerance,” intended to deter violence from occurring on school grounds.<sup>3</sup> Courts too have followed suit by giving schools increasing power in exchange for students’ rights.<sup>4</sup> Oregon is no stranger to both these issues—

---

1. See, e.g., Daniel Beekman & Jack Broom, *Marysville Shooting Victims Remain in Intensive Care*, SEATTLE TIMES, Oct. 25, 2014, [http://seattletimes.com/html/localnews/2024873645\\_marysvillemainxml.html](http://seattletimes.com/html/localnews/2024873645_marysvillemainxml.html).

2. Nirvi Shah & Michele McNeil, *Discipline Policies Squeezed as Views on What Works*, 16 EDUC. WK. no. 16, 2013, at 4.

3. *Id.*

4. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the Fourth

violence in schools and the strategies taken to combat it.

The town of Springfield, Oregon made national news on May 21, 1998 when fifteen-year-old Kipland Kinkle shot and killed both of his parents, and then proceeded to school where he again opened fire.<sup>5</sup> Kinkle walked into the cafeteria and began firing, killing one student and wounding twenty-three others before being subdued by fellow classmates.<sup>6</sup> Oregon more recently made national news on June 12, 2014 when fifteen-year-old Jared Padgett shot and killed a classmate and wounded a teacher at Reynolds High School in Troutdale.<sup>7</sup> In an effort to deter school violence, Oregon schools embraced the “Zero-Tolerance” policy in the 1990s. However, the policy has proven to be more harmful than beneficial, and Oregon’s legislature recently passed a bill to end this approach.<sup>8</sup> In tandem, courts have increasingly truncated students’ constitutional rights in an effort to foster safer schools.<sup>9</sup> This comment traces the history of the narrowing of students’ constitutional rights, in particular students’ Fourth Amendment rights, concluding with the Oregon Supreme Court’s 2014 decision in *State v. A.J.C.* Then this article will discuss the competing policies that have led to this narrowing of students’ rights. Furthermore, this article will discuss arguments against the narrowing of students’ rights and will argue for the implementation of alternative theories for creating safer schools and reducing school violence. Lastly, this article will argue for aligning the reasonableness standard required for the search and seizure of students with the standard of reasonableness for random drug testing of extracurricular activity participants.

---

Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials).

5. *Teen Jailed After Oregon High School Shooting Spree*, CNN (May 21, 1998, 10:14 PM), <http://www.cnn.com/US/9805/21/school.shooting.pm.2/>.

6. *Id.*

7. Ed Payne & Dana Ford, *Oregon Shooting: ‘This is Becoming the Norm’—But Will Anything Change?*, CNN (June 12, 2014, 9:23 AM), <http://www.cnn.com/2014/06/11/justice/oregon-high-school-shooting/>.

8. Press Release, Youth Rights & Justice, Oregon Legislature Passes Bill to Reform School Discipline and Roll Back “Zero Tolerance” Policies (May 21, 2013) (available at <http://www.youthrightsjustice.org/media/2393/Press%20release%20on%20HB%202192.pdf>).

9. *See, e.g., State v. A.J.C. (In re A.J.C.)*, 326 P.3d 1195 (Or. 2014) (holding that a school principal’s warrantless search of a juvenile’s backpack was reasonable under the circumstances and that the search was permissible under the school-safety exception to the warrant requirement).

## II. SCHOOLS' SOURCE OF AUTHORITY

Public education is not a fundamental right given to all United States citizens.<sup>10</sup> The federal government has no express authority granted to it by the Constitution to create or maintain schools.<sup>11</sup> Therefore, that power is reserved to the states by the Tenth Amendment of the United States Constitution.<sup>12</sup> The Oregon Constitution states that “[t]he Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.”<sup>13</sup> Through this power granted to the Legislative Assembly, Oregon children between the ages of four and twenty are granted access to education.<sup>14</sup> The Oregon Legislature passed a compulsory attendance statute requiring regular school attendance by all children between the ages of seven and eighteen who have not completed the twelfth grade.<sup>15</sup> Since public schools are state actors, however, their actions are limited by protections granted to Oregon citizens by the Oregon Constitution.<sup>16</sup> Moreover, the Fourteenth Amendment of the United States Constitution further confers some protections to students against actions taken by a school official.<sup>17</sup> Thus, “[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate.”<sup>18</sup>

## III. UNITED STATES SUPREME COURT AND OREGON SUPREME COURT ACTIONS

Both the United States Supreme Court and the Oregon Supreme Courts have found the school setting to be a special circumstance.<sup>19</sup>

---

10. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–39 (1973).

11. *Id.* at 35.

12. *Id.* at 36.

13. OR. CONST. art. VIII, § 3.

14. OR. CONST. art. VIII, § 4 (noting the funding is allocated based on the number of children between four and twenty-years-old present).

15. OR. REV. STAT. § 339.010 (2015).

16. *See, e.g., State ex rel. Juvenile Dep't of Clackamas Cty. v. M.A.D.*, 233 P.3d 437, 441–443 (Or. 2010) (finding a school official reaching into the coat of a student to be a search for purposes of OR. CONST. art. I, § 9).

17. *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding a state statute prohibiting the teaching of foreign languages to pupils below the eighth grade was unconstitutional).

18. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

19. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (noting the

While public school officials' actions are actions of the state, the courts have continually held that it is different from actions by police officers.<sup>20</sup> Courts reason that this is so because school officials' actions' outcomes do not necessarily implicate criminal proceedings.<sup>21</sup> Courts also reason that schools have special interests in maintaining order and discipline so as to effectuate the educational process.<sup>22</sup> Furthermore, schools have the power and duty to "inculcate the habits and manners of civility."<sup>23</sup> These interests often result in courts shrinking students' constitutional rights while in school.<sup>24</sup> At odds with this idea, however, are the compulsory laws that require children to attend school. While the courts recognize this tension, the United States Supreme Court reconciles it by stating that:

Traditionally at common law, and still today unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom to the control of their parents or guardians.<sup>25</sup>

Thus, minors do not enjoy all fundamental rights as adults, and therefore, they have a lower expectation of privacy and self-

---

school setting constitutes a special need making the "warrant and probable-cause requirement impractical").

20. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 329 n.1 (1985) ("Unlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws.")

21. *Id.*

22. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (citations omitted) ("[C]onstitutional rights of students in public school are not automatically coextensive with rights of adults in other settings, and [rights of students] must be applied in light of special characteristics of school environment.").

23. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

24. *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns"); *Bethel School Dist.*, 478 U.S. at 681 ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) ("Imposing additional administrative safeguards [upon corporal punishment] . . . would also entail a significant intrusion into an area of primary educational responsibility."); *Gross v. Lopez*, 419 U.S. 565 (1975) (due process for a student challenging suspension requires an informal discussion between teacher and student of the alleged misconduct minutes after it occurred).

25. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

determination. This results in greater authority given to those who are charged with minors' care, including schools.

The flaw in this reasoning becomes apparent, however, when comparing the typical disciplinary actions taken by actual guardians and school officials. Moreover, the increasing presence of police in schools and school officials' reliance on police intervention means that students are actually have a higher likelihood of criminal proceedings, directly conflicting with one of the common arguments for why students should receive less protection from schools.<sup>26</sup> This next section will discuss the United States Supreme Court's interpretation of the Fourth Amendment as applied to schools, as well as the Oregon Supreme Court's interpretation of article I, section nine of the Oregon Constitution.<sup>27</sup>

#### IV. THE RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE

In *New Jersey v. T.L.O.*, the United States Supreme Court determined that the Fourth Amendment protection from unreasonable search and seizure applies to public school officials.<sup>28</sup> In that case, two students were discovered smoking cigarettes in the school lavatory against school rules.<sup>29</sup> Upon questioning by the school's assistant vice principal, the fourteen-year-old student denied smoking.<sup>30</sup> The assistant vice principal demanded to see the student's purse and found a pack of cigarettes and a package of cigarette rolling papers in the purse.<sup>31</sup> Knowing that the rolling papers are commonly

---

26. Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behavior*, JUST. Q., Oct. 2011, at 2 (stating sixty-nine percent of students aged twelve to eighteen reported the presence of police officers in their school).

27. The Fourth Amendment of the United States Constitution and article I, section nine of the Oregon Constitution provide:

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

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

29. *Id.* at 325.

30. *Id.*

31. *Id.*

associated with the use of marijuana, the school official searched her purse more thoroughly and discovered marijuana, a pipe, and a list of students who owed her money, among other items that implicated her in dealing drugs.<sup>32</sup> The assistant vice principal then notified the police, turned over the evidence of drug dealing to them, and informed the student's mother.<sup>33</sup>

In holding that the Fourth Amendment protections extend to students, so as to be free from unreasonable search and seizure by school officials, the court noted the special role of schools—that “[t]eachers and school administrators . . . act *in loco parentis* in their dealings with students[.]”<sup>34</sup> The Court, however, rejected this idea and stated that public school officials are not exercising “authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies,” for example, by virtue of compulsory laws.<sup>35</sup> However, noting the legitimate interests of the school in maintaining an environment in which learning can take place, the Court held schools need only meet a reasonableness standard, whereas police require probable cause.<sup>36</sup> That is, at the inception of the search there must be “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>37</sup> Therefore, the Court found the search of the student's purse to be reasonable, shrinking the constitutional protection of students once at school.<sup>38</sup>

In another Supreme Court decision, the random drug testing of students participating in extracurricular activities was found to be constitutional under the Fourth Amendment.<sup>39</sup> Like the decision in *T.L.O.*, the Supreme Court further circumscribed students' right to privacy and protections against search and seizure in *Vernonia School District 47J v. Acton*. In this case, all students participating in interscholastic athletics were subjected to random urinalysis tests to detect the presence of drugs.<sup>40</sup> After receiving parental consent, the

---

32. *Id.*

33. *Id.* at 328.

34. *Id.* at 336.

35. *Id.*

36. *Id.* at 337–43.

37. *Id.* at 326.

38. *Id.*

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

40. *Id.* at 648.

school would randomly select ten percent of the school's athletes to test.<sup>41</sup> The school saw increased drug use among students and noticed student athletes were not just participants but were actually the "leaders of the drug culture."<sup>42</sup> Suit was brought when a seventh grader was denied participation on the football team "because he and his parents refused to sign the testing consent form."<sup>43</sup> The parents and student claimed the suspicionless random drug testing was an unreasonable search and seizure, violating the Fourth Amendment of the United States Constitution, as well as article I, section nine of the Oregon Constitution.<sup>44</sup>

The United States Supreme Court held the search and seizure reasonable after considering several factors.<sup>45</sup> First the Court reasoned that the school had a legitimate interest in "preventing student athletes from using drugs[,] and based on the reasonableness standard, was not required to use the least intrusive means."<sup>46</sup> Second, the Court reasoned that students have a diminished expectation of privacy in public schools compared to other places and that the "reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases."<sup>47</sup> The Court went on to state that student athletes have an even further diminished expectation of privacy than regular students because they must "suit up" before every practice or game, that there is "an element of 'communal undress' inherent in athletic participation."<sup>48</sup> Third, the Court reasoned that students voluntarily participate in athletics.<sup>49</sup> Lastly, the court considered the manner in which the testing was conducted. In holding it not overly intrusive, the court relied on the fact that test results were "disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any

---

41. *Id.* at 649.

42. *Id.*

43. *Id.* at 649.

44. *Id.* (emphasis added).

45. *Id.* at 646.

46. *Id.* at 661.

47. *Id.*

48. *Id.* at 657 (quoting *Schail ex rel. Koss v. Tippecanoe Cty. Sch. Corp.*, 864 F.2d 1309, 1318 (1988)).

49. *Id.*

internal disciplinary function.”<sup>50</sup> Thus, the use and repercussions of the test were seen as an important factor in its reasonableness.<sup>51</sup>

#### V. THE SCHOOL-SAFETY EXCEPTION

In *State ex rel. Juvenile Dep’t of Clackamas Cty. v. M.A.D.*, the Oregon Supreme Court announced a new exception to the Oregon Constitution’s protection from unreasonable search and seizure, the “school-safety exception.”<sup>52</sup> In this case, the court pointed to the already established “officer-safety exception,” which gives police officers “considerable latitude to take safety precautions” in situations where “[t]here may be little or no time to weigh the magnitude of a potential safety risk against the intrusiveness of protective measures.”<sup>53</sup> This exception “requires reasonable suspicion of an immediate threat of serious physical injury to the officer or others, based on specific, articulable facts.”<sup>54</sup> The court extended this exception to school officials so that a school official’s warrantless search of a student would not violate the Oregon Constitution if the official had specific articulable facts that an immediate risk of harm existed.<sup>55</sup>

In this case, school officials knew the student had possible drug issues from records attained from his previous school.<sup>56</sup> Another student had reported to the school official that he had seen the student

---

50. *Id.* at 658.

51. *Id.* at 666 (Ginsberg, J., concurring) (“[T]he most severe sanction allowed under the District’s policy is suspension from extracurricular athletic programs.”). *But see id.* at 671, 686 (citations omitted) (O’Connor, J., dissenting) (“The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context . . . . Having reviewed the record here, I cannot avoid the conclusion that the District’s suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.”); *York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995 (Wash. 2008) (declining to follow *Acton* on state constitution grounds and reasoning the district does not link regulations and the communal atmosphere of locker rooms with a student’s lowered expectation of privacy in terms of being subjected to suspicionless, random drug testing.). The Washington Supreme Court majority in *York* explained that “[it does] not see how what happens in the locker room or on the field affects a student’s privacy in compelling him or her to provide a urine sample. A student athlete has a genuine and fundamental privacy interest in controlling his or her own bodily functions.” *Id.* ¶ 21, at 1002.

52. *State ex rel. Juvenile Dep’t of Clackamas Cty. v. M.A.D.*, 233 P.3d 437 (Or. 2010).

53. *Id.* at 443 (quoting *State v. Bates*, 747 P.2d 991, 994 (Or. 1987)).

54. *Id.*

55. *Id.* at 443–45.

56. *Id.* at 440.



at the “pit attempting to sell marijuana.” The school official also knew students often used drugs at the “pit.” Reasoning these facts were specific and articulable, that those facts “would lead a reasonable person to suspect that [the student] was in possession of illegal drugs,” and that the student’s attempt to sell the drugs earlier that morning “created an immediate risk of harm to [the student] and to other students at the school,” the court held it was reasonable for the school official to reach into the student’s inner jacket pocket and remove a bag.<sup>57</sup> Therefore, the precautions taken by the school officials were reasonable, not overly intrusive, and did not violate the Oregon Constitution’s protection from unreasonable search and seizure.<sup>58</sup>

More recently the court has expanded this exception. In *State v. A.J.C.*, a student had called and threatened V, another student at his school.<sup>59</sup> The student told V he was going to bring a gun and shoot her and other students.<sup>60</sup> The next morning, when V arrived at school she informed the school counselor, who then informed the principal about the threats.<sup>61</sup> The principal first searched the student’s locker and found no evidence corroborating the threat.<sup>62</sup> The principal then went to the student’s classroom, picked up the student’s backpack, which was under his chair, and asked the student to follow him to his office.<sup>63</sup> Once in the office, the principal asked the student about the threat reported.<sup>64</sup> The student’s mother and a uniformed officer—who stated he was just there to observe, that it was not yet a criminal matter—were also in the office at this time.<sup>65</sup> The student denied making the threat, but admitted that he and V had a relationship and that they called and texted each other.<sup>66</sup> The principal, who still had control over the student’s backpack, informed the student that he needed to see “if this [threat] is true or not” and searched the student’s backpack.<sup>67</sup> Upon searching the student’s backpack, the principal

---

57. *Id.* at 439.

58. *Id.* at 445.

59. *State v. A.J.C. (In re A.J.C.)*, 326 P.3d 1195, 1196 (Or. 2014).

60. *Id.*

61. *Id.*

62. *Id.* at 1197.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

found bullets and, in a separate compartment, a handgun.<sup>68</sup>

At trial, the student moved to suppress the evidence found during the warrantless search of his backpack as it violated his rights under article I, section nine of the Oregon Constitution.<sup>69</sup> The State argued that the search fell within the “school-safety exception” and was therefore reasonable.<sup>70</sup> The student argued that the school-safety exception should not apply because the imminent risk of harm no longer existed once the principal had control over the backpack.<sup>71</sup> The student further argued that because of the “overlap between the officer-safety exception and the school-safety exception . . . [the] court should adhere to the limitations on searches that are well-established in the officer-safety context,”<sup>72</sup> notably, that a “warrantless search is no longer justified once an officer has seized a closed container from a suspicious individual.”<sup>73</sup>

The court reasoned that “the differences between an officer-citizen context and a school context matter in assessing whether protective measures are reasonable” in that “young students are confined in close-quarters on a school campus that they are compelled to attend, and . . . [because] school officials have a heightened standard of care to students and adults in that environment.”<sup>74</sup> The court held that the search of the student’s backpack was reasonable. However, this reasoning seems to set a dangerous precedent. One way to interpret this is to understand the school environment, in and of itself, as creating an “imminent risk of harm” because of students being confined in close quarters. Moreover, if the suspicious, closed container is wholly and entirely separated from the suspected person, how does the “imminent risk of harm” continue to exist? And how does searching the closed container reduce the imminent risk of harm? Wouldn’t instead giving the closed container to police reduce the imminent risk of harm while still *preserving* the student’s constitutional rights? Wouldn’t searching the closed container then and there actually *increase* the imminent risk of harm by presenting the student with an even more stressful situation and actually easing

---

68. *Id.*

69. *Id.*

70. *Id.* at 1198.

71. *Id.*

72. *Id.* at 1200.

73. *Id.* at 1201; *see also* State v. Booker, 820 P.2d 1378, 1379 (Or. Ct. App. 1991) (“[N]either the purse nor anything inside it was a threat to [the officer] once he had seized it.”).

74. *A.J.C.*, 326 P.3d at 1201–02.

access, in this case, to the firearm? At least before the search, the imminent risk of harm was in a closed container; now, the imminent risk of harm is in the open and the emotionally charged situation has become even more volatile.

The court was cautious to note that this decision did not confer school officials the power to “engage in an unlimited search of students and their belongings on campus based on generalized threats to safety.”<sup>75</sup> The court however, declined to give a bright-line rule for when searches of already seized containers would be reasonable, instead only stating that the “permissible scope of a school official’s precautionary actions based on imminent safety concerns remains confined by the specific and articulable facts of each case.”<sup>76</sup>

Despite this attempted limitation, this decision severely frustrates students’ constitutional protections while at school, while missing the mark on good policy.

## VI. SCHOOL CLIMATE AND RISK PREVENTION STRATEGIES

Instances of school violence, despite the media’s portrayal, are rare.<sup>77</sup> Because of this, it is impossible to “profile” students who might engage in these acts and “[a]ttempts to identify likely attackers would sweep up many youth who pose no risk and miss some who do.”<sup>78</sup> School violence occurs when “victimized children become victimizers[,] when they choose aggressive strategies to cope with threat, rejection, love deprivation, and mistreatment.”<sup>79</sup> Moreover, children “disconnected from adults form negative subcultures in a process of peer deviance training . . . [,] reinforc[ing] anti-social behavior, strutting, bragging, and glamorizing deviance.”<sup>80</sup> These youths “assume their peers harbor violence against them and react by trying to impress one another with their own aggressive potential.”<sup>81</sup> It is environments such as this that “fuel fear and reactive behavior of adults and peers alike.”<sup>82</sup> Research has shown the most effective way

---

75. *Id.* at 1203.

76. *Id.* at 1202–03.

77. See Martin L. Mitchell & Larry K. Brendtro, *Victories Over Violence: The Quest for Safe Schools and Communities*, RECLAIMING CHILD. & YOUTH, Fall 2013, at 5.

78. *Id.* at 9.

79. *Id.* at 8.

80. *Id.* at 9.

81. *Id.*

82. *Id.*

to reduce school violence is by changing this type of environment.<sup>83</sup> This requires creating a supportive climate fostering respect among peers as well as adults.<sup>84</sup> It requires bullying to be seen as a “moral” wrong, whereby bystanders should “speak up and extend support to those [who are] rejected or mistreated.”<sup>85</sup> In some cases, school is often the only place youth meet positive role models.<sup>86</sup> Therefore, along with traditional academic learning, schools need to also help develop students’ “interpersonal skills that foster teamwork, conflict resolution, empathy, and respect.”<sup>87</sup> School discipline policies need to focus on inclusion instead of exclusion, as research has shown that “school exclusion and failure [are] powerful predictors of subsequent antisocial behavior.”<sup>88</sup>

Teachers and other school authorities play an active or passive role in the creation of a violent school climate.<sup>89</sup> When teachers or school authorities act as victimizers, they take on an active role in creating this type of environment.<sup>90</sup> Although physical aggression on the part of teachers is rare, new forms have taken its place.<sup>91</sup> The new form of aggression is psychological and it manifests itself through threats, verbal maltreatment, and discrimination.<sup>92</sup> Much of this type of aggression arises in the course of discipline, whereby school officials apply increasingly intrusive and even abusive actions.<sup>93</sup> Although the effects are not visible, many believe this type of psychological aggression is even more harmful to students “hav[ing] the potential to cause serious, and sometimes long-lasting, emotional harm. . . [and] may lead to increased student hostility, anger, and

---

83. *Id.* at 9–10.

84. *Id.* at 10.

85. *Id.* at 9.

86. *Id.*

87. *Id.* at 10.

88. *Id.* at 9.

89. Irwin Hyman & Donna Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 36 J. SCHOOL PSYCH. 7, 7 (1998).

90. *Id.*

91. *Id.*; see, e.g., Andrew Nemeč, *Lake Oswego Boys Basketball Coach Mark Shoff Fired Following Incident at Les Schwab Invitational*, THE OREGONIAN, Jan. 5, 2015, <http://highschoolsports.oregonlive.com/news/article/-8757404416467915081/lake-oswego-boys-basketball-coach-mark-shoff-fired-following-incident-at-les-schwab-invitational/> (coach fired for making physical contact with player, and publically reprimanded for teaching practices in which he used “excessive force in the discipline of a student”).

92. Hyman & Perone, *supra* note 89, at 8.

93. *Id.*

aggression against school property, peers, and authorities.”<sup>94</sup> The public knows about this type of school-wide policy as “zero-tolerance” or by its euphemism—to “get-tough” on crime.

## VII. SCHOOL POLICIES

Schools began to embrace a policy of zero tolerance after the state and federal drug policies of the 1980s.<sup>95</sup> Initially, zero tolerance was “defined as the administrative response to weapons, drugs and violent acts of students occurring in the school setting—with the actual responses being punishment of the students, suspension or expulsion.”<sup>96</sup> School authorities, however, “expanded the term to mean the automatic expulsion of students who bring guns, knives, or items that look like weapons[,]”<sup>97</sup> alcohol, or drugs onto school grounds.<sup>98</sup> In an effort to “get tough” and demonstrate their dedication to the zero-tolerance policy, school administrators dealt out expulsions and suspensions for “items that look like weapons” such as a ten-year-old’s imaginary bow and arrow.<sup>99</sup> Because of the perceived lack of discretion dictated by the policy, this boy was suspended.<sup>100</sup> In addition to zero-tolerance policies, some schools instituted the use of metal detectors and many schools retained the assistance of police officers or resource officers.<sup>101</sup>

The harmful effects were realized only years after schools embraced zero-tolerance policies.<sup>102</sup> Research has shown zero-tolerance policies disproportionately affect minority children, resulting

---

94. *Id.*

95. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289, 301 (2005).

96. *Id.*

97. *Id.* (internal quotes omitted).

98. Na & Gottfredson, *supra* note 26, at 3 (“As of 1998, 91% of school principals reported that their schools automatically or usually (after a hearing) expelled or suspended students for possession of a gun, drugs, alcohol, or a knife.”).

99. Carol Kuruvilla, *Pennsylvania Boy, 10, Suspended for Using Imaginary Bow and Arrow*, N.Y. DAILY NEWS, Dec. 11, 2013, <http://www.nydailynews.com/news/national/boy-10-suspended-imaginary-bow-arrow-article-1.1544627>; Glenn Harlan Reynolds, *Zero-Tolerance Stupidity at School*, USA TODAY, Dec. 31, 2013, <http://www.usatoday.com/story/opinion/2013/12/30/preschool-kids-education-grades-column/4239891/>.

100. Kuruvilla, *supra* note 99.

101. Na & Gottfredson, *supra* note 26, at 3.

102. See Hanson, *supra* note 95; Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 Am. U. L. Rev. 1039 (2001); Press Release, *supra* note 8.

in harsher and more frequent punishment.<sup>103</sup> Moreover, the very type of discipline dictated by zero-tolerance policies has proven to be incredibly detrimental to youths' development.<sup>104</sup> Suspended and expelled students "typically fall behind in their schoolwork" resulting in diminished grades.<sup>105</sup> For example, Dana Heitner, a "straight-A student and leading candidate for valedictorian of his school class[,]” was suspended for ten days for hanging a student council campaign poster that parodied the movie *Speed* during his senior year.<sup>106</sup> In the movie, "a bomb was set to explode if a bus slowed below fifty miles per hour and could only be deactivated by a ransom delivery."<sup>107</sup> On the bathroom stall door, Heitner hung a poster that read: "There is a bomb in this receptacle. If the weight on the seat goes over 50 pounds, the bomb will be activated . . . . The only way to get off the seat safely is to scream as loud as you can that you will vote for Robin Cox in the coming election."<sup>108</sup> Even though school officials "admitted that [Heitner's] poster was never considered to be a true threat to school safety," he was suspended.<sup>109</sup> As a result, Heitner received no credit for the schoolwork during the suspension, dropping his grade in one class from an *A* to a *D*, and taking him out of the running for valedictorian.<sup>110</sup> The effects of suspension and expulsion, however, can be far greater than an immediate drop in grades. Suspended and expelled students not only fall behind in schoolwork but also are more likely to drop out of school completely. Moreover, college applications often require disclosure of any suspensions or expulsions.<sup>111</sup>

In addition to the effects on educational prospects, this type of disciplinary action has highly detrimental psychological impacts.

---

103. Cherry Henault, *Zero Tolerance in Schools*, 30 J. L. & Educ. 547, 550–51 (2001) ("The Department of Education recently released figures showing that though African American children represent only 17% of public school enrollment nationally, they make up 32% of out-of-school suspensions. In contrast, white students, who make up 63% of the national enrollment, make up only 50% of the suspensions and 50% of the expulsions.<sup>14</sup> Another recent study indicates that black children, especially black males, receive more frequent and harsh discipline than any other minority group.").

104. Insley, *supra* note 102, at 1064.

105. *Id.*

106. *Id.* at 1066.

107. *Id.*

108. *Id.* (Robin Cox, Heitner's girlfriend, was running for election).

109. *Id.*

110. *Id.* at 1066.

111. *Id.* at 1064–65.

Often suspension and expulsion leads to feelings of alienation, hostility, and distrust of adults.<sup>112</sup> Thus, “[a]s exclusionary punishments frequently intensify this conflict with adults, students who have been suspended or expelled from school often turn to deviant behaviors with their peers[,]” compounding the very behavior intended to deter.<sup>113</sup> The most disturbing effect of zero-tolerance policies, however, is the criminalization of students, and what has been dubbed the “school-to-prison pipeline.”<sup>114</sup>

### VIII. SCHOOL-TO-PRISON PIPELINE

Many have criticized school discipline policies stating that “the real threat to youth comes not from school violence, but from the recent policies that are turning schools into ‘funnels for the juvenile justice system.’”<sup>115</sup> In response to public outcry, many schools have begun to require “even minor offenses be referred to law enforcement officials.”<sup>116</sup> Although the Gun-Free Schools Act of 1994 mandates referral to law enforcement if a student is found in possession of a gun or weapon, “most referrals are made for minor incidents of fighting that pose no real threat to school-wide safety.”<sup>117</sup> Thus, in an attempt to “get tough” on aggressive behavior, behavior that would have traditionally been dealt with by school administrators, it is now

---

112. *Id.* at 1064–70; COUNCIL ON SCH. HEALTH, AM. ACAD. OF PEDIATRICS, POLICY STATEMENT: OUT-OF-SCHOOL SUSPENSION AND EXPULSION, 1001–02 (2013) (“Students who experience out-of-school suspension and expulsion are as much as 10 times more likely to ultimately drop out of high school than are those who do not. . . . [Suspended students] will engage in more inappropriate behavior and will associate with other individuals who will further increase the aforementioned risks.”).

113. Insley, *supra* note 102, at 1070.

114. *Id.* at 1070–71 (“[O]ne of the most harmful effects of zero tolerance policies is the criminalization of minors for behavior that was once handled by school administrators.”).

115. *Id.* at 1070 (quoting ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (2000)).

116. *Id.* at 1072 (noting that “the ACLU has received complaints from parents of children suspended or expelled for dyeing their hair, wearing certain jewelry, or tattooing their bodies”); see also Lia Epperson, *Brown’s Dream Deferred: Lessons on Democracy and Identity from Cooper v. Aaron to the “School-to-Prison Pipeline,”* 49 WAKE FOREST L. REV. 687, 698 (2014) (“Following strong ‘tough on crime’ rhetoric advocating zero-tolerance policies to combat school-based violence, several states implemented severe criminal sanctions, penalties, and prosecutions of youth for minor misconduct occurring in schools. These policies were a response to a perceived increase in school-based violence. Yet, evidence suggests that instances of school violence and other disruptions are stable if not on the decline—and have been since 1985.”).

117. Insley, *supra* note 102, at 1071.

being handled by the juvenile justice system.

While zero tolerance and other similar policies are significant pieces of the school-to-prison pipeline puzzle, it is not the only culprit. Schools have been increasing the use of police in schools, in particular secondary schools. In 1997, twenty-two percent “of all schools reported having a police officer stationed at the school at least one hour per week or available as needed.”<sup>118</sup> During the 2003–2004 school year, principals from 36% of all schools “reported police stationed in the school.”<sup>119</sup> That means that in just a five-year span fourteen percent more schools reported having a police officer at school and that a police officer is stationed in more than one of every three schools. By the 2007–2008 school year, the “percentage had risen to 40%.”<sup>120</sup> As of 2010, sixty percent of high schools teachers noted that armed police officers are stationed on school grounds.<sup>121</sup>

It is not a difficult inference to make, and in fact research suggests that “as schools increase their use of police, they record more crimes involving weapon and drugs *and report a higher percentage of their non-serious violent crimes to law enforcement.*”<sup>122</sup> Researchers believe this is because “school principals tend to rely on the officer as a legal adviser when there is an uncertainty about the relevant rules of law to apply.”<sup>123</sup> Thereby, the “increased use of police officers facilitates the formal processing of minor offenses and harsh response to minor disciplinary situations.”<sup>124</sup> As is the case with zero-tolerance policies, the presence of police officers in schools disproportionately affected minority youths regarding school-based arrests.<sup>125</sup> On its face, increasing arrests at school looks like it is improving school safety but on closer examination, this is not the case.

Overall juvenile crime has been steadily decreasing since 1991,

---

118. Na & Gottfredson, *supra* note 26, at 2.

119. *Id.*

120. *Id.*

121. Epperson, *supra* note 116, at 700 (also noting “almost half of all public schools have assigned police officers”).

122. Na & Gottfredson, *supra* note 26, at 1 (emphasis added) (finding that for “all types of crime, the harsher response was more likely in schools with the presence of at least one full-time [officer]” as opposed to schools without an officer).

123. *Id.* at 4.

124. *Id.*

125. *Id.* at 5.



before zero tolerance and police presence in schools.<sup>126</sup> Many believe the decrease in school violence is actually just a reflection of the overall decrease in juvenile crime.<sup>127</sup> The overcriminalization of student misbehavior is especially troubling when, according to the Federal Bureau of Investigation, the total number of crimes against persons occurring at a school (elementary and secondary) for the United States in 2012 was 24,523;<sup>128</sup> however, in Florida alone 16,377 students were referred directly to the juvenile justice system.<sup>129</sup>

Moreover, the

American Psychological Association has found that zero tolerance and other harsh disciplinary approaches do not improve school safety. . . . [a]nd further research shows that excessive and inappropriate reliance on school-based law enforcement officers can actually promote disorder and distrust in schools. Far from making students feel safe, this trend has led to increased student anxiety, and led to increasing numbers of students ending up in prison instead of on a college or career path.<sup>130</sup>

In short, the get-tough, zero-tolerance-type policies and presence of police at school does the exact opposite of its intention. Instead of keeping kids safe at school, it actually breeds the very type of climate researchers have determined causes school violence, while at the same time compounding the issue by involving more students in the criminal justice system, which has proven to be the number one predictor of future offense. In fact, prior incarceration was a greater predictor of recidivism than carrying a weapon, gang membership, or a poor parental relationship.<sup>131</sup>

In response to these findings, the 2013 Oregon Legislature

---

126. Insley, *supra* note 102, at 1062–63.

127. *Id.* at 1062.

128. FED. BUREAU OF INVESTIGATION, CRIMES AGAINST PERSONS OFFENSES: OFFENSES BY LOCATION 1 (2012).

129. ADVANCEMENT PROJECT ET AL., POLICE IN SCHOOLS ARE NOT THE ANSWER TO THE NEWTOWN SHOOTING 8 (2013) (statistics for the 2010–2011 school year).

130. *Id.* at 7.

131. BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER FACILITIES 4 (2007).

removed “mandatory expulsion requirements from the state’s school discipline statute[,]” returning discretionary control to school administrators and doing away with “zero tolerance.”<sup>132</sup> Although police are still present in Oregon schools, this is a step in the right direction. Conversely, however, Oregon courts have reinforced this very type of get-tough policy in schools through judicially created school exceptions to students’ constitutional rights.<sup>133</sup>

#### IX. IT DOESN’T ADD UP

The most damaging assumption made by the Supreme Court in *New Jersey v. T.L.O.* was that students do not need all the protections guaranteed by the United States Constitution because school actions do not necessarily implicate criminal repercussions. This proposition is wholly inaccurate. As we have seen, more and more police are being stationed at and in schools. More students are being referred to the juvenile justice system for minor infractions, infractions that previously would have been dealt with internally or with a phone call to the parents. This increase is despite the overall decrease in juvenile criminal activity. The Oregon decision in *State v. A.J.C.* is sure to continue this trend, as well as increase student hostility. This is especially likely considering the amount of searches not resulting in the discovery of contraband, but it is nonetheless lawful under *A.J.C.* Either schools need to create better internal policies and exercise restraint in relying on formal criminal processes, or courts need to look more realistically at the school environment.

Not only is the Court’s assumption in *T.L.O.* contradictory, it is bad policy. Research has demonstrated the best way to promote safe schools is by fostering a climate of trust and mutual respect. Allowing such a low threshold for schools to search students and their effects destroys those feelings of trust and respect. In fact, it breeds feelings of alienation and hostility. Moreover, one of the primary goals of schools is to inculcate students with the habits and manners of civility. Often school authorities and parents are students only interaction with figures of authority. When students feel school authorities are disrespectful it fosters an “us versus them” disposition which may carry over when the school authority figures are replaced by other figures of authority, such as the police. School is one of two

---

132. Press Release, *supra* note 8, at 1.

133. See, e.g., *State v. A.J.C. (In re A.J.C.)*, 326 P.3d 1195 (Or. 2014) (creating the school-safety exception).

places (home being the other) where students learn to respect rules and basic codes of civility. We want students to trust adults and respect rules, but when they do not feel respected themselves, they will likely act out against them.

Finally, keeping kids in school is good policy. Students who are present in school perform better and are more likely to become productive members of society once they graduate. The legal assumption of students' lowered expectation of privacy, coupled with the increase presence of police in schools has resulted in a flood of students funneling through the school-to-prison pipeline. This pipeline is pulling kids out of school and placing them in the juvenile justice system. This results in lowering students' achievement, lowering graduation rates, and reducing employment opportunities in the future. Furthermore, it increases the likelihood of reoffending. Despite its goals, it has the opposite effect on school safety.

#### X. BETTER POLICY

So what do we do? The first step is to stop the fear mongering created by the media. Despite lower levels of school violence, media coverage has increased, resulting in public outcry for action and harsh responses instead of thoughtful and effective approaches. The second step is for school officials to not be so quick to involve law enforcement. Schools need to develop policies that foster inclusion instead of exclusion and focus on building relationships with students so as to get at the root of the problem instead of surface level reactionary solutions. Third, courts should look past the not so accurate assumptions made by previous holdings and consider the intimate relationship between law enforcement and schools moving forward. The lowered expectation of privacy should reflect the courts reasons and be applied when there are no automatic legal ramifications or, in situations where there are legal ramifications, students should have the same protections as they have when outside of school. Finally, in light of stare decisis, the legislature should further policies that reflect what we know works in child development and the rights and responsibilities of citizenship. In short, schools, legislators, and courts need to determine what our priority is when dealing with deviant school behavior. Our priority should be to teach kids how to interact with the greater world, not to imprison them.