

RESTORING JUSTICE IN SCHOOLS

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Abstract

Criminalization of minorities and people with disabilities begins early. It begins in school. This “school-to-prison pipeline” is exacerbated by the presence of police in schools, commonly known as “school resource officers” or “SROs.” Schools’ use of SROs has grown in response to perceived threats to student safety, but this growth has also coincided with a rise in those schools’ disproportionate and harsh punishment of students of color and students with disabilities. Schools need to use SROs to restore justice, not diminish it. Unfortunately, lawsuits against SROs and law enforcement agencies for excessive use of force offer few victories for students and do nothing to address the overcriminalization of student conduct.

At the same time, the restorative-justice movement is gaining traction in the United States, and many organizations are coming to see the value of repairing harm and restoring relationships when a person wrongs another, rather than simply referring disputes to the criminal justice system. State and federal agencies too are beginning to recognize the usefulness of restorative justice, but to date neither governmental policies nor local implementation of SROs in schools has done much to decrease the trend toward criminalizing student behavior.

This Article argues for reorienting the role of SROs away from criminal justice and toward restorative justice. It calls for increased support for restorative justice both from the top down, by tying SRO funding to an actual mandate to use restorative justice, and from the bottom up, through schools developing their own restorative-justice programs. Schools and school districts must work to curb the ability of SROs to mete out punishment by changing schools’ disciplinary cultures from ones focused on criminal justice to ones focused on restorative justice, as well as by placing limits on the types of punishment and charges SROs can administer. Legislatures and other governmental bodies must provide incentives for such re-evaluations, making restorative justice an explicit focus of SRO programs. In this way, SROs can become a true resource for justice in schools.

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I. INTRODUCTION

“We’re not going to arrest a kid for refusing to obey a teacher, but that’s what they want us to do. We have to draw the line.” – School Resource Officer in Massachusetts, speaking about school expectations.¹

1. JOHANNA WALD & LISA THURAU, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST.,

“You don’t get to swing at me like that. You can do what we’ve asked you to, or you can suffer the consequences.” – School Resource Officer in Kentucky, as he handcuffs an eight-year-old boy with ADHD and PTSD.²

Schools should be a safe place for students to learn and teachers to teach. Yet the current environment in many schools has become one of fear. Teachers and students worry about mass shootings, bombs, fights, and drug trafficking. These worries have led to the rise of zero-tolerance policies for student misbehavior and an increase in the placement of law enforcement in schools, individuals commonly dubbed “school resource officers” or “SROs.” These trends have sparked a surge in suspensions, expulsions, and arrests of students, particularly minority students and students with disabilities, feeding these students into the school-to-prison pipeline.

Students with disabilities often find themselves facing criminal charges for behavior that results from their disability, acts as innocuous as resisting an SRO who is asked by a teacher to remove an unruly student from a classroom. This should not be happening. Students with disabilities are legally protected from being suspended or expelled for behavior that is a manifestation of their disability, and yet they can find themselves facing a disorderly-conduct charge issued by an SRO who has failed to follow the steps outlined in that student’s behavior plan. Yet what is to be done?

This Article argues for a set of solutions, both top-down approaches by federal and state governments as well as bottom-up approaches by schools and school districts. The federal government appears to be saying all the right things about how SROs ought to behave toward students in schools, but has had little success in decreasing the criminalization of student behavior. From a national perspective, better training of SROs in how to work with discrete populations like racial minority students or students with special needs might do more than a federal legislative or regulatory approach. This training should emphasize de-escalation, conflict resolution, and the appropriate use of force on children. Of course, this training is most likely to happen when

FIRST, DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO PRESERVE SCHOOL SAFETY AND PROTECT VULNERABLE STUDENTS 8 (2010).

2. Holly Yan, *School Resource Officer Sued for Allegedly Handcuffing Children with ADHD*, CNN (Aug. 4, 2015), <http://www.cnn.com/2015/08/04/us/aclu-disabled-students-handcuffed-lawsuit/>; see also Amended Complaint for Damages and Declaratory and Injunctive Relief ¶ 32, S.R. et al. v. Kenton County Sheriff’s Office et al., No. 2:15-cv-00143 (E.D. Ky. Aug. 3, 2015), ECF No. 92 [hereinafter Kentucky Complaint]; S.R. et al. v. Kenton County Sheriff’s Office, No. 2:15-cv-00143, 2017 WL 4545231 (E.D. Ky. Oct. 11, 2017) [hereinafter Kentucky Decision].

it is mandated, either by the federal government or by local school districts in their hiring of SROs. Ideally, federal funding would tie the use of SROs to the use of “restorative justice,” a dispute-resolution framework that focuses on restoring the parties’ relationships rather than on simply punishing wrongdoers. This national approach should be coupled with continued litigation, raising awareness of the overcriminalization of student behavior, the disparate treatment of racial minorities and students with disabilities, and the necessity of following the behavioral plans of students with disabilities.

At the state and local level, education agencies and school districts should commit themselves to promoting dialogue between SROs and student and parent groups, as well as giving SROs the mandate to actively promote conflict resolution in schools rather than merely refer students for criminal charges. In doing so, schools should adopt a restorative-justice, rather than a criminal-justice, model. Using this model, schools can begin to change their culture of pushing students out of school and using SROs as punitive instruments. Federal and state governments cannot change this culture on their own; schools themselves must be the ones to focus their SROs on keeping students in schools and out of the school-to-prison pipeline, including by placing limits on the kinds of misbehavior SROs are authorized to enforce as crimes in their schools.

By combining top-down funding and support with bottom-up changes in school culture, schools can increase the positive effects of SROs in schools, turning them into a true resource for justice and safety.

II. SCHOOL RESOURCE OFFICERS IN THE UNITED STATES

Broadly speaking, a school resource officer (SRO) is simply a law enforcement officer who has been stationed in a school.³ Federal law offers two definitions for SROs, both of which provide that one role of SROs is “to train students in conflict resolution, restorative justice, and crime . . . awareness.”⁴ That the federal definitions include conflict resolution at all is a testament to the growing popularity of alternative dispute-resolution procedures throughout the United States. But while both federal definitions propose a role for conflict resolution, many schools’ focus has been on using SROs in a more traditional role, similar to a security officer.⁵ That SROs’ real-world emphasis remains

3. Nathan James & Gail McCallion, *School Resource Officers: Law Enforcement Officers in Schools*, CONG. RES. SERV. 3 (2013), <https://www.fas.org/sgp/crs/misc/R43126.pdf> [hereinafter *CRS Report*].

4. 34 U.S.C. § 10389 (2012); 20 U.S.C. § 7161 (repealed 2015).

5. *CRS Report*, *supra* note 3, at 3 (“The definition of an SRO under the authorizing legislation

on security, with an eye toward subduing armed threats, should cause little surprise in an era in which gun violence in schools and other public places is frequently in the news. Unfortunately, this focus on these types of mass catastrophes has led to another mass catastrophe: the diversion of students from schools and into prison.

The rise of SROs has occurred in an education environment that encourages the use of “zero-tolerance” policies, in which students are suspended or expelled for a single occurrence of prohibited behavior.⁶ Both the use of SROs and the implementation of zero-tolerance policies reflect a desire for safety and security in schools.⁷ To the extent that schools feel that additional, armed security is needed to address potential threats, it makes sense for SROs, who are trained officers, to fill that role.⁸ Problems arise, however, when SROs’ focus on responding to serious threats causes them to become overly punitive toward all student misbehavior, even that which does not present a serious threat to other students.

Unlike punishments by a teacher, punishment by an SRO can carry with it criminal charges—or, at the very least, criminal treatment, such as the use of restraints (like handcuffs) that many states otherwise prohibit being used on students.⁹

This criminalization of student conduct is especially troubling because it comes disproportionately at the expense of racial minority students and students with disabilities. While discourse about such

for the COPS program focuses more on how SROs could address a school’s crime problems through a more traditional law enforcement/security approach.”). The website for the Community Oriented Policing Services’ Supporting Safe Schools grants, which include SROs, backs up this assessment. It lists the four key roles of an SRO as law enforcer, informal counselor, educator, and emergency manager without any mention of conflict resolution or restorative justice. It also appears to be focused primarily on school violence or active shooter situations. See *Supporting Safe Schools*, COMMUNITY ORIENTED POLICING SERVS., U.S. DEP’T JUST., <http://www.cops.usdoj.gov/supportingsafeschools> (last visited Oct. 12, 2016).

6. William Haft, *More than Zero: The Cost of Zero Tolerance and the Case for Restorative Justice in Schools*, 77 DENV. U. L. REV. 795, 796 (2000).

7. *Id.* at 797.

8. In other words, it makes sense for SROs to have this role rather than, for example, arming teachers. See, e.g., Cliff Pinckard, *School Shootings Bring Debate on Whether to Arm Teachers, Other Employees: A Closer Look*, PLAIN DEALER (Jan. 15, 2013), http://www.cleveland.com/nation/index.ssf/2013/01/school_shootings_bring_debate.html.

9. After the Supreme Court ruling in *Ingraham v. Wright* in 1977, allowing schools to use corporal punishment despite parents’ objecting, states began to pass statutes covering corporal punishment and school discipline. Some states still allow its use. For example, South Carolina law says, “The governing body of each school district may provide corporal punishment for any pupil that it deems just and proper.” S.C. CODE ANN. §59-63-260 (2017). Michigan, by contrast, has a much more detailed statutory provision that says a “person employed by or engaged as a volunteer or contractor by a local or intermediate school board or public school academy shall not inflict or cause to be inflicted corporal punishment upon any pupil under any circumstances,” but then goes on to give a long list of circumstances in which restraint or removal of students is appropriate. MICH. COMP. LAWS SERV. § 380.1312 (West, Westlaw through P.A.2017, No. 117, 2017 Reg. Sess.).

students often promotes inclusion, the criminalization of student conduct encourages exclusion—suspending and expelling students for actions that would not have received such harsh punishments in earlier eras, and even treating students with disabilities in ways that violate federal law.¹⁰ This disproportionate punishment of minorities and students with disabilities is a pervasive problem in U.S. schools, but the power of SROs to refer students for charges adds an extra layer of criminalization to the punishment, making it ever more likely that students will enter the prison pipeline.¹¹

Other scholars have critiqued the use of zero-tolerance policies and have advocated for the use of restorative justice and community organizing practices as a way of ameliorating punitive school-discipline models.¹² Here, I build on those approaches by looking specifically at school resource officers' roles in this process, with a focus on how schools can alter SRO mandates to promote effective dispute resolution in schools and reduce the troubling criminalization of student conduct. SROs need to be trained on ways to take different approaches with students who have disabilities and plans in place to address those disabilities. That training, however, should also coincide with a greater emphasis on using SROs to support school-wide policies that promote conflict resolution within schools rather than through the removal and criminalization of individual students.

A. Origins of the School Resource Officer

SROs are not a new phenomenon in the United States. Some place the first SRO in Flint, Michigan in the 1950s, but police officers were in schools long before that.¹³ Indianapolis Public Schools hired a “private

10. The Individuals with Disabilities Education Act provides some protections from suspension or expulsion for behavior that is a result of a student's disability. 20 U.S.C. § 1400–1482. See also Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (West, Westlaw through Pub. L. No. 114-316). See discussion *infra* note 56.

11. See, e.g., Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101 (2015); ANITA WADHWA, RESTORATIVE JUSTICE IN URBAN SCHOOLS: DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 1–28 (2016).

12. See, e.g., Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 835 (2015) (discussing harsher penalties for behavior “historically ignored or addressed through counseling and minor punishment”); David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506 (2014) (calling for restorative-justice practices to address systemic racism in school discipline practices); Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 299 (2006); Christina L. Anderson, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*, 152 U. PA. L. REV. 1181, 1201 (2004).

13. Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological*, 34 J. CRIM. JUST. 591, 592 (2006); *Supporting Safe Schools*, COMMUNITY ORIENTED POLICING SERVS., U.S. DEP'T JUST., <http://www.cops.usdoj.gov/supportingsafeschools> (last visited Oct.

investigator” for its schools in 1939, which evolved into the Indianapolis Public School Police in 1970.¹⁴ Los Angeles’s School Police Department, the largest independent school police department in the U.S., began as a security section in 1948 and now has over 350 sworn police officers.¹⁵ Concerns about crime in schools grew throughout the 1970s and 1980s, and the mass shootings of the 1990s and early 2000s increased popular and legislative attention to SRO programs.¹⁶ The number of SROs peaked in 2003, but those numbers may rise again with the renewal of federal grant money for such programs.¹⁷

Recently, lawmakers have renewed their interest in funding SRO programs in the wake of mass shootings and other incidents of violence in schools, like the December 2013 Sandy Hook Elementary School massacre, in which twenty kindergartners and first-graders, along with six adults, were killed by a lone gunman.¹⁸ Part of the legislative response to such acts focuses on weapons—both arming school personnel and controlling access to weapons—and part focuses on school safety via mechanisms like increased screening and the stationing of law enforcement officers in schools.¹⁹ Obviously, having an armed officer in the school serves both roles, providing both an armed staff person and a law enforcement officer in the school.²⁰

Not every school that employs SROs has an officer on campus full time.²¹ In some districts, SROs rotate through multiple campuses, and

12, 2016).

14. *Id.*

15. *Id.*; *What is the LASPD About...*, L.A. SCH. POLICE DEP’T, <http://www.laspd.com/about.html> (last visited Oct. 16, 2016).

16. Brown, *supra* note 13, at 591; Tierney Sneed, *School Resource Officers: Safety Priority or Part of the Problem?*, U.S. NEWS (Jan. 30, 2015), <http://www.usnews.com/news/articles/2015/01/30/are-school-resource-officers-part-of-the-school-to-prison-pipeline-problem> [hereinafter *Part of the Problem*].

17. *CRS Report*, *supra* note 3, at 5.

18. *See Sandy Hook Shooting: What Happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/> (last visited Oct. 12, 2016). At the time of the shooting, Sandy Hook had one SRO at its high school and one at its intermediate school, as well as three unarmed guards at the high school. After the shooting, every school in the district was assigned at least two full-time police officers and unarmed security guards at each school. Nanci G. Hutson, *Newtown School Security on Front Burner*, NEWSTIMES (Jan. 30, 2014), <http://www.newstimes.com/local/article/Newtown-school-security-on-front-burner-5191557.php> [hereinafter *Newtown School Security*].

19. *See* Rebekah Elliott, *The Real School Safety Debate: Why Legislative Responses Should Focus on Schools and Not on Guns*, 57 ARIZ. L. REV. 523, 532 (2015).

20. *See CRS Report*, *supra* note 3, at 1 (citing the Obama administration’s request for more funding for SROs); *About the National School Shield*, NAT’L SCH. SHIELD, <https://www.nationalschoolshield.org/about/> (last visited Oct. 12, 2016) (describing the National Rifle Association’s National School Shield Task Force).

21. *See, e.g.*, Emma Brown, *Police in Schools: Keeping Kids Safe, or Arresting Them for No Good Reason?*, WASH. POST (Nov. 8 2015), <https://www.washingtonpost.com/local/education/police-in->

federally gathered data uses at-least-weekly appearance as a measure of whether a school is deemed to have an SRO on campus.²² In the 2009–2010 school year, 43% of public schools reported having one or more security guards, security personnel, SROs, or other law enforcement officers at their school at least once a week.²³ SROs are much more common in large schools (79.3% of schools with enrollments over 1,000 students have at least one SRO), schools with large minority populations (41.3% of schools where more than half the students belong to minority groups), and urban schools (39.7%).²⁴ Overall use of SROs grew from the mid-1990s to the mid-2000s, with nearly 20,000 SROs employed through police departments and sheriffs’ offices in 2007.²⁵ By the 2013–2014 school year, the federal Department of Education reported that 24% of elementary schools and 42% of high schools had sworn law enforcement officers, including SROs, on campus.²⁶ That number was greater in minority communities, where 51% of high schools with high Black and Latino student enrollment had sworn law enforcement officers on campus.²⁷ Overall, by 2013–2014, 43% of all public schools had one or more full or part-time security personnel present at the school at least once per week, and 30% of public schools had an actual SRO.²⁸

B. Funding and Training of School Resource Officers

Funding for SROs is provided at both the state²⁹ and federal levels. For fiscal year 2014, the Obama Administration asked Congress for \$150 million in funding for the Community Oriented Policing Services

schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddf0-816c-11e5-9afb-0c971f713d0c_story.html (photo essay following Baltimore police officer Tiffany Wiggins as she went through her beat as a school resource officer).

22. See *CRS Report*, *supra* note 3, at 6–7.

23. Simone Robers et al., *Indicators of School Crime and Safety: 2014*, NAT’L CTR. FOR EDUC. STATISTICS 90 (2015), <http://nces.ed.gov/pubs2015/2015072.pdf>.

24. *Id.* at 162 tbl.20.3.

25. See *CRS Report*, *supra* note 3, at 5–7 (reporting on statistics from the Bureau of Justice Statistics’ Law Enforcement Management and Administrative Statistics (LEMAS) survey).

26. *2013-2014 Civil Rights Data Collection: A First Look*, U.S. DEP’T EDUC. OFFICE FOR CIVIL RIGHTS 5 (2016), <http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [hereinafter *A First Look*].

27. *Id.* at 5. “High” enrollment denotes schools with more than 75% enrollment of black and Latino students. *Id.* at 10.

28. LUCINDA GRAY & LAURIE LEWIS, NAT’L CTR. FOR EDUC. STATISTICS, PUBLIC SCHOOL SAFETY AND DISCIPLINE: 2013-2014 at 10 tbl.5 (2015), <http://nces.ed.gov/pubs2015/2015051.pdf>. The “security personnel” category includes security guards, security personnel, SROs, and sworn law enforcement officers who are not SROs. *Id.* SROs were present in 30% of all public schools. *Id.*

29. See, e.g., MISS. CODE ANN. § 37-3-82 (West, Westlaw through HB 32, 2017 Reg. Sess.) (providing for Mississippi’s Community Oriented Policing in Schools Grant Program 2013).

(COPS) program.³⁰ An older COPS program had been available through 2005, and similar grants under the Safe and Drug Free Schools and Communities Act had been available through 2009.³¹ These grant programs provided “seed” money for local law enforcement agencies to hire officers to serve in schools, but after these initial funds are expended, the burden of retaining these officers falls to local government, either the law enforcement agencies themselves or, usually, to the schools using them.³² Under the old COPS program, nearly 7,200 SRO positions were funded.³³ The revived COPS hiring program gave out \$113 million in 2015, which included “School Based Policing” initiatives in fifty-nine jurisdictions throughout the country.³⁴

Today, there are a number of state-based SRO organizations and two large national organizations that provide training, the National Association of School Safety and Law Enforcement Officials (NASSLEO) and the National Association of School Resource Officers (NASRO).³⁵ Yet neither group’s publicly available training curriculum places much emphasis on formal training in alternative dispute-resolution methods like mediation, instead focusing on more general interactions with students and on active-shooter type scenarios.³⁶ NASRO’s basic training course for SROs, for example, focuses on three areas: (i) functioning as a police officer in the school setting; (ii) working as a resource and problem solver; and (iii) developing teaching skills. It frames this three-part role as the “Triad Concept,” conceptualizing the SRO as simultaneously law enforcement officer, informal counselor, and educator.³⁷

30. *CRS Report*, *supra* note 3, at 1.

31. *Id.* at ii.

32. *Id.* at iii; *see also, e.g., Newtown School Security*, *supra* note 18 (noting that town received \$1.5 million in federal grants, but without those grants the additional operating costs to the school budget would have been over \$216,000).

33. *CRS Report*, *supra* note 3, at 7.

34. *2015 COPS Hiring Program (CHP) Award List*, COPS HIRING PROGRAM (CHP), http://www.cops.usdoj.gov/pdf/2015AwardDocs/chp/CHP_Award_List.pdf (last visited Oct. 12, 2016). The number of officers funded in each jurisdiction ranged from one officer in many jurisdictions to a maximum of fifteen officers for the city of Fresno, California.

35. Brown, *supra* note 13, at 592; NAT’L ASS’N SCH. SAFETY & L. ENFORCEMENT OFFICIALS, <http://www.nassleo.org/> (last visited Oct. 12, 2016); NAT’L ASS’N SCH. RESOURCE OFFICERS, <https://nasro.org/> (last visited Oct. 12, 2016). For the month of August 2016, NASRO had SRO trainings scheduled in 15 cities. *Training Calendar*, NASRO, (2016-08), <https://nasro.org/training/> (last visited Oct. 12, 2016).

36. *Basic SRO Course*, NASRO, <https://web.archive.org/web/20150911003949/https://nasro.org/basic-sro-course/> (last visited Oct. 12, 2016). Of NASRO’s 5-Day Basic SRO Course, one day appears to be devoted to the “role of ‘informal counselor or problem solver’” which includes “discussions on Child Abuse, Adolescent Stress, Dysfunctional Families, and working with Children with Special Needs.” *Id.*

37. *Id.* The most recent iteration of the NASRO’s explanation of its Basic SRO Course does appear to place more emphasis on counseling functions. It also explicitly lists “Understanding Special

Yet there appear to be few legal requirements that SROs engage in role-specific training, nor do federal funding guidelines require any particular training for SROs. Moreover, local agreements that govern the relationships between SROs and schools do not require much by way of formal training.³⁸ While these agreements may have hortatory language encouraging or discouraging certain training or conduct, they typically have little in the way of concrete training objectives or requirements.³⁹ State legislatures have done little to fill this gap. It does not appear that many states even set a minimum number of training hours for SROs.⁴⁰ The most stringent state requirements for SROs call for forty hours, or about one week's worth, of additional training on working in schools.⁴¹ At the end of the day, it appears that the only concrete qualification required of an SRO in most states is to be a law enforcement officer.

C. The Criminalization of Students, and the Disproportionate Punishment of Minority Students and Students with Disabilities

As schools' use of SROs has grown, so have concerns about SRO actions on the job, which parallel concerns about police conduct in broader society. Of paramount concern to student advocates is the way in which SROs may be contributing to the school-to-prison pipeline by

Needs Students" with the goal to "[p]rovide strategies for SROs to be appropriately proactive and reactive when interacting with students with disabilities." *Basic SRO Course*, NASRO, <https://nasro.org/basic-sro-course/>. This may be a positive step if part of being "appropriately reactive" is understanding and following students with disabilities' education and behavior plans.

38. For example, as the result of a Virginia incident discussed below, the Lynchburg Public Schools revised its MOU with the local police department to provide that the Lynchburg Police Department "shall provide any training required of SROs by applicable Virginia law. The LPD will also offer SROs additional training opportunities, if available, that will increase their effectiveness under this MOU. Such training may include child and adolescent development and psychology; age-appropriate responses; cultural competence; restorative-justice techniques; the needs of and accommodations for students with disabilities; and practices proven to improve school climate." Memorandum of Understanding Between the Lynchburg City Schools and the City of Lynchburg Police Department 52 (2015), <https://www.lcsedu.net/sites/default/files/pdfs/schoolboard/agendas/agenda081815.pdf>.

39. *See id.* See also discussion of MOUs in Part IV *infra*.

40. Mark Keierleber, *Why So Few School Cops Are Trained to Work with Kids*, ATLANTIC (Nov. 5, 2015), <http://www.theatlantic.com/education/archive/2015/11/why-do-most-school-cops-have-no-student-training-requirements/414286/> (noting that only 12 states have laws requiring SRO training); Angela Ciolfi & Sarah Gross, *To Reduce Criminalization of Childhood, We Should Start by Training SROs*, RICHMOND TIMES-DISPATCH (Apr. 27, 2015), http://m.richmond.com/opinion/their-opinion/guest-columnists/article_94d8b7dd-9857-5b65-a267-d873d760266f.html?mode=jqm (noting that in Virginia "no specialized training in working with kids is required at all, and only 1 percent of the total training hours at Virginia's police academies cover juvenile justice topics").

41. *See* MISS. CODE R. 7-6-2:2 (West, Westlaw through the Miss. Admin. Rules Listing of Filings, dated Jan. 2017) and MO. REV. STAT. § 168.450 (LexisNexis, Lexis Advance through all legislation approved as of Feb. 6, 2017). Mississippi and Missouri both appear to require forty hours of additional training for SROs.

unnecessarily bringing students into the criminal justice system.⁴² These concerns are shared by the federal government. The 2016 COPS funding guidelines specifically call out the danger of criminalizing student conduct:

The placement of law enforcement officers in school carries a risk of contributing to a “school-to-prison pipeline” process where students are arrested or cited for minor, nonviolent behavioral violations and then diverted to the juvenile court system. This pipeline wastes community resources and can lead to academic failure and greater recidivism rates for these students.⁴³

SROs’ contribution to the school-to-prison pipeline lies in their potential to criminalize student behavior that previously would not have been treated as criminal. This is often referred to as a “net-widening” effect, where behavior that previously would have been subject only to internal discipline in schools is now referred for criminal charges.⁴⁴ Once students enter the criminal justice system, they are more likely to be criminally punished for misconduct down the road, thus entering the “school-to-prison pipeline.”⁴⁵ In part to counter these concerns, the federal government requires that SRO programs funded through the COPS program make it clear that SROs “will not be responsible for requests to resolve routine discipline problems involving students.”⁴⁶

Calling in SROs to address student misbehavior can lead to escalating situations and criminal charges against students. An example of this escalation was caught on video in Round Rock, Texas. After officers broke up a fight, two of them cornered one of the high-school students involved. When the student, Gyasi Hughes, reached out and pushed one of the officers, the officer grabbed Gyasi by the throat and pulled him to the ground.⁴⁷ In October 2015, another video captured on a student’s

42. *Part of the Problem*, *supra* note 16; see also Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013).

43. *COPS Office FY 2016 Application Guide: COPS Hiring Program (CHP)*, COMMUNITY ORIENTED POLICY SERV., U.S. DEP’T JUST. 33 (2016), <http://www.cops.usdoj.gov/pdf/2016AwardDocs/chp/AppGuide.pdf>.

44. Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 83 (2008).

45. *Part of the Problem*, *supra* note 16.

46. *Memorandum of Understanding Fact Sheet*, COMMUNITY ORIENTED POLICY SERV., U.S. DEP’T JUST. 2 (2015), http://www.cops.usdoj.gov/pdf/2015AwardDocs/chp/CHP_MOU_Fact_Sheet.pdf (emphasis in original). The factsheet goes on to add, “The administration of student discipline, including student code of conduct violations and student misbehavior, is the responsibility of school administrators unless the violation or misbehavior involves criminal conduct.” *Id.*

47. Alex Boyér & Adela Uchida, *Incident Between Round Rock PD Officers and Student Caught*

cell phone showed Ben Fields, an SRO in Columbia, South Carolina, flipping a black high school student out of her desk during a math class and throwing her across the room.⁴⁸ One of her classmates stated that the student had been asked to put her cell phone away by their teacher and a school administrator, and only after the student ignored those requests was the SRO called into the classroom.⁴⁹ Both the disciplined student and another girl in the class who stood up for her were charged with disturbing school.⁵⁰ The SRO, Deputy Fields, who also served as a coach for the high school football team, had received a “Culture of Excellence Award” in 2014 from an elementary school where he also worked.⁵¹ The Richland County Sheriff’s Department dismissed Deputy Fields two days after the incident.⁵² Yet at the time Deputy Fields was dismissed, the Sheriff’s Department said it thought the student would still be prosecuted on the disturbing-school charge.⁵³

These concerns about police on school campuses exist within a broader problem of disproportionate punishment of both minority students, particularly black boys, and students with disabilities. Criminalization of student conduct is more prevalent and intense in urban schools with disadvantaged minority populations than in predominantly white, suburban schools.⁵⁴ But the interplay between these two categories—students of color and students with disabilities—is complex. Students in predominantly minority schools are less likely to receive special-education services, regardless of race or ethnicity.⁵⁵ However, there are some notable differences for black and Hispanic students in terms of rates of punishments like suspension and expulsion.

on Camera, CBS AUSTIN (Oct. 9, 2015), <http://keyetv.com/news/local/incident-between-round-rock-pd-officer-and-student-caught-on-camera>.

48. Dana Ford et al., *Spring Valley High School Officer Suspended After Violent Classroom Arrest*, CNN (Oct. 27, 2015), <http://www.cnn.com/2015/10/27/us/south-carolina-school-arrest-video/> [hereinafter *CNN Coverage*] (see related videos).

49. *Id.*

50. *The Lead with Jake Tapper Transcripts*, CNN 16:38:04 (Oct. 27, 2015), <http://edition.cnn.com/TRANSCRIPTS/1510/27/cg.02.html>. A leader of a local black parents’ association commented, “Most school resource officers are great people. They do awesome work in our schools. But this is a shame.” *Id.*

51. *CNN Coverage*, *supra* note 48.

52. Alan Blinder, *Ben Fields, South Carolina Deputy, Fired over Student Arrest*, N.Y. TIMES (Oct. 28, 2015), <http://www.nytimes.com/2015/10/29/us/south-carolina-deputy-ben-fields-fired.html>.

53. *Id.*

54. Hirschfield, *supra* note 44, at 81.

55. David M. Ramey, *The Social Structure of Criminalized and Medicalized School Discipline*, 88 SOC. EDUC. 181, 185 (2015). When I use the term “special education services,” I am referring both to services under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400–1482 (2012), and to services under Section 504 of the Rehabilitation Act of 1973. Under the IDEA, students receive an individual education program (IEP) that is tailored to their specific disabilities. Under Section 504, students do not receive an IEP as they do under the IDEA, but do receive additional services to address their disabilities, often in the form of assistive technology.

School districts with larger black populations use fewer special-education services and more punishments and contacts with police.⁵⁶ School districts with larger Hispanic populations also have lower rates of special education, but have significantly lower rates of school punishment and police contact than do schools with larger black populations.⁵⁷

Studies by both the government and independent researchers have long shown that white and minority students are treated differently when they misbehave in class.⁵⁸ One recent study found that black students are more likely to be removed from school or referred to law enforcement.⁵⁹ The U.S. Department of Education has found that Hispanic and African-American students make up nearly three quarters of students referred by schools to the police or involved in school-related arrests.⁶⁰ This difference in school discipline starts at an early age: black *preschool* children are 3.6 times more likely to receive an out-of-school suspension as white preschool children.⁶¹ In K–12 schools, black students are 3.8 times more likely as white students to receive an out-of-school suspension.⁶² In addition to higher suspension rates, black students are also 1.9 times more likely to be expelled and 2.3 times more likely to be referred to law enforcement or subject to a school-related arrest.⁶³ Other work suggests that minority students are not only more likely to be punished in school, but also are more likely to attend schools that use strict security measures like metal detectors, guards, and searches of student property.⁶⁴

The disproportionate punishment of black students is a complex problem, and the presence of police officers in schools is one of many

56. Ramey, *supra* note 55, at 189.

57. *Id.* at 192.

58. Catherine E. Lhamon & Jocelyn Samuels, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, U.S. DEP'T EDUC. & U.S. DEP'T JUSTICE 3–4 (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>. The U.S. Department of Education and Department of Justice released guidance on disproportionate punishment in schools in 2014, highlighting the disproportionate suspension, expulsion, and arrest of students of color. The guidance addresses “[a]ppropriate use of law enforcement” in an appendix, recommending that schools regularly meet with SROs for additional training, which “may include . . . restorative-justice techniques.” *Id.* at app. 3–4; *see also* Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 332 (2016).

59. Lisa Abregú, *Restorative Justice in Schools: Restoring Relationships and Building Community*, 18 DISP. RESOL. MAG. 10 (2012).

60. *Id.*

61. *A First Look*, *supra* note 26, at 3.

62. *Id.*

63. *Id.* at 4.

64. Nance, *supra* note 42, at 41. An interesting wrinkle to Nance’s findings is that as the percentage of students that have limited English proficiency increase, the odds of security measures decreases. *See id.* at 42.

complicating factors. Psychological research on bias in education suggests that the roots of this problem run deep and may rest in unconscious cultural biases that affect teachers' perception of student behavior.⁶⁵ In a pair of 2015 psychological studies, Stanford researchers found that a person's race appears to influence both how teachers perceive that person's individual behaviors and how they detect patterns of misbehavior over time.⁶⁶ In the first study, a group of practicing teachers viewed school records in which students with either stereotypically black names (Darnell or Deshawn) or white names (Greg or Jake) misbehaved twice.⁶⁷ While there was not a significant difference in feeling about the first infraction based on race, the teachers felt significantly more troubled by the second infraction when the student had a stereotypically black name; in such cases, the teachers thought the "black" student should be disciplined more severely than a corresponding "white" student.⁶⁸ In the second study, teachers were also asked the extent to which they could imagine suspending the misbehaving student at some point in the future. The teachers were significantly more likely to imagine themselves suspending the "black" student than the "white" student.⁶⁹

A growing concern has also emerged over SROs inappropriately disciplining students with disabilities, especially students with emotional and behavioral disabilities.⁷⁰ Students with an "individualized education program" (IEP) under the Individuals with Disabilities Education Act (IDEA) are supposed to receive protections from punishment for behavior that is a manifestation of their disability.⁷¹ Even so, rather than

65. See, e.g., Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617 (2015); La Vonne I. Neal et al., *The Effects of African American Movement Styles on Teachers' Perceptions and Reactions*, 37 J. SPECIAL EDUC. 49 (2003); Christine Reyna & Bernard Weiner, *Justice and Utility in the Classroom: An Attributional Analysis of the Goals of Teachers' Punishment and Intervention Strategies*, 93 J. EDUC. PSYCHOL. 309 (2001).

66. Okonofua & Eberhardt, *supra* note 65, at 617.

67. *Id.* at 618. The study also included a manipulation check in which the teachers were asked how likely it was that the student's name was that of a black person. *Id.* at 618–19.

68. *Id.* at 619–20.

69. *Id.* at 621–22. As in the first study, Okonofua and Eberhardt also found that the more likely a teacher was to think the student was black, the more likely that teacher was to label the student a troublemaker. *Id.* at 621.

70. See, e.g., Nate Robson, *The Punishment Gap: Schools Discipline Special Ed Students at Higher Rates*, OKLA. WATCH (Aug. 20, 2015), <http://oklahomawatch.org/2015/08/20/the-punishment-gap-schools-discipline-special-ed-students-at-higher-rates/>. This report from Oklahoma discusses a second-grade special education student handcuffed with zip ties by campus police, and a six-year-old be held down by four campus police officers, reflecting the overall trend of disproportionate punishment of special education students. The article reported that in the Tulsa School District, seventeen schools each expelled more than fifty percent of their special education students. *Id.*

71. 20 U.S.C. § 1415(E) (2012).

face lower rates of discipline, students with disabilities are disciplined more severely and more often than other students. Students with disabilities who are receiving IDEA services are more than two times more likely to receive out-of-school suspensions than are students without disabilities.⁷²

One possible reason for these disparities in punishment is that students are diagnosed with disabilities at different levels depending on their race. As discussed above, minority students are more likely than their white peers to be disciplined in school.⁷³ In a 2016 study by the U.S. Department of Education Office of Special Education and Rehabilitation Services, the federal government pooled data from throughout the United States, calculating the “risk ratio” of a particular group to receive discipline or a disability classification relative to other students in their school district. Minority students are also more likely to receive the disability categorization of “emotionally disturbed” than their non-minority peers.⁷⁴ Black students, in particular, are almost 3.5 times more likely to be labeled “emotionally disturbed” than are their non-Black peers.⁷⁵ Black students with disabilities are also nearly five times as likely to receive out-of-school suspensions, and more than six times as likely to be removed from school, than are other students with disabilities.⁷⁶ As the U.S. Department of Education summarizes, based on its own data: “With the exception of Latino and Asian-American students, more than one out of four boys of color with disabilities (served by IDEA)—and nearly one in five girls of color with disabilities—receives an out-of-school suspension.”⁷⁷ Students with disabilities are also more likely to be arrested or subject to school-related arrest.⁷⁸ Therefore, the same trends in disproportionate

72. *A First Look*, *supra* note 26, at 4. The figures are 13% for students with disabilities and 6% for students without disabilities. *Civil Rights Data Collection: Data Snapshot (School Discipline)*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T EDUC. 1 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> [hereinafter *Data Snapshot*].

73. See Lhamon & Samuels, *supra* note 58, at 3.

74. *Racial and Ethnic Disparities in Special Education: A Multi-Year Disproportionality Analysis by State, Analysis Category, and Race/Ethnicity*, U.S. DEP’T EDUC., OFFICE SPECIAL EDUC. & REHABILITATIVE SERV. 18 (2016), <http://www2.ed.gov/programs/osepidea/618-data/LEA-racial-ethnic-disparities-tables/disproportionality-analysis-by-state-analysis-category.pdf> [hereinafter *DOE Disparity Study*]. This is in comparison to less stigmatized classification categories, like autism.

75. *Id.*

76. Black students are 4.99 times more likely than white students to receive out of school suspensions of 10 days or less. *Id.* at 36 tbl.13. Black students are 6.15 times more likely than white students to face total removal from school. *Id.* at 40 tbl.15.

77. *U.S. Department of Education Takes Action to Deliver Equity for Students with Disabilities*, U.S. DEP’T EDUC. (Feb. 23, 2016), <http://www.ed.gov/news/press-releases/us-department-education-takes-action-deliver-equity-students-disabilities>.

78. See *Data Snapshot*, *supra* note 72, at 7. Students with disabilities make up 25% of arrests or

punishment discussed for students of color, particularly black students, seem exacerbated by disability status, rather than being alleviated by the disciplinary protections that exist under the IDEA.

Psychological research also lends support to the reported disparities in the number of black students who are categorized as in need of special education compared to white students.⁷⁹ In one study, middle school teachers viewed either a black or white student walking from a locker and into a classroom.⁸⁰ The students used either a stereotypically white or stereotypically black walking style.⁸¹ Teachers presented with either a black or white student using the stereotypically black walking style, which the researchers called a “stroll,” perceived that student to be more aggressive regardless of race.⁸² They also perceived both white and black students walking with a “stroll” to be more likely to need special education.⁸³ While these results may seem partly positive, in that the effect does not seem to be due to ethnicity alone, they do suggest a cultural bias in teachers’ perceptions of student behavior that may impact the likelihood that students displaying stereotypically black behaviors will be referred for special education services.

1. Examples of SROs’ Disproportionate Punishment of Behavior by Students with Disabilities.

The psychological research discussed above may provide an additional explanation for why teachers—and SROs—seem to overreact to misbehavior by racial minority students and students with disabilities. In a Texas incident, an SRO was called in when LaChastity, a black, female high school student who had an intellectual disability and mild retardation, refused to stop talking in class. The SRO claimed that LaChastity swung at him as he tried to remove her from class. LaChastity claimed that the SRO pulled her down to the ground, preparing to use his Taser in the process. Ultimately, LaChastity was charged with disorderly conduct and resisting arrest, with the police refusing to drop the charges even after the school district requested it on

referrals, but only 12% of the student population. *Id.*

79. Neal et al., *supra* note 65, at 55.

80. *Id.* at 52. The study included both a black and white student, dressed similarly and of similar size. *Id.*

81. For purposes of their study, the researchers used the following definitions: the stereotypically European-American walk had “an erect posture with leg and arm movement synchronized with posture and pace, a steady stride, and a straight head,” while the African-American walk had “a deliberately swaggered or bent posture, with the head held slightly titled to the side, one foot dragging, and an exaggerated knee bend (dip).” *Id.* at 50.

82. *Id.* at 53.

83. *Id.* at 53–55.

grounds that LaChastity's behavioral plan had not been followed.⁸⁴

In Virginia, Kayleb, an eleven-year-old black male student with autism, was found guilty on a series of charges initiated by his school's SRO.⁸⁵ After receiving a disorderly conduct charge for kicking a trash can during a tantrum, Kayleb then received another disorderly conduct charge, along with a felony assault charge, after an incident in which he struggled out of the grasp of the SRO.⁸⁶ Following this second incident, Kayleb claims the SRO left him in handcuffs for over three hours.⁸⁷ A juvenile court judge found Kayleb guilty on all charges.⁸⁸ The school district denied the family's version of events, but refused to comment further, aside from stating that "SROs play an important role in the school division, and we have and will continue to work together on procedures for when SROs should become involved in incidents involving students. We feel they are being unfairly portrayed in this matter."⁸⁹ After Kayleb's story was featured on public radio, along with findings from the Center for Public Integrity showing that Virginia schools referred students to law enforcement at the highest rate in the country, with particularly high rates of referrals from middle schools,⁹⁰ the Lynchburg City School Board drew up a new Memorandum of Understanding with the City Police Department, setting out an approach

84. *Family Pushes Texas Police to Drop Charges Against Disabled Student*, FOX NEWS U.S. (June 26, 2012), <http://www.foxnews.com/us/2012/06/26/family-pushes-texas-police-to-drop-charges-against-disabled-student.html>. The district attorney did drop the resisting arrest charge. *Id.* In another Texas school district, eight-year-old Ethan, who was diagnosed with ADHD and had a special education plan, was handcuffed by a school resource officer after teachers called the SRO in because they were having trouble controlling Ethan. The handcuffs were too big for Ethan and so the SRO, according to the police report, "maintained control of the student" until his parents arrived to pick him up. His parents asked why Ethan had not been placed in a quiet room, as called for by his plan, and were told that the school had been using the designated room for storage. Rissa Shaw, *School District Apologizes After Special Ed Student Handcuffed*, KCEN TV (Feb. 17, 2016), <http://www.dignityinschools.org/news/school-district-apologizes-after-special-ed-student-handcuffed>. There are also examples of school staff being arrested by police after the staff object to the treatment of students by SROs. See Jennifer Medina, *Police Arrest a Student, Then Her Principal, Too*, N.Y. TIMES (Oct. 10, 2007), <http://www.nytimes.com/2007/10/10/nyregion/10school.html> (school principal charged with obstructing government activity and resisting arrest; another principle kept out of school for two months after being accused of interfering with the arrest of a student).

85. Susan Ferriss, *How Kicking a Trash Can Became Criminal for a 6th-Grader*, REVEAL (Apr. 11, 2015), <https://www.revealnews.org/article/how-kicking-a-trashcan-became-criminal-for-a-6th-grader/>.

86. *Id.*

87. Press Release, Va. Legal Aid Society, Virginia Legal Aid Society Statement Regarding Moon-Robinson Case (Sept. 2, 2015), <http://vlas.org/wp-content/uploads/2015/09/VLAS-Statement-Moon-Robinson-Case-LCS-and-LPD-MOU.pdf>.

88. Ferriss, *supra* note 85.

89. *Lynchburg City Schools Issues Statement Regarding Criminal Charges for 11-Year-Old Boy*, WNET-TV (Apr. 16, 2015), <http://www.wset.com/story/28818097/lynchburg-city-schools-offers-statement-regarding-charges-for-11-year-old-boy>.

90. Ferriss, *supra* note 85.

the school board is calling “Prevention before Intervention versus Enforcement.”⁹¹ The media attention also led Virginia governor Terry McAuliffe to create a task force on student referrals to law enforcement.⁹² Eventually the charges against Kayleb were dropped.⁹³

A recent lawsuit from Kentucky highlights many of the concerns about SROs.⁹⁴ In 2014, the Sheriff’s Office in Kenton County, Kentucky, agreed to provide four deputies to serve as SROs in the Covington public schools.⁹⁵ That fall, “S.R.,” an eight-year-old boy with attention deficit hyperactive disorder (ADHD) and post-traumatic stress disorder (PTSD), was placed in handcuffs by his school’s SRO.⁹⁶ S.R. was so small that the SRO cuffed the child around his biceps, an incident captured on video in the vice principal’s office.⁹⁷ In October of that same year, L.G., a nine-year-old girl with ADHD, was twice handcuffed by the same SRO, who had to call an ambulance after the first incident, yet handcuffed her again just a few weeks later.⁹⁸ These incidents occurred despite the fact that Kentucky, like many states, has regulations prohibiting certain types of restraint and seclusion of students in public schools.⁹⁹ In particular, the state allows the physical restraint of students only if “the student’s behavior poses an imminent danger of physical harm to self or others.”¹⁰⁰ Perhaps the most

91. Suri Crowe, *Lynchburg City Schools Updates SRO Policy*, ABC 13 WSET (Sept. 10, 2015), <http://wset.com/news/local/lynchburg-city-schools-updates-sro-policy> (“We have language in there that talks about doing everything we can to limit the arrest of anyone under the age of 13.”).

92. Susan Ferriss, *Virginia Bills Would Put Limits on Role of Police in Schools*, CTR. FOR PUB. INTEGRITY (Feb. 9, 2016), <https://www.publicintegrity.org/2016/02/09/19275/virginia-bills-would-put-limits-role-police-schools>.

93. Susan Ferriss, *Virginia Drops Felony Charges Against Sixth-Grade Boy with Autism*, REVEAL (Mar. 15, 2016), <https://www.revealnews.org/article/virginia-drops-felony-charges-against-sixth-grade-boy-with-autism/>.

94. For a more detailed discussion of this case, and concerns about SROs and students with disabilities, see Elizabeth A. Shaver and Janet R. Decker, *Handcuffing a Third Grader? Interactions between School Resource Officers and Students with Disabilities* 2(1) UTAH L. R. 229 (2017).

95. See Kentucky Complaint, *supra* note 2, ¶ 18.

96. *Id.* ¶ 12. At the time, S.R. weighed fifty-two pounds. He also did not have an IEP. Kentucky Decision, *supra* note 2, at *2. His mother requested educational accommodations for S.R. a month after the incident with Deputy Sumner, and after debate between his mother and the school S.R. was given behavioral interventions and services under Section 504, but not an IEP. *Id.* at *4.

97. *Id.* ¶ 3; ACLUvideos, *Third Grader Handcuffed in School*, YOUTUBE (Aug. 3, 2015), <https://www.youtube.com/embed/72vu6nxZX58>.

98. Kentucky Complaint, *supra* note 2, ¶¶ 44–45, 48.

99. 704 KY. ADMIN. REGS. 7:160 (2017). Kentucky defines a school resource officer as “a sworn law enforcement officer who has specialized training to work with youth at a school site. The school resource officer shall be employed through a contract between a local law enforcement agency and a school district.” KY. REV. STAT. ANN. § 158.441(2) (LexisNexis, Lexis Advance through sections amended through Ch. 7 of the 2017 sess.).

100. 704 KY. ADMIN. REGS. 7:160 § 3(3)(a). The statute also cites exceptions for the use of force in self-defense and by persons responsible for the care of minors, so long as the force “is not designed to cause or known to create a substantial risk of causing death, serious physical injury, disfigurement,

dispiriting fact in this whole scenario is that the SRO who handcuffed these children, Deputy Kevin Sumner, is himself a former teacher, one who told a local newspaper prior to these incidents that he thought it was “good to have a positive interaction with the kids and to be a good role model and to undo any negative stereotypes of law enforcement that some of the kids may have.”¹⁰¹ In both incidents, Deputy Sumner was at another school and was called to the schools in question by school employees to deal with an “out of control” student.¹⁰² He also declined to file criminal charges against either student, testifying that “none of what they did was worthy of trying to file a criminal charge.”¹⁰³

In a lawsuit brought on behalf of S.R. and L.G., the students’ families allege Fourth and Fourteenth Amendment violations and violations of the Americans with Disabilities Act. They seek damages as well as changes to the training of the district’s SROs, including a focus on “reasonable modifications such as crisis intervention, de-escalation, patience, and waiting” for students with disabilities.¹⁰⁴ In a statement of interest filed in the suit, the Department of Justice emphasized its belief that the Americans with Disabilities Act applies to police interactions and that the Kenton County Sheriff’s Office had a duty under the Americans with Disabilities Act to reasonably modify its procedures when interacting with students with disabilities.¹⁰⁵ It called on the court to consider “whether Deputy Sumner’s actions were reasonable in light of the appropriate role of an SRO at a school.”¹⁰⁶ As of October 2017, the lawsuit had survived, in part, defendants’ motion for summary judgment, with the court ruling the SRO’s actions were an unconstitutional seizure and excessive force.¹⁰⁷ However, the court also

extreme pain, or extreme mental distress.” KY. REV. STAT. ANN. § 503.110(1)(b) (LexisNexis, Lexis Advance through sections amended through Ch. 7 of the 2017 session). S.R. and L.G.’s lawsuit was brought under federal law, but given L.G.’s reaction to the first time Deputy Sumner restrained her (he had to call an ambulance), one could plausibly argue that a second restraint would create a substantial risk of extreme mental distress.

101. Holly Yan, *School Resource Officer Sued for Allegedly Handcuffing Children with ADHD*, CNN (Aug. 4, 2015), <http://www.cnn.com/2015/08/04/us/aclu-disabled-students-handcuffed-lawsuit/>; Michael Monks, *Sheriff’s Deputy, Former Teacher & Covington Officer, Returns to Schools*, RIVER CITY NEWS (Feb. 21, 2014), <http://www.rcnky.com/articles/2014/02/21/sheriffs-deputy-former-teacher-covington-officer-returns-schools>.

102. Kentucky Decision, *supra* note 2, at *3, *5.

103. *Id.* at *6.

104. Kentucky Complaint, *supra* note 2, ¶¶ 68, 71.

105. Statement of Interest of the United States at 2, 29–39, S.R. et al. v. Kenton County Sheriff’s Office et al., No. 2:15-cv-00143 (E.D. Ky. Oct. 2, 2015), ECF No. 32 [hereinafter DOJ Statement of Interest].

106. *Id.* at 28.

107. Kentucky Decision, *supra* note 2, at *9. The court, applying the Graham factors discussed in Section D.1 *infra*, found that those factors generally weighed in favor of the students, particularly given their youth and small size. *Id.*

ruled that plaintiffs did not show that it was “clearly established” when the handcuffings took place that such actions were unconstitutional and so Deputy Sumner was entitled to qualified immunity.¹⁰⁸ The case is thus moving forward against Kenton County to determine municipal liability for S.R. and L.G.’s constitutional claims.¹⁰⁹

Incidents like those involving LaChastity, Kayleb, S.R., and L.G. are particularly disturbing because students with disabilities are supposed to receive additional protections from disciplinary procedures under the Individuals with Disabilities Education Act.¹¹⁰ When a student violates his or her school’s code of student conduct, and the school would like to suspend or expel that student, the school must meet with the student’s parents and members of the student’s IEP team and decide whether or not the offending conduct was related to the student’s disability or a result of the school’s failure to implement the student’s IEP.¹¹¹ If either is the case, then the student cannot be removed from the school.¹¹² These actual incidents put names and faces to the federal data showing that students with disabilities, particularly black students with disabilities, are being disproportionately punished.¹¹³

Unfortunately, the IDEA does not offer any protection when students are criminally charged by police officers, even when those police officers are employed at schools as SROs. In LaChastity’s case, for example, the school admitted that it had not followed her behavioral plan and asked that the charges against her be dropped, but the local police chief refused, reasoning that since she was disciplined enough to graduate from high school, she knew right from wrong.¹¹⁴ In S.R.’s case, after he was handcuffed by his school’s SRO, the SRO was heard on tape telling the child, “It’s your decision to behave this way. If you want the handcuffs off, you’re going to have to behave and ask me nicely.”¹¹⁵ These police officers display little understanding of the differences between adults and minors, let alone minors with disabilities. They appear to expect these students to respond to their orders instantly and rationally, even if the students’ behavior

108. *Id.* at *11.

109. *Id.* at *13.

110. 34 C.F.R. § 300.530–300.537 (2016).

111. *Id.* § 300.530(e).

112. *Id.* § 300.530 (f). There are exceptions. If the student has a weapon, possesses drugs or a “controlled substance,” or “has inflicted serious bodily injury upon another person,” then school personnel can remove the student to “an interim alternative education setting for not more than 45 school days” regardless of whether the behavior was a manifestation of the student’s disability. *Id.* § 300.530(g).

113. See *DOE Disparity Study*, *supra* note 74.

114. *Family Pushes Texas Police*, *supra* note 84.

115. Kentucky Complaint, *supra* note 2, ¶ 34.

immediately prior was neither calm nor rational. Incidents like those described above have led to calls for reform in how SROs are deployed in our nation's schools.¹¹⁶

D. Lawsuits Are Inadequate Remedies for School Resource Officer Misconduct.

1. Courts Afford High Levels of Deference to School Administrators and Police in Lawsuits Alleging Misconduct by SROs.

Scholars have long sought to outline the contours of constitutional protections for students in schools.¹¹⁷ That inquiry has largely centered on First Amendment freedom of speech, Fourth Amendment protections from search and seizure, and Fourteenth Amendment due process concerns.¹¹⁸ In all of these areas, students enjoy fewer constitutional protections in schools than they (and other persons) do outside of school.¹¹⁹ Lawsuits against SROs for their treatment of students typically involve claims that the officers have violated the Fourth Amendment's prohibition on unreasonable search and seizure.¹²⁰ Much of the research on Fourth Amendment rights in schools focuses on school officials' ability to search students and their belongings, and the discovery of contraband that is then used against students in criminal cases.¹²¹ This Article, especially in light of the interactions discussed above in which students are charged with assaulting police officers, specifically considers Fourth Amendment violations for excessive force: is it possible that excessive force by SROs could mitigate potential charges against students?

In analyzing alleged Fourth Amendment violations for use of

116. Ciolfi & Gross, *supra* note 40.

117. See, e.g., Black, *supra* note 12; Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861 (2012); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395 (2011); Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825 (2009); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996); Jacqueline A. Stefkovich, *Students' Fourth and Fourteenth Amendment Rights After Tinker: A Half Full Glass?*, 69 ST. JOHN'S L. REV. 481 (1995).

118. Dupre, *supra* note 117, at 54–59.

119. Kim, *supra* note 117, at 873–74.

120. See, e.g., Bryan C. Hathorn, *Constitutional Law – Searches, Seizures, & Confessions – Constitutional Protections for Students in Public Schools: R.D.S. v. State*, 245 S.W. 3d 356 (Tenn. 2008), 76 TENN. L. REV. 211 (2008). For a recent case example, see *E.G. v. Barry Bond et al.*, No. 1:16-cv-00068, 2016 U.S. Dist. LEXIS 182002 (N.D. Tex. Aug. 31, 2016).

121. Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 96 (2014).

excessive force by law enforcement officers, courts apply the “objective reasonableness” standard found in *Graham v. Connor*.¹²² *Graham* requires a balancing “of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.”¹²³ Since students’ Fourth Amendment rights in schools are already weaker, in part due to the strength of the governmental (i.e., the schools’) interest, to which courts defer, much hinges on the nature and quality of the interaction with the student. Even so, this inquiry looks to whether an officer’s actions are objectively reasonable in light of the facts and circumstances confronting him or her, and must include “allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.”¹²⁴ The officer’s intentions—good or bad—do not matter if his or her use of force was objectively reasonable.¹²⁵ However, a few cases suggest that use of force against young children may tip the scales against a finding that actions are reasonable. Importantly, although the use of handcuffs on students is not necessarily a Fourth Amendment violation, courts do take the age of the student being handcuffed under consideration when evaluating the circumstances surrounding Fourth Amendment claims.¹²⁶

As applied by courts, the *Graham* standard results in most actions by SROs being deemed reasonable under the circumstances. However, the Kentucky case involving students S.R. and L.G., discussed above, may yet become a counterexample. This lawsuit raised claims under the Fourth and Fourteenth Amendment, as well as claims under the Americans with Disabilities Act.¹²⁷ The court denied the SRO’s qualified immunity claims without prejudice, saying that more discovery

122. *Graham v. Connor*, 490 U.S. 386, 398 (1989).

123. *Id.* at 396.

124. *Id.* at 396–97.

125. *Id.* at 397.

126. In the United States’ Statement of Interest in S.R. and L.G.’s complaint, the DOJ lawyers drew analogies to several other cases in which young children were subject to excessive use of force by police officers both in school settings and in conjunction with the arrests of adults. See DOJ Statement of Interest, *supra* note 105, at 20–21 (citing *Hoskins v. Cumberland Cty. Bd. of Educ.*, No. 2:13-CV-15, 2014 WL 7238621, at *33 (M.D. Tenn. Dec. 17, 2014) (noting that an eight-year-old boy was “a startlingly young child to be handcuffed at all, much less for forty-five minutes”); *Gray v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006) (“[H]andcuffing [nine-year-old Gray] was excessively intrusive given Gray’s young age and the fact that it was not done to protect anyone’s safety.”); *Tekle v. United States*, 511 F.3d 839, 847 (9th Cir. 2007) (“Tekle was a minor at the time of the incident and ‘posed no threat to the safety of . . . any . . . officer present.”); *Ikerd v. Blair*, 101 F.3d 430, 435 (5th Cir. 1996) (“Deputy Varnado, a 300-pound man, violently jerked Laura, a ten-year-old child, out of her living room”); *James v. Frederick County Pub. Sch.*, 441 F. Supp. 2d 755, 758–59 (D. Md. 2006) (officer handcuffed an eight-year-old with ADHD after the child became upset in class).

127. *S.R. v. Kenton Cty. Sheriff’s Office*, No. 2:15-CV-143, 2015 WL 9462973, at *2 (E.D. Ky. Dec. 28, 2015).

was needed to understand the circumstances behind the SRO's actions.¹²⁸ In its order, the court appeared sympathetic to the students, finding the claims of the SRO and school personnel that they had been criminally assaulted to be exaggerated.¹²⁹

However, it may be that the court was simply asking the SRO and school personnel to present better justifications for their actions. In a similar case, elementary school student Laquarius Gray and her family brought suit against an SRO, Deputy Antonio Bostic, who handcuffed nine-year-old Gray after she refused to cooperate in gym class.¹³⁰ Although Gray eventually won her case, the jury awarded her only \$1 in damages.¹³¹ On appeal, the Eleventh Circuit twice vacated the District Court's award of over \$70,000 in attorney's fees.¹³² The appellate court specifically rejected the importance (and legality) of awarding attorney's fees as incentives for attorneys to take the cases of civil rights litigants.¹³³ Thus, it took truly egregious behavior for the Eleventh Circuit to overcome its deference to SROs' decision-making, and in the second appeal the court seized every opportunity to limit the scope and effect of its initial decision.

Such decisions go far to discourage other families from suing in response to SRO misconduct. The monetary damages awarded in these lawsuits stand a slim chance of actually incentivizing changes to the behavior of SROs, schools, or police, and they do nothing to stem the

128. *Id.* at *6. (“In any event, because the defense of qualified immunity requires an analysis of all the surrounding facts in order to place the officer's conduct in context, the Court will deny the motion to dismiss without prejudice so that discovery can be done to examine the exact circumstances that led to the handcuffing of these children and whether, if a constitutional violation occurred, a reasonable officer in Sumner's position would have known that his actions were unlawful.”)

129. *Id.* at *4 (“While defendants argue that the plaintiffs were lawfully seized because they had committed the crime of assault, this characterization—while perhaps technically accurate—exaggerates the conduct at issue. Plaintiff S.R.—whose conduct was captured, in part, on video—was having, effectively, a severe temper tantrum. Admittedly, as seen on the video, he was pushing and swatting at the teacher who is preventing him from opening the door, but given his age and size, one could reasonably conclude that handcuffing was not necessary to address that conduct.”)

130. *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295 (11th Cir. 2006). Gray allegedly threatened to harm one of her gym teachers in some way, but the record was not clear as to what exact threat she made. One gym teacher claimed Gray said that “I bust you in the head,” which the teacher interpreted as a threat to punch the other gym teacher. *Id.* at 1300. Gray's gym coach “insisted she would handle the matter” but Deputy Bostic escorted Gray outside the gym and proceeded to handcuff her for a disputed amount of time, telling her, “[T]his is how it feels when you break the law.” *Id.* at 1301. In Gray's case, the Eleventh Circuit Court's analysis focused on the fact that Gray was already compliant when she was handcuffed, and so Deputy Bostic's handcuffing her “for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights.” *Id.* at 1307. Still, the court also emphasized that it “is not saying that the use of handcuffs during an investigatory stop of a nine-year-old child is always unreasonable, but just unreasonable under the particular facts of this case.” *Id.*

131. *Gray v. Bostic*, 720 F.3d 887, 891 n.5 (11th Cir. 2013).

132. *Id.* at 901.

133. *Id.* at 897–99.

school-to-prison pipeline as SROs continue to charge students with crimes without accompanying use of force that could give rise to a claim against the SROs. On the other hand, perhaps there is some benefit to pursuing cases with the goal of injunctive as well as monetary relief. For example, in an Alabama case, in which SROs had pepper sprayed students on numerous occasions, the court awarded a small amount of monetary damages, but also ordered the parties to work together to come up with a plan for training and procedures to guide SROs' use of pepper spray going forward.¹³⁴ Despite the monetary damages, however, the Alabama case still shows considerable deference to SRO and police decision-making. Of the eight students who filed suit after being sprayed, only two succeeded on the merits for their actual spraying because they were not resisting, fleeing, or trying to assault someone when sprayed by an SRO.¹³⁵ Unfortunately, the lesson from cases like those of the Birmingham students seems to be that passivity is the only response to SRO behavior that will allow a chance of success in a Fourth Amendment claim of excessive force, at least as the Eleventh Circuit analyzes such claims. While such passive compliance can be—and is—taught to students, it is difficult to imagine that the average, emotionally charged teenager would be able to stay sufficiently calm when confronted with an overaggressive SRO, much less a student who has disabilities that induce disruptive behaviors.¹³⁶ Yet the Court's willingness to consider equitable remedies opens the door for litigants to push for changes in school and SRO policy that will benefit future generations of students.

134. *J.W. v. Birmingham Bd. of Educ.*, 143 F. Supp. 3d 1118 (N.D. Ala. 2015). The pepper spray at issue, "Freeze+P," was marketed as "the most intense . . . incapacitating agent available today." *Id.* at 1125. In its qualified immunity analysis, the court first asked whether the students' constitutional rights were violated (finding that they were) and then asked whether those rights were clearly established at the time the violation occurred, finding that the officers were under notice that using pepper spray in the manner in which they did was a violation. *Id.* at 1145–47. The incidents included spraying of students by SROs who were not defendants in the case. *Id.* at 1169. The court discussed at length the existing Birmingham Police Department's policies around the use of pepper spray, noting that between 2006 and 2014, SROs sprayed 199 Birmingham City School students, only one of whom had a weapon at the time he or she was sprayed. *Id.* at 1135–37.

135. *Id.* at 1125–26, 1147–48. These two successful plaintiffs, K.B. and B.J., were already restrained and not posing a danger when they were sprayed. Fifteen-year-old K.B. was crying, in handcuffs, and five months pregnant when she was sprayed by Officer Silburn Smith. *Id.* at 1131, 1147. Sixteen-year-old B.J. was already being held up against a locker by two men when he was sprayed by Officer Marion Benson, who charged B.J. with harassment. B.J. was not ultimately charged with any criminal conduct from the incident. *Id.* at 1133, 1147. The court awarded the eight plaintiffs \$5,000 each for the SROs' failure to decontaminate the students after pepper spraying them, and K.B. and B.J. an additional \$5,000 each for the SROs' excessive use of force. *Id.* at 1177–78.

136. For example, The New York Civil Liberties Union offers a training called Know Your Rights: Interacting with Police in Schools. *Know Your Rights: Interacting with Police in Schools*, NYCLU, <http://www.nyclu.org/content/trainings-and-workshops#knowrights> (last visited Aug. 28, 2016).

2. Reasons Families May Avoid IDEA Claims.

Students who receive excessive punishment for behaviors that are due to their disabilities have legal claims under the IDEA. Yet those students do not always bring these claims when they sue SROs in federal court.¹³⁷ Instead, these students typically bring constitutional claims and claims under the ADA. One possible reason for this discrepancy is that IDEA claims are typically heard in the first instance by state hearing officers rather than federal judges, so potential claimants may avoid bringing these claims in order to ensure that their cases are heard in federal court and not stayed pending completion of administrative proceedings.¹³⁸

Families may also avoid IDEA claims because these claims do not provide the type of relief that parents are hoping for when their child has been the target of disproportionate punishment or use of force by an SRO. The IDEA itself is incredibly vague as to what remedies are available under the Act.¹³⁹ According to the statute, plaintiffs may bring civil claims in state or federal court, and the court shall, based on a preponderance of the evidence, “grant such relief as the court determines is appropriate.”¹⁴⁰ Since the IDEA focuses on providing children with disabilities access to “free appropriate public education,” the kinds of civil remedies typically awarded often seek to remediate past failures to properly educate children, such as ordering appropriate educational services in the future.¹⁴¹

Remedies like tuition reimbursement and additional education services might make up for schooling missed due to disproportionate punishment such as suspension or expulsion—that is, assuming that the punishment was found by a court to be a denial of a “free and

137. See *Hoskins v. Cumberland Cty. Bd. of Educ.*, No. 2:13-CV-15, 2014 WL 7238621 (M.D. Tenn. Dec. 17, 2014). The author did find an instance of parents suing their local school for unlawful seizure by an SRO (who had handcuffed their son for 45 minutes) and for the school’s failure to place their child in special education. In *Hoskins*, the boy’s parents filed a complaint against the school with the Office of Civil Rights, which was resolved, and then brought a Fourth Amendment claim against the SRO. In its opinion, the court pointed out that the plaintiff parents could have raised an excessive force claim as well, but failed to do so. *Id.* at *20–21.

138. The IDEA has an exhaustion provision. See 20 U.S.C. § 1415(l) (2012) (“[B]efore the filing of a civil action under such laws seeking relief that is also available under this [subchapter], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this [subchapter.]”).

139. For discussion of how claims are resolved under the IDEA, see Elizabeth A. Shaver, *Every Day Counts: Proposals to Reform the IDEA’s Due Process Structure*, 66 CASE W. RES. L. REV. 143 (2015).

140. 20 U.S.C. § 1415(i)(2)(C)(iii).

141. 20 U.S.C. § 1401(9)(2012); see also Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RES. 525 (2014).

appropriate public education,” entitling the student to IDEA remedies—but those remedies do nothing to address the behavior of the SRO that might have escalated a student’s behavioral issues. At best, such remedies might encourage schools to train their SROs better with regards to interacting with students with disabilities, and they might serve as a mild deterrent to schools having SROs interact with students with disabilities without receiving proper training. If plaintiffs bring in a sufficient number of complaints alleging denial of free and appropriate education, those suits might turn schools’ attention to SRO practices in the schools. However, for the reasons discussed above, it would be better to bring about changes in SROs’ interaction with students without having to bring a constitutional or IDEA suit.

E. Schools Play a Key Role in Student Altercations with School Resource Officers.

Many student advocates see the suspension and expulsion of students from schools as a deliberate focus of school administrators, who seek to root out “problem kids” and remove them from their school population.¹⁴² A more nuanced version of this view is that school administrators exclude low-achieving students from schools to boost the schools’ standardized test scores, a response to the push for school accountability.¹⁴³ In the final weeks of 2015, Congress passed a successor to the No Child Left Behind Act of 2001 (NCLB), which had been widely criticized for its emphasis on measuring schools according to their students’ test scores.¹⁴⁴ The new Every Student Succeeds Act

142. A recent example of this at a New York City charter school, which made a “Got to Go” list of students the principal thought should be removed from the school, made national headlines. The charter network said making such a list was “a mistake,” but it is reflective of an ethos that may exist in certain schools, not just charter schools. Kate Taylor, *At a Success Academy Charter School, Singling Out Pupils Who Have “Got to Go,”* N.Y. TIMES (Oct. 29, 2015), <http://www.nytimes.com/2015/10/30/nyregion/at-a-success-academy-charter-school-singling-out-pupils-who-have-got-to-go.html>.

143. Hirschfield, *supra* note 44, at 85; Nance, *supra* note 42, at 15–16; James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 968–70 (2004) (discussing the exclusion of poor and minority students). Hirschfield describes this as the “school accountability narrative.” He summarizes four potential narratives for the criminalization of students. First, “moral panic” is a response to an upswing in violence in schools. Second, “school accountability” encourages schools to drop poorly performing students from the rolls. Third, a “due process” narrative suggests that legal decisions in the 1960s and 1970s gave students more rights against arbitrary punishment, leading to more codification and less discretion in how students are disciplined. Finally, a “governing-through-crime” narrative places blame on underperforming students and teachers. Hirschfield, *supra* note 44, at 85–88.

144. No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002). See Darrell D. Jackson, *Teaching Tomorrow’s Citizens: The Law’s Role in Educational Disproportionality*, 5 ALA. C.R. & C.L. L. REV. 215, 246 (2014); Ayriel Bland, *No Child Left Behind: Why Race-Based Achievement Goals Violate the Equal Protection Clause*, 24 BERKELEY LA RAZA L.J. 59, 63–67 (2014);

still requires schools to measure students' academic progress, but devolves more authority to the states to decide what to do with that data and limits the amount of intervention (or punishment, as some would term it) available to the federal government for failure to meet academic benchmarks.¹⁴⁵ SROs coming into such environments may serve as a convenient explanation and justification for the removal of such students. School leaders can point to decisions made not by them, but by SROs, as the reasons why students have been removed from the school.

Schools have an important, and legitimate, concern with the safety of all the people who are in school each day, students and staff alike. School personnel often have the daunting challenge of dealing with students—even quite young ones—who are unable to control their behavior and lash out verbally and physically at adults and other students.¹⁴⁶ Moreover, there is a fear that schools will be blamed for failure to respond to incidents.¹⁴⁷ To have an SRO to call upon in these situations can be a huge relief for school staff.

A tension exists between schools and SROs, alluded to in the quote that begins this Article. While many school advocates claim that SROs are responsible for criminalizing student behavior and leading to higher arrest rates for students, SROs claim that schools are the ones responsible for unnecessarily pushing SROs to address student behavior that instead should be dealt with by school administrators.¹⁴⁸ This can be a blurry line, and courts are sympathetic to SROs acting under the direction of school administration, even to address behavior that could have been handled by an administrator. In a Florida case, a student flipped off her principal and proceeded to walk away.¹⁴⁹ The principal told an SRO to bring the student back, and the SRO grabbed her around

Stephanie S. Fitzgerald, *No Child Left Behind and Special Education: The Need for Change in Legislation That is Still Leaving Some Students Behind*, 16 RICH. J.L. & PUB. INT. 553, 557 (2013); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944–78 (2004).

145. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

146. See *Part of the Problem*, *supra* note 16 (quoting a nonprofit leader as saying, “What teachers do now is call on officers and ask them to handle things.”).

147. *Id.* President of the International Association of Chiefs of Police, Richard Beary, explained, “Unfortunately anything to [do] with schools anymore, if you don’t make an arrest and something bad happens, it’s over.” *Id.*

In a survey of schools with SRO programs, about one-quarter reported that media attention around school violence was the primary reason they started their program. See Lawrence F. Travis III & Julie K. Coon, *The Roles of Law Enforcement in Public School Safety: A National Survey* 85 (July 10, 2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/211676.pdf>.

148. Wald & Thureau, *supra* note 1 (quote beginning this Article).

149. *C.M.M. v. State*, 983 So. 2d 704, 705 (Fla. Dist. Ct. App. 2008).

the waist after she attempted to walk around him.¹⁵⁰ The court found that the student could be convicted of battery of a police officer and resisting arrest, because the SRO was acting under instructions from the school principal.¹⁵¹ Police officers are used to taking orders, and may be reluctant to refuse to act when called upon by administrators to enforce school rules. Unfortunately, this leads to law enforcement altercations for students who are not breaking any laws. That certainly seems to be the case in the incidents with students with disabilities described earlier.

In the case of S.R. in Kentucky discussed above, for instance, Deputy Sumner successfully took S.R. to the restroom and brought him back to the vice principal's office without incident. But once they returned to the office, the boy refused to sit quietly, at which point the Deputy handcuffed him. It is not clear why the Deputy needed to be involved in this situation at all, other than that school administrators specifically called him in and that Deputy Sumner was willing to oblige. In another case, one in which an SRO injured a student, a Tenth Circuit judge commented, "Our present jurisprudence is sending the wrong message to schools. It makes it too easy for educators to shed their significant and important role in that process and delegate it to the police and courts."¹⁵²

It is easy to point the finger at SROs, but it is the schools that are giving these officers access to and supervisory power over students. Schools must be held accountable when officers harm or excessively

150. *Id.*

151. *Id.* at 706. The court reasoned, "At the time Deputy Faine encountered Appellant, he was acting in the direction of a school administrator in enforcing school rules. Clearly, he was engaged in the lawful execution of his legal duty as a school resource officer." *Id.* The court's reasoning is faulty here. The school may have rules that it should not be an SRO's duty to enforce. For example, should an SRO have the power to physically remove a student from school for a dress code violation?

152. *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1246 (10th Cir. 2014) (Lucero, J., concurring). The main opinion, which was unpublished, dealt with the § 1983 claim of the grandparents of a nine-year-old who was put in a "twist-lock" by an SRO after the student—identified in the opinion as "C.G.H."—physically resisted "efforts to constrain his combative behavior." *Hawker v. Sandy City Corp.*, 591 Fed. Appx. 669, 670 (10th Cir. 2014) (unpublished). The student had taken an iPad from the school and resisted when the principal asked him to give it back. Two SROs responded to the situation. The second SRO placed C.G.H. in the twist lock after the boy gave no response to her directive, "We can do this the easy way by you talking to me, or we can do this the difficult way or hard way by you not talking to me." Later that day, the first SRO took C.G.H. to the doctor's office, where he was treated for a possible hairline fracture to his collarbone. *Id.* at 671. The grandparents did not challenge the boy's arrest or the use of handcuffs, only the use of the twist-lock as excessive force under the Fourth Amendment. *Id.* at 672. In its opinion, the court applied the Fourth Amendment analysis from *Graham v. Connor*, 490 U.S. 386, 396 (1983), to determine whether the use of force was "objectively reasonable." It looked at three factors: (i) the severity of the crime at issue, (ii) whether the suspect posed an immediate threat to the safety of the officers or others, and (iii) whether he was actively resisting arrest or attempting to evade arrest by flight. The first factor weighed in favor of the boy's grandparents, but the latter two factors weighed against the boy's family, since he grabbed the officer's arm prior to the twist-lock. *Id.* at 674–75. Ultimately, the court found that because the officer's behavior was not a constitutional violation, the municipality had no liability. *Id.* at 675–76.

punish students. As part of this accountability, schools need to do more to address their own culture and the ways they address conflict.

In the examples of students with disabilities discussed above, the students were not engaging in fights with other students that needed to be broken up by law enforcement, nor had the students brought weapons to school. Instead, these were all cases in which a student was misbehaving in class (potentially due to a disability), and teachers or administrators called in an SRO rather than dealing with the incident on their own. It is highly unlikely that any of these students' education or behavior plans specified calling in law enforcement as a potential method of addressing misbehavior.¹⁵³

The biggest problems arise from situations where SROs are brought in to deal with low-level misbehavior—a non-criminal action—and then the student reacts by trying to evade the grasp of the SRO who is attempting to remove the student from the situation, striking or kicking the SRO in the process. Students are rarely formally trained in how to react when stopped by a police officer, and these reactions are exactly of a type to set off a script for SROs—one that is drilled into their heads during law-enforcement training—that, “this suspect is resisting arrest, so I must deal with this potential threat to my person.”¹⁵⁴ The irony is that in most of these cases, the student is not (at that moment) being arrested. Instead, the SRO is simply performing an action that would better be performed by school personnel. The student is only faced with arrest after they make contact with the SRO and, as a result of resisting the SRO in some way, find themselves with a juvenile court summons or criminal charges for resisting arrest or disorderly conduct.

Despite the stories of misconduct by SROs, and the chilling statistics about the disparate impact of punishment and discipline on minorities and students with disabilities, SROs can be, and often are, valued members of school communities on many campuses across the United States. There are many untold and unreported stories of SROs serving as role models for students, stepping in to prevent harm to students during fights, preventing and addressing bullying, and working with students to make schools a better place through conflict-resolution

153. The author has not personally reviewed any of these students' IEPs.

154. Groups have organized workshops with youth about how to react when stopped by the police. Terrance F. Ross, *How to Deal with the Police*, ATLANTIC (Dec. 23, 2014), <http://www.theatlantic.com/education/archive/2014/12/how-to-deal-with-the-police/384000/>. As the *Atlantic* article highlights, for many youth, especially minority boys, these are life-or-death fears. Even more than being charged with resisting arrest or other crimes, these youths fear being shot by police officers. *Id.* (quoting one African-American mother as saying, “[I]n the world we have now, telling our kids about how to conduct themselves when they are questioned by the police and conversations around what constitutes resisting and excessive force are necessary”).

initiatives and classes on personal safety.¹⁵⁵ SROs often make themselves accessible to students, via phone, email, and even Facebook.¹⁵⁶ In Houston, for example, in response to student complaints that students felt antagonized by police in the school, the principal of E.L. Farr High School made a conscious effort to recruit SROs who had common backgrounds with the student population.¹⁵⁷ She also instituted a principal's court with student juries. Both actions coincided with a reduction in students receiving tickets.¹⁵⁸ One of the Houston SROs, Officer Danny Avalos, told the *New York Times*, "Writing tickets is easy. We do it the hard way, talking with the kids and coaching them."¹⁵⁹

As this example shows, SROs can serve as mentors and counselors for students in schools. More than one and a half million students in the United States attend a school that has a sworn law enforcement officer but no school counselor.¹⁶⁰ Students need guidance, and while most schools rely on teachers and school counselors to fill that role, SROs can—and often must—play a part as well. The next two Parts of this Article discuss ways to help ensure that SROs are a positive resource for schools and students.

III. ENGAGING SCHOOL RESOURCE OFFICERS IN ADR: APPROPRIATE DISCIPLINARY RESOLUTION.

As the previous discussion shows, lawsuits do little to protect students from disproportionate punishment and reduce their likelihood of receiving criminal charges from SROs. Instead of forcing parents to seek post hoc remedies for misconduct, schools need to do more to prevent these incidents before they occur. One way to do this is to shift the disciplinary orientation of schools from one focused on criminal justice to one focused on restorative justice.

Dispute resolution is a powerful tool in the context of school discipline, where despite zero-tolerance policies schools still have considerable discretion as to how students can and should be punished. A common question people ask in the context of a dispute-resolution

155. *A Day in the Life of a School Resource Officer*, COPS OFFICE E-NEWSLETTER, U.S. DEP'T JUST. (Apr. 2013), http://cops.usdoj.gov/html/dispatch/04-2013/a_day_in_the_life.asp.

156. *Id.*

157. Erik Eckholm, *With Police in Schools, More Children in Court*, N.Y. TIMES (Apr. 12, 2013), <http://www.nytimes.com/2013/04/12/education/with-police-in-schools-more-children-in-court.html>.

158. *Id.*

159. *Id.*

160. *A First Look*, *supra* note 26, at 9. Minority students are more likely than white students to attend a school with a law enforcement officer but no school counselor: Latino students 1.4 times, Asian students 1.3 times, black students 1.2 times. *Id.*

program is *to what outcome is this an alternative?* Generally, in-school dispute-resolution programs seek to provide an alternative to harsher punishments like suspension, expulsion, or criminal charges for things like truancy. Two common in-school programs are peer mediation and restorative practices. I discuss each below, along with a “bridge” between the two practices: victim/offender mediation. Ultimately, I conclude that for the type of cultural shift required to make SROs a more helpful resource, schools should seriously consider restorative-justice initiatives, which incorporate mediation-like elements, but shift participants’ focus away from simply punishing misbehaving students and toward teaching those students how to repair the harm they have done and avoid future harm.

A. Peer Mediation in Schools.

Peer mediation programs in schools train students—and sometimes adults—to mediate disputes between other students.¹⁶¹ Many peer mediation programs use a co-mediation model, in which two students work together to lead the mediation process.¹⁶² Programs start in elementary school, with mediators as young as fourth or fifth graders, and with care given at all levels to make sure a range of students are chosen, not just the top students in the class.¹⁶³ Indeed, many students who are “challenging in class” prove to be excellent student mediators.¹⁶⁴ The use of peer mediation programs increased in schools throughout the 1990s and into the early 2000s.¹⁶⁵ By 2013, seventeen states had laws supporting peer mediation programs in K–12 schools.¹⁶⁶

161. Emily Linnemeier, *School-Based Conflict Resolution Education and Peer Mediation Programs: The Western Justice Center Experience*, 18 DISP. RESOL. MAG. 14 (2012).

162. Kay O. Wilburn & Mary Lynn Bates, *Conflict Resolution in America’s Schools: Defusing an Approaching Crisis*, 52 DISP. RESOL. J. 67, 68 (1997).

163. *Id.* at 69.

164. Linnemeier, *supra* note 161, at 14.

165. Jon M. Philipson, *The Kids Are Not All Right: Mandating Peer Mediation as a Proactive Anti-Bullying Measure in Schools*, 14 CARDOZO J. CONFLICT RESOL. 81 (2012); Matthew D. Decker, *Unexcused Absence: A Review of the Need, Costs, and (Lack of) State Support for Peer Mediation Programs in U.S. Schools*, 2009 J. DISP. RESOL. 485 (2009); Anne Isbell, *Peace Education through Mediation*, 65 ALA. LAW. 196, 197 (2005) (noting that the “Alabama Supreme Court Commission on Dispute Resolution has supported peer mediation since 1994”); Lawrence T. Kajs et. al., *The Use of the Peer Mediation Program to Address Peer-to-Peer Student Conflict in Schools: A Case Study*, 146 ED. LAW. REP. 605, 606 (2000); William S. Haft & Elaine R. Weiss, *Peer Mediation in Schools: Expectations and Evaluations*, 3 HARV. NEGOTIATION L. REV. 213, 214 (1998) (“[T]en years ago the concept was known only to a handful of enthusiasts.”); Kelly Rozmus, *Peer Mediation Programs in Schools: Resolving Classroom Conflict But Raising Ethical Concerns?*, 26 J.L. & EDUC. 69, 71 (1997); Brian Koy Harper, *Peer Mediation Programs: Teaching Students Alternatives to Violence*, 1993 J. DISP. RESOL. 323 (1993).

166. Raija Churchill, *Today’s Children, Tomorrow’s Protectors: Purpose and Process for Peer*

Recently, peer mediation has been presented as a way to address school bullying.¹⁶⁷ As of 2014, forty-nine states had some sort of anti-bullying legislation, ranging from defining bullying to requiring reporting of bullying by schools to giving victims legal relief.¹⁶⁸ While peer mediation is popular, some question whether its use is appropriate in bullying situations, as it may suggest that no one is at fault and may thus perpetuate power imbalances among participants.¹⁶⁹ Others see it as a powerful tool to help students learn to deal with conflict and stress, both at home and at school, with a goal of incorporating conflict resolution techniques throughout the general curriculum so that it becomes a means of “proactive prevention” rather than “reactive intervention.”¹⁷⁰

But peer mediation seems to be poorly suited to mitigating SROs’ role in the school-to-prison pipeline. Scholars debate whether student mediators are capable of handling anything more than very low-level disputes among their peers, things like relationship spats, gossiping, teasing, or name-calling.¹⁷¹ Peer mediation is rarely used to address violence or other more serious misbehavior.¹⁷² Among its many limitations is the observation that many peer mediations end in “avoidance strategies” in which students agree to avoid or ignore one another as the solution to their dispute.¹⁷³ While it may feel satisfying for student mediators to reach a resolution, more experienced mediators know that avoidance, particularly among co-workers or neighbors, rarely works in the long run and does not serve one of the key goals of mediation, that of empowering people to communicate with and resolve conflicts between themselves and other people.

Moreover, while mediation can be a very effective way to resolve disputes privately among individuals, it often lacks openness and transparency. SROs may refer students to peer mediation with the explicit or implicit threat that if the students do not settle, they will face some further punishment later. If SROs take part in the mediation—by serving as an adult mediator or helper, for example—they might also serve as a reminder of the potential punishment that awaits students who

Mediation in K-12 Education, 13 PEPP. DISP. RESOL. L.J. 363, 368 (2013). The US Virgin Islands requires peer mediation training. *Id.*, at 368 n.21.

167. Angélique Palmer, *Room for Me?: An Analysis of Whether Mediation Is a Viable Solution to School Bullying*, 16 CARDOZO J. CONFLICT RESOL. 221, 230–35 (2014); Philipson, *supra* note 165, at 83–84.

168. Palmer, *supra* note 167, at 226–27.

169. *Id.* at 231; Philipson, *supra* note 165, at 92–97.

170. Palmer, *supra* note 167, at 230, 233; *see also* Philipson, *supra* note 165, at 100.

171. Philipson, *supra* note 165, at 90.

172. *Id.*

173. *Id.* at 92.

do not settle. And the existence of peer mediation programs is unlikely to do much to effect a broader cultural change in schools. SROs should certainly be educated about peer mediation in schools with existing programs and encouraged to refer misbehaving students to those programs, but peer mediation alone is not enough.

B. Victim–Offender Mediation

Before discussing restorative justice and its use in schools, it is useful to have some background on the use of victim–offender mediation in the criminal justice system. Victim–offender mediation allows victims of crimes the chance to meet and talk with offenders in a structured setting.¹⁷⁴ In victim–offender mediation, a mediator usually meets with both the victim and offender separately (either in person or on the phone) prior to bringing them together to speak with one another.¹⁷⁵ This process can be used with adult or juvenile offenders and is most often used for low-level offenses, like property crimes or minor assaults. As with peer mediation, there is debate about whether victim–offender mediation is appropriate for higher-level offenses.¹⁷⁶

Unlike mediation that is being used as an alternative to civil litigation, victim–offender mediation is often layered on top of criminal charges and punishment, with its focus being creating a dialogue between victims and offenders. Sessions may lead to a restitution agreement in addition to whatever criminal penalties the offender is already facing.¹⁷⁷ This restitution might take the form of money, community service, or some sort of personal service to the victim.¹⁷⁸

Victim–offender mediation was one of the first restorative-justice methodologies to gain widespread use in the United States, but its use only gained the support of the American Bar Association in the mid-1990s, well after the ABA had begun supporting mediation in civil courts.¹⁷⁹ A 2004 survey of victim–offender mediation programs in the United States found that 45% of them primarily focused on juvenile offenders and that two-thirds of the cases referred were misdemeanors, among which vandalism, minor assault, theft, and burglary were the

174. *Id.*

175. *The Restorative Justice and Mediation Collection: Executive Summary*, OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T JUST. 4 (July 2000), https://www.ncjrs.gov/ovc_archives/reports/rjbulletin1/files/ncj20180301.pdf [hereinafter *OVC Bulletin*].

176. Mark S. Umbreit, Robert B. Coates & Betty Vos, *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. QUARTERLY 279, 279–80 (2004).

177. *Id.* at 280. Restitution is sometimes referred to as “reparation.” *Id.* at 290.

178. *Id.* at 290.

179. *Id.* at 281–82.

most common offenses.¹⁸⁰ One important aspect of victim–offender mediation is that it is voluntary; that same 2004 meta-study found that 40–60% of people offered the opportunity to participate in victim–offender mediation refused.¹⁸¹ Yet those who choose to participate in victim–offender mediation report high rates of satisfaction with the process, with higher satisfaction ratings coming from parties who participate in face-to-face, rather than shuttle, mediation.¹⁸²

Trainers in victim–offender mediation programs make a number of suggestions about how mediators should approach the multicultural issues that are likely to come up in victim–offender mediation and restorative justice generally.¹⁸³ These suggestions include the mediator:

- Understanding his/her communication style and “cultural baggage”;
- Refraining from making quick assumptions about others;
- Perceiving participants as individuals and noting their worldview;
- Nurturing relationships with individuals in an unfamiliar culture or community; and
- Preparing participants by helping them understand the viewpoints and communication styles of other participants.¹⁸⁴

Victim–offender mediation is an antecedent to restorative-justice programs, but it focuses primarily on responding to discrete instances of harm done to others and may occur after a person has already been charged with a crime. Restorative justice, on the other hand, usually takes a broader approach, one better suited to preventing criminal charges against students.

C. Restorative Justice

Another type of dispute resolution—one that has great potential for keeping students out of the school-to-prison pipeline—is called “restorative justice.” Restorative justice is both an orientation toward how the justice system ought to interact with individuals, and a set of practices that reflect that orientation. It focuses on promoting discussion between wrongdoers and victims, with the goal of allowing the affected parties to work out solutions among themselves that repair the broken relationship, rather than imposing penalties from outside and largely

180. *Id.* at 283–84.

181. Umbreit et al., *supra* note 176, at 287.

182. *Id.* at 288. In shuttle mediation, the parties remain in different rooms and the mediator goes back and forth between the parties.

183. They define multicultural broadly, including not merely race and ethnicity, but also class, national origin, urban or rural environment, and sexual orientation, as potential cultural frames that may lead to differences in how parties express themselves. *OVC Bulletin*, *supra* note 175, at 8.

184. *Id.*

ignoring the victim's experience.

Writ large, restorative justice focuses on the relationships between wrongdoers and those who have been wronged, a group which can include the community as a whole.¹⁸⁵ One proponent, Howard Zehr, sums it up: "Restorative justice requires, at minimum, that we address the harms and needs of those harmed, hold those causing harm accountable to 'put right' those harms, *and involve both of these parties as well as relevant communities in this process.*"¹⁸⁶ Zehr describes three pillars of restorative justice: (1) identifying harms and needs—which includes identifying the harm that has been done and letting the person harmed express what needs he or she has as a result (as opposed to having an external system identify and define the victim's needs for him or her); (2) undertaking obligations—which includes not only holding the wrongdoer accountable for the harm, but also having the wrongdoer take responsibility to repair that harm; and (3) ensuring stakeholder engagement and participation—which includes not only the person who has done wrong and the person or persons directly harmed, but also any other (potentially many) stakeholders who are indirectly affected by the wrongdoer's actions.¹⁸⁷ This compares with the criminal-justice system, which looks at three very different questions: (1) what laws have been broken; (2) who did it; and (3) what punishment is deserved.¹⁸⁸ By involving many stakeholders, restorative justice stands in contrast to typical criminal justice systems, in which the state stands in opposition to the wrongdoer, and the victim may or may not have input into the evaluation of the wrongdoer and the ultimate outcome of the case.

185. See J. Sophia H. Hall, *Restorative Justice: Restoring the Peace*, 21 APR CBA REC. 30, 31 (2007) ("focused on creating an environment in which relationships can develop between the offender and those within the community affected by his or her conduct"); Paul Clark, *Restorative Justice and ADR: Opportunities and Challenges*, 44 NOV ADVOCATE (IDAHO) 13, 15 (2001) ("Healing is the goal; healing for all parties.").

186. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 35 (2d ed. 2015) (emphasis added).

187. *Id.* at 32–34.

188. *Id.* 35. Thorsborne and Blood, in their book *Implementing Restorative Practices in Schools*, contrast what they term "retributive justice" and "restorative justice," expanding Zehr's three basic questions into:

Retributive Justice	Restorative Justice
Crime and wrongdoing are violations against the laws/rules: what laws/rules have been broken?	Crime and wrongdoing is a violation of people and relationships: who have been harmed? In what way?
Blame must be apportioned: who did it?	Obligations must be recognized: whose are those?
Punishment must be imposed: what do they deserve?	How can the harm be repaired?

MARGARET THORSBORNE, GRAHAM ROBB & PETA BLOOD, *IMPLEMENTING RESTORATIVE PRACTICES IN SCHOOLS: A PRACTICAL GUIDE TO TRANSFORMING SCHOOL COMMUNITIES* 12, 20 (2013).

Restorative-justice practices are spreading throughout the country, especially in the criminal diversion arena, and, as of 2016, thirty-five states have adopted legislation allowing the use of restorative justice in their criminal justice systems.¹⁸⁹ Its use is not yet as widespread in schools, but is growing. In fact, one of the biggest areas of growth in the use of restorative justice has been in schools.¹⁹⁰

Restorative justice emphasizes listening to others, both the offender listening to those hurt, and those who have been hurt listening to the offender.¹⁹¹ This is a change from the typical, top-down imposition of punishment usually meted out in schools.¹⁹² To reflect shared responsibility and increase stakeholder involvement, schools often use a “circles” process, in which students, community members, and facilitators gather in a circle with some sort of symbolic item—often called a “talking stick”—passed from person to person to designate who may speak.¹⁹³ This circles process allows more focus on how the greater school community has been harmed and gives an offender’s support persons an opportunity to demonstrate how they will help him or her make better choices in the future. Community involvement is also an important component of restorative justice, and so some circles will invite friends or relatives of the victim and offender to make those participants feel safer and more welcome.¹⁹⁴ Being faced with the

189. Rebecca Beitsch, *States Consider Restorative Justice as Alternative to Mass Incarceration*, PBS NEWS HOUR (July 20, 2016), <http://www.pbs.org/newshour/rundown/states-consider-restorative-justice-alternative-mass-incarceration/>.

190. ZEHR, *supra* note 186, at 11.

191. There is debate about what comes after “restorative” in naming the process as it is used in schools. Is it restorative *justice*, restorative *practices*, or as some school administrators use, restorative *discipline*? This debate can be seen in the title of three different books that all discuss restorative processes in schools: *THE LITTLE BOOK OF RESTORATIVE JUSTICE*, ZEHR, *supra* note 186; *IMPLEMENTING RESTORATIVE PRACTICES IN SCHOOLS*, THORSBORNE ET AL., *supra* note 188; and LORRAINE STUTZMAN AMSTUTZ & JUDY H. MULLEN, *THE LITTLE BOOK OF RESTORATIVE DISCIPLINE FOR SCHOOLS* (2015). Each choice reflects a different emphasis on the goals behind the process’s use in a school environment. For example, one practitioner says that restorative practices have a broader focus, “[restorative justice] involve[d] professionals working exclusively with young people who offend. In [restorative practices] in education, the whole school community, all school staff, pupils and sometimes parents can be involved.” Gilleen McCluskey et al., *Can Restorative Practices in Schools Make a Difference?*, 60 EDUC. REV. 405, 407 (2008). The Oakland Unified School district defines restorative justice as “a set of principles and practices to build community and response to student misconduct, with the goal of repairing harm and restoring relationships between those impacted.” And restorative practice as “activities that decrease suspension rates and lower disproportionate discipline.” Lyke Thompson et al., *Evaluation of the Michigan Special Education Mediation Program (MSEMP) Restorative Justice Project: 2015 Report*, WAYNE STATE UNIV. COLLEGE FOR URBAN STUDIES 5 (2015) (copy on file with author). This Article uses the term “restorative justice,” in part because it is comparing the potential for restorative justice as an alternative to (i) referral to the criminal justice system and (ii) in light of the weak outcomes available to plaintiffs claiming SRO abuses in the civil justice system.

192. Abregú, *supra* note 59, at 12.

193. ZEHR, *supra* note 186, at 53.

194. Abregú, *supra* note 59, at 12.

consequences of their misbehavior in front of others can be much more difficult for students than detention or other, more standard punishments.¹⁹⁵

A number of organizations provide resources for schools (and other bodies) seeking to implement restorative-justice programs. In the United States, the International Institute for Restorative Practices is a large training organization and resource for information about restorative justice in schools through its SaferSaner Schools initiative.¹⁹⁶ For restorative justice generally, the Institute supports a conferencing model in which facilitators use a set script to guide the conversation among participants, somewhat like mediation but with a more highly structured process than is typical in a facilitative mediation session.¹⁹⁷ Another resource for information about implementing restorative justice in schools is the Center for Dispute Resolution at the University of Maryland School of Law (C-DRUM).¹⁹⁸ C-DRUM (along with the International Institute for Restorative Practices) helps run conflict-resolution programs in Baltimore area schools and conducts trainings on facilitating restorative-justice programs.¹⁹⁹

Restorative-justice programs have many potential benefits for schools, especially when compared with the zero-tolerance, criminal-justice paradigm in vogue today. Evidence shows that zero-tolerance policies, with their emphasis on using the fear of harsh punishment to deter bad behavior, often do not reduce bad behavior as much as expected. Schools with high suspension rates, for example, also have high repeat-offender rates, and students who are suspended just once are three times more likely to drop out of school than a student who has never been suspended.²⁰⁰ Restorative-justice approaches to school discipline, on the other hand, focus on keeping offenders in school, but impose a discussion process that focuses on having those hurt by the offenders' conduct explain how they have been affected, and then letting

195. One student in a restorative-justice program in a Berkeley, California middle school said, "I don't want to face my teacher and in detention all I have to do is sit there for an hour and I'm done." *Id.* at 13.

196. *SaferSanerSchools: Whole-School Change through Restorative Practices*, INT'L INST. FOR RESTORATIVE PRAC., <http://www.iirp.edu/education-programs/continuing-education/projects/safer-saner-schools> (last visited Oct. 11, 2016).

197. *Id.*

198. *Resources: Restorative Practices in Schools*, UNIV. MD. FRANCIS KING CAREY SCH. L., http://www.law.umaryland.edu/programs/cdrum/restorative_practices.html (last visited Oct. 11, 2016).

199. *Id.*

200. Abregú, *supra* note 59, at 10. It could be that schools with high suspension rates just happen to have the worst students in terms of behavior, but even if that is the case, it would seem that suspending these students does not improve their behavior upon their return. It does serve to remove them from the school community and move them closer to the prison community via the school-to-prison pipeline.

offenders have a role in creating a response to their conduct.²⁰¹ In other words, there are still consequences for students' actions—which may look like traditional forms of punishment like suspension—but other stakeholders have more input in deciding how students will be held responsible.

Money can be a big motivator in prompting schools to start restorative-justice programs, both the carrot of grant money to administer a program and the stick of decreased per-pupil funding when suspension and expulsions begin to drive down school attendance numbers.²⁰² Many states require schools to return money to local school districts if students drop out or are expelled.²⁰³ Schools have a financial incentive, then, to find ways of addressing student misbehavior that keep students in schools and out of jail, and that do not make it more likely that students will drop out of school before graduation.²⁰⁴

These programs may seem uncontroversial, but even a process as popularly applauded as restorative justice is not without some controversy. Many schools face (actual or perceived) funding shortages that make administrators reluctant to introduce new programming into schools already overstuffed with unfunded mandates. Moreover, even those who champion the use of restorative justice in schools debate whether restorative justice is best used as a tool for community integration or as a means of heightening political expression.²⁰⁵ The former approach fits within the more traditional view of restorative justice, while the latter presents a more radical evolution of the technique, one which addresses concerns that ADR has simply become one more tool for perpetuating the oppression of minority groups in American society.²⁰⁶

Another critique of restorative justice is that it has become too “offender focused” and that it does not meet its stated goal of healing

201. *Id.* at 11.

202. See, e.g., Jeremy Adam Smith, *Can Restorative Justice Keep Schools Safe?*, GREATER GOOD SCI. CTR. BLOG (Mar. 6, 2012), http://greatergood.berkeley.edu/article/item/can_restorative_justice_keep_schools_safe [hereinafter *Can RJ Keep Schools Safe?*].

203. David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 33 YOUTH & SOC'Y 249, 254 (2001).

204. For example, the RJOY program in Oakland, California says that reduced suspension rates are “saving the school thousands in attendance and Title I funding.” *About Us, Mission*, RESTORATIVE JUST. FOR OAKLAND YOUTH, <http://rjoyoakland.org/about/> (last visited Oct. 11, 2016) [hereinafter RJOY].

205. See, e.g., Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281 (2012).

206. Erin Archerd, *An IDEA for Improving English Language Learners' Access to Education*, 41 FORDHAM URB. L. J. 351, 379 (2013).

relationships within a community.²⁰⁷ As a process, restorative justice must focus on more than simply addressing individuals' bad behavior. Restorative justice is not an alternative to detention or other more traditional forms of punishment. Restorative justice also is not a diversion program, or a way of winnowing out some of the "not-so-bad" kids into a milder form of punishment. In its strongest and best form, restorative justice is a school-wide practice that emphasizes repairing and improving relationships throughout the school community and not merely addressing bad behavior as it happens—as the examples below demonstrate.²⁰⁸

D. Examples of Restorative Justice in Schools.

Schools throughout the country have implemented restorative-justice programs. To date, though, there are few studies comparing different programs. One difficulty is choosing what features of a restorative-justice program should be measured and how. Funders may want hard metrics—like reduction in suspension and expulsion rates or increased school attendance figures, numbers that are tied to state per-pupil dollars—while practitioners themselves may be more interested in factors like student self-expression and whether students feel like the restorative processes are helping them connect with their school community.

In 2001, Karp and Breslin reviewed data from three different parts of the United States, each of which had a strong restorative-justice program: Minnesota public schools; Denver, Colorado metro area schools; and a group of alternative schools in southeastern Pennsylvania.²⁰⁹ Minnesota had by far the broadest use of restorative practices, with almost half of all school districts in the state using them.²¹⁰ In the Denver Metropolitan Schools, restorative practices were combined with traditional criminal sanctions. For example, if a student was caught selling drugs, the student was expelled, but would participate in a restorative session before reentering school.²¹¹ In Pennsylvania, the Buxmont Academy—a chain of charter schools for "at-risk" youth—was founded on restorative principles.²¹² Because the schools also

207. See, e.g., ZEHR, *supra* note 186, at 8–9.

208. THORSBORNE & BLOOD, *supra* note 188, at 12 ("The distinction is seeing restorative practices as part of 'the way we do things around here,' versus something we use as an occasional tool when a child is in trouble.").

209. Karp & Breslin, *supra* note 203, at 254.

210. *Id.* at 256.

211. *Id.* at 261. Denver has one of the oldest restorative-justice programs in the country. For more about the Denver schools program, see Anderson, *supra* note 12, at 1210.

212. Karp & Breslin, *supra* note 203, at 263.

served as drug treatment centers, students caught with drugs or alcohol would participate in restorative conferences, but would also discuss drug and alcohol use in more informal talking circles.²¹³ Overall, Karp and Breslin found that only Buxmont used restorative justice in a broad, comprehensive way, and that the public schools systems tended to use it reactively to address specific disciplinary issues.²¹⁴ Data on the effect of these programs was still limited; in Minnesota, Karp and Breslin found a drop in suspension and expulsions throughout the schools using restorative practices,²¹⁵ but they did not report on whether the other programs showed similar results. The researchers did, however, identify three key issues with starting restorative-justice programs in schools: (1) restorative justice takes more time than traditional sanctions, (2) outsiders like school district superintendents may resist it, and (3) school staff may likewise resist embracing a new philosophy.²¹⁶

Since Karp and Breslin's study, a number of school districts and individual schools across the country have started using restorative justice to address in-school disputes. Research has shown that even when restorative-justice programs are implemented school-by-school rather than district-wide, rates of student punishment can fall at schools with restorative-justice programs, while continuing to rise at schools without them.²¹⁷ The San Francisco Unified School District, for instance, has adopted a broad-based restorative-practices approach, of which "restorative discipline" is but one piece. Between 2010 and 2013, over 2,500 educators in the district received full-day restorative-practices training, and in 2014 the school board began rolling out restorative practices and school-wide positive behavior interventions in all its schools.²¹⁸ The Los Angeles Unified School District has committed to using restorative justice in all of its schools by 2020.²¹⁹ Its

213. *Id.* at 266.

214. *Id.* at 267–68.

215. *Id.* at 257. Karp and Breslin, however, did not see a drop in alcohol and drug use, another factor they were measuring. The researchers also could not be sure whether participating in restorative sessions made an actual difference in suspensions or whether having the programs available signaled to school administrators that they did not have to suspend students for misbehaving. *Id.* at 257–58.

216. *Id.* at 269.

217. This happened in the San Francisco Unified School District. See *Can RJ Keep Schools Safe?*, *supra* note 202.

218. Establishment of a Safe and Supportive Schools Policy in the San Francisco Unified School District, S.F. Bd. of Educ. Res. No. 1312-10A4 (Feb. 25, 2014), <http://www.healthiersf.org/RestorativePractices/About/docs/HANEY%20SAFE%20SUPPORTIVE%20POLICY%20FINAL%20FOR%20POSTING%202025%202014.pdf>. The resolution expressed continuing concern that 36% all suspensions in the SFUSD were for "willful defiance" and that African-American and Latino students made up 81% of all suspensions for willful defiance. The board resolved to update district policies so that no student could be suspended or expelled solely on the basis of willful defiance. *Id.*

219. *Restorative Justice Statement*, L.A. UNIFIED SCH. DIST.,

restorative-justice roll-out began in the 2014–2015 school year with 150 schools in the district, focusing on schools serving high numbers of African-American students and students with disabilities.²²⁰ It will be interesting to see if the data produced by the Los Angeles restorative-justice program shows differing rates of suspension and expulsion between the schools that use restorative justice and those that are not.

The sections below discuss several restorative-justice pilot programs from the past five to ten years that scholars have investigated in more depth. These programs, while all using a restorative model, have varied in the scope of their implementation and in the kind of data gathered about the programs. Regardless of whether these programs track reductions in suspension or expulsions or whether they examine students' abilities to address harms they have caused to others, all three examples show ways in which restorative justice can both address students' misbehavior and avoid unnecessary criminalization of their conduct.

1. Boston

In her book, *Restorative Justice in Urban Schools: Disrupting the School-to-Prison Pipeline*, teacher and restorative-justice practitioner Anita Wadhwa shares lessons she learned from observing restorative justice implemented in Boston public schools.²²¹ After examining the racial-discipline gap and zero-tolerance policies previously present in the school system, she took a systematic look at restorative-justice practices in two different schools, Bridge High and Equity High. Using an ethnographic data gathering process called “portraiture,” Wadhwa focused on initiatives seeking to reduce inequality in the schools.²²² Because of her approach, she chose not to track metrics like graduation or attendance rates, but to instead examine the relationships and interactions between school staff and students participating in the restorative programs. Bridge High was large, with a diverse but

<http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/293/Restorative%20Justice%20State%20ment.pdf> (last visited Mar. 6, 2017).

220. Memorandum on Restorative Justice Training from Earl R. Perkins, Assistant Superintendent School Operations, L.A. Unified Sch. Dist., to All Principals (Oct. 29, 2014), <http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/293/RJ%20Memo%20to%20Principals%20with%20List.pdf>; see also *The LAUSD Restorative Justice Implementation Roadmap*, L.A. UNIFIED SCH. DIST., http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/293/RJ_RoadMap.pdf (last visited Mar. 6, 2017).

221. WADHWA, *supra* note 11. This book is an excellent resource for anyone contemplating using restorative practices in their schools.

222. *Id.* at 28–29. For more on the portraiture method, see *id.* at 37–38.

somewhat segregated community of students.²²³ Equity High was a smaller school, funded by the Bill and Melinda Gates Foundation, with an emphasis on social justice.²²⁴

The principals' support at Bridge and Equity was critical to the success of their respective programs, but Wadhwa found that it was also important that the initiative was adopted by teachers who believed in restorative justice, and not forced on those who were not interested.²²⁵ At Equity, the restorative processes ended up being more student-led and more explicitly labeled as restorative justice than were those at Bridge.²²⁶ Wadhwa identified several constraints common between the two schools: first, that teachers not using restorative processes viewed students as not receiving sufficient punishment for bad behavior; and second, that a lack of time and fluctuating personnel made it hard for the schools to hold students to their agreements.²²⁷ Despite these constraints, Wadhwa found that restorative practices allowed students to address systemic harms, like racism, in addition to addressing individual behaviors.²²⁸

2. Oakland

In Oakland, California, the Restore Justice for Oakland Youth program began in 2007 with a pilot project at Cole Middle School, which has a majority African-American student population.²²⁹ One frequently cited reason for implementing this restorative-justice practice was students' "disrespect," with behavior ranging from swearing at teachers to being slow to follow directions.²³⁰ All teachers and staff at Cole Middle School were trained in restorative justice, and one year into the pilot, the school district allocated a case manager to implement the program.²³¹ Teachers found ways to incorporate restorative-justice

223. Bridge had 1,226 students: 38% African-American, 36.6% Latino, 18% Asian, and 6% White. Many of the Asian students were separated from the other students in a program for English learners. *Id.* at 32.

224. Equity had 300 students: 60% Black, 34% Hispanic, 1% Asian, 4% White. *Id.* at 33–34. I mirror the author's own categories for these two schools, recognizing they differ between schools.

225. *Id.* at 46.

226. *Id.* at 147.

227. WADHWA, *supra* note 11, at 147–49.

228. *Id.* at 152–54.

229. RJOY, *supra* note 204. The findings were also reported in Michael D. Sumner, Carol J. Silverman & Mary Louise Frampton, *School-Based Restorative Justice as an Alternative to Zero-Tolerance Policies: Lessons from West Oakland*, THELTON E. HENDERSON CTR. FOR SOC. JUST. (2010), https://www.law.berkeley.edu/files/thcsj/10-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf.

230. *Id.* at 2.

231. *Id.* at 2, 32.

circles into their lesson plans, such as when students discussed the upcoming presidential election,²³² and circles were also used to address community and police relations.²³³

While many teachers and students liked the process, one particular critique of the program was that circles were sometimes used for minor issues, such as for laughing inappropriately or failing to turn in homework, which may have diminished the importance of the process.²³⁴ Researchers also noted that regular contact was important to build trust among the students, and they recommended that if using a volunteer model, volunteers must commit themselves to regular contact with affected parties.²³⁵ They also pointed out that program organizers had to carefully consider the time commitment required to allow participation by lower-income parents with less flexible work schedules.²³⁶

Even with those caveats, the researchers found that Cole's suspension rates dropped dramatically after the restorative-justice program began. Looking at five years of data, the last two of which saw the implementation of restorative justice, the authors saw the suspension rate drop from fifty per one hundred students to six per one hundred students (an 87% decrease).²³⁷

3. Michigan

In 2016, Michigan passed a law, effective in August 2017, requiring that schools “shall consider using restorative practices as an alternative or in addition to suspension or expulsion” of students.²³⁸ This law is part of an existing effort by the Michigan Department of Education and its state Community Dispute Resolution Centers to promote the use of restorative justice in schools.²³⁹ Michigan's school restorative-justice program is unique in that it includes a mandate to specifically track outcomes for the use of restorative justice for students with

232. *Id.* at 14.

233. *Id.* at 15. For example, circles were held about the shooting of Oscar Grant by Bay Area Rapid Transit (BART) police, a polarizing event in the Bay Area community.

234. Sumner et al., *supra* note 229, at 24.

235. *Id.* at 28.

236. *Id.* at 29. It is not clear from the study how this difficulty was addressed.

237. *Id.* at 31. The authors cautioned, however, that they could not know for sure that the drop was due to the restorative-justice program and not other changes at the school—in particular, a new principal's joining the school and declining enrollment. *See id.*

238. MICH. COMP. LAWS SERV. 380.1310(c)(1) (LexisNexis through 2017 Public Act 117).

239. *See, e.g., Restorative Justice Practices*, MICH. DEP'T EDUC., http://www.michigan.gov/mde/0,4615,7-140-74638_72831-358881--,00.html (last visited Sept. 15, 2017).

disabilities.²⁴⁰ In response to data showing highly disproportionate suspension and expulsion rates for students with disabilities, the state Office of Special Education made restorative justice for students with disabilities a priority, and a number of Community Dispute Resolution Centers throughout the state helped implement restorative practices in local schools. Michigan chose three school districts to participate in a 2013–2015 pilot study.²⁴¹

By the second year of the pilot, these schools saw a reduction of nearly 2,400 days of suspension, an average of about three days for each student who participated in the program.²⁴² Of the suspensions avoided, 90% would have been out-of-school suspensions, suggesting that restorative justice was effective in keeping kids in school.²⁴³ Based on the initial two years of the pilot, school staff and restorative facilitators offered a number of suggested best practices. These included introducing restorative practices to the entire school staff early and having interactive discussions about the program; presenting the program to family and community members; increasing the availability of restorative facilitators from two to five days a week; and involving public safety and police officers more in the process.²⁴⁴ By the third year of the pilot, a number of elementary schools joined the program, and researchers found that schools continued to report that 90% of suspensions avoided were out of school suspensions.²⁴⁵ One consideration that came up in the third year was how the Community Dispute Resolution Centers could continue to serve as restorative

240. Thompson et al., *supra* note 191; WAYNE STATE UNIVERSITY COLLEGE FOR URBAN STUDIES, EVALUATION OF THE MICHIGAN SPECIAL EDUCATION MEDIATION PROGRAM (MSEMP) RESTORATIVE JUSTICE PROJECT: 2015 REPORT (2015) (copy on file with author). The author has not been able to find other programs with this specific focus.

241. *Id.* at 12.

242. *Id.* at 18–19.

243. *Id.* at 4, 18.

244. *Id.* at 20–22. Another program of note in Michigan is Ingham County's Juvenile Accountability and Restorative Justice Program, in which juveniles who receive tickets for certain low-level offenses, like disturbing the peace, are automatically flagged by the local precinct's computer system and given the option of using a restorative process. The program accepts the following offenses: curfew, truancy, destruction of property, disturbing the peace, trespassing, offensive language/verbal conduct, false activation of fire alarm, fighting/disorderly conduct, failure to obey, information (lying). Interview with Brandy Jones, Director, Juvenile Accountability Program, Resolution Services Center (Aug. 3, 2016). See *Ingham County's Juvenile Accountability and Restorative Justice Program*, RESOLUTION SERVS. CTR., <http://www.rscm.org/#!/juvenile-accountability-program/wrga5> (last visited Sept. 15, 2017). The program conducts an initial restorative conference around the offending conduct, and then refers youths to the program while their families take part in additional classes on dealing with conflict in their lives. Interview with Brandy Jones.

245. WAYNE STATE UNIVERSITY COLLEGE FOR URBAN STUDIES, EVALUATION OF THE MICHIGAN SPECIAL EDUCATION MEDIATION PROGRAM (MSEMP) RESTORATIVE JUSTICE PROJECT: 2016 REPORT 3 (2016) (copy on file with author).

facilitators in the schools long term.²⁴⁶ A comprehensive report on restorative practices in Michigan schools, including data on special and general education students, is due to be published in 2018.

IV. PROPOSALS FOR REVAMPING SRO PROGRAMS

There is no one solution to the overcriminalization and school-to-prison pipeline issues caused by the increased use of law enforcement officers in schools. Like the problem itself, the remedy has to be multifaceted. SROs need to receive better information about the behavior plans of students in their schools, as well as better training on how to interact with those students in productive ways. Governmental bodies need to contractually limit the kinds of criminal charges that SROs can impose on students. And schools themselves need to take control of the SROs in their midst, accepting responsibility for their part in creating this problem. Perhaps most critically, schools need to take the lead in changing their own culture, no longer relying on SROs to “lay down the law” and punish students, but rather using SROs as a tool to facilitate better relations among all parties. Restorative justice provides the key to this change, and that is where this Part will begin.

A. Incorporating Restorative Justice into SRO Funding and Training Programs.

As discussed above, the use of restorative justice shows a great deal of promise in reducing the disproportionate punishment of minority students and student with disabilities. Moreover, restorative-justice programs reflect (and promote) a change in the culture of a school, reducing administrators’ reliance on a criminal-justice model, which removes students from school and imposes punishments from above, and replacing it with a more cooperative, community-based model, where all affected parties work together to find solutions and achieve just results. But this cultural change cannot occur in a vacuum. As schools implement restorative-justice programs, they need to make sure that SROs are integrated into the restorative model and do not become a separate, criminal justice track within an institution otherwise focused on restorative justice.

One may question whether law-enforcement officers can truly adapt to a restorative framework, rather than a criminal-justice framework. During a workshop with a group of educators and special-education workers during the Center for Appropriate Dispute Resolution in Special

246. *Id.* at 5, 24.

Education (CADRE) Symposium in 2015, many participants expressed skepticism about that very point. But it is worth pointing out that the federal government disagrees with this assessment. As noted above, both definitions of “SRO” found in federal law provide that one role of an SRO is “to train students in . . . restorative justice.”²⁴⁷ Moreover, a couple of participants at the CADRE Symposium shared a story that illustrates the power of giving students a voice. A new student, who had a learning disability and had been pegged as a troublemaker in his previous school, proactively reached out to his school’s SRO to have a conversation about the student’s behavioral problems and to work out a strategy for how the SRO could best respond and help the student if any problems did crop up. This kind of preventative and informative dialogue is the sort of response that a whole-school restorative-justice program can help elicit.²⁴⁸

But though the federal government sees a place for restorative justice in SROs’ job duties, it does little to encourage such programs. Federal and state agencies need to take more responsibility for the SROs that they fund, tying continued funding to the use of restorative practices in schools. Rather than placing restorative justice or conflict resolution on a list of “things it would be nice to have,” funders should more directly tie the use of SROs to the use of restorative justice. This could come by requiring that SROs undergo a substantive training session in restorative justice, akin to the forty hours of training mediators must receive to practice in some state courts.²⁴⁹ Even better would be to couple this kind of training to a requirement that every school receiving an SRO also receive a trained, restorative facilitator, either by contracting with an outside service or by training an in-house restorative facilitator.

In implementing restorative-justice programs, schools should keep in mind the experiences of other districts, discussed above, as well as the following questions:

1. *Who is providing funding?* This is a constant question for these sorts of school interventions. As suggested above, schools should seek to tie funding for restorative justice more directly to funding for SROs. Ideally, as a school shifts toward a culture of restorative justice, the cost of its program becomes a routine administrative cost that can be absorbed in the regular school budget. Until that happens, many

247. 42 U.S.C. § 10389 (2012); 20 U.S.C. § 7161 (repealed 2015).

248. It was not clear whether this school already had a restorative-justice program when the conversation between the student and SRO took place.

249. See *State-by-State Guide to Court Mediator Certification Practices*, NORTHERN VA. MEDIATION SERV. 3 (Aug. 16, 2013), <https://nvmsus.files.wordpress.com/2014/11/us-mediation-certification-standards.pdf> (reporting that fourteen states require at least forty hours of training for mediators).

restorative-justice programs are at risk of disappearing as sources of funding shift, even if a pilot program proves effective.

2. *Will the restorative-justice program rely on internal or external practitioners?* It may seem intuitively preferable to have all of the teachers and administration in a school community, at least those who want to participate, trained in restorative justice. This training is costly, however, and teacher and staff turnover may result in up-front training dollars evaporating as personnel leave the school. Using an external agency, such as a local community mediation center, is lower-cost and may allow for schools to build capacity more effectively as more money materializes for implementing restorative-justice programs.

3. *How will SROs fit into the program?* SROs should be active participants in a school's restorative practices, making referrals to circles or other restorative processes and even participating in those processes. They do not have to participate, however. As the Ingham County, Michigan program shows, referrals can be made to restorative-justice programs after students have received a ticket, but before their case is charged. Ideally, SROs will be trained along with other school personnel in the use of restorative justice, so that they will know when and how to refer students to a restorative process and will feel comfortable participating in a restorative process when faced with student provocation—such as the examples discussed earlier—rather than resorting to imposing criminal charges for students' misbehavior.

4. *Is there a plan for follow-up and data analysis?* Agreements reached in restorative-justice sessions may require additional support and follow-through to make sure that participants are taking the steps they agreed to. Did the school promise to provide additional resources to a student, but has been unable to? Did a student agree to a community service project, but then fail to show up? How satisfied are the participants that the agreed-upon plan is working? Following up on agreements provides useful information for improving the program, ensures accountability for participants, and helps justify the program to funders.²⁵⁰

B. Training School Resource Officers on Behavior Plans.

While the types of conflict resolution procedures discussed above will go a long way toward creating a less punitive environment, schools need to take special steps to make sure that SROs are adequately educated and trained to address the needs of students with disabilities within the

250. See, e.g., WADHWA, *supra* note 11, at 106 (“Fundors often want proof that using restorative justice leads to higher test scores or school attendance.”).

student population. The evidence suggest that SROs may be targeting different kinds of behavior in students with disabilities than they target in general-population students. In the general population, SROs may be called in to address fights with other members of the school community, like a fight among students or a student threatening a teacher. But as the incidents discussed earlier show, many times when there is an issue between an SRO and a student with a disability, it begins with the student being disruptive, only to escalate when the student resists the SRO sent in to address the disruptive behavior.²⁵¹ SROs need to be aware that many students with disabilities react by punching or hitting and that for specific students whose behavior plans indicate this reaction, it is inappropriate to use physical restraints and charge them with assault of a police officer. Teachers and staff need to be proactive about notifying SROs when students are prone to outbursts and coaching SROs about how particular students are supposed to be treated according to their behavior plans.

C. Contractually Limiting School Resource Officers.

A number of states have statutes dealing with the employment of SROs.²⁵² An officer may be a directly contracted employee of a school or school district, or the officer may be an employee of a local law enforcement agency (police department or sheriff's office) and contracted out to a school by a memorandum of understanding (MOU). In some states, an SRO can even be employed by a private company that contracts the SRO's services out to schools.²⁵³

Numerous groups, including the Department of Justice, have called for increased attention to the contracts governing SROs' relationships with schools.²⁵⁴ In order to receive funding from the federal

251. See *supra* Part II.C.1.

252. ALA. CODE § 16-1-44.1 (2016); ARK. CODE ANN. § 6-10-128 (West 2015); CONN. GEN. STAT. ANN. § 10-233m (West 2015); FL. STAT. ANN. § 1006.12 (West 2003); IND. CODE ANN. § **20-26-18.2-2 (West 2013)**; LA. STAT. ANN. § 17:416.19 (2005); MASS. GEN. LAWS ANN. ch. 71, § 37P (West 2015); MISS. CODE ANN. § 37-3-82 (West 2013); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1302-A(6) (West 2014); N.C. GEN. STAT. ANN. § 160A-288.4 (West 2013); N.H. REV. STAT. ANN. § 186:11(XXXVII) (2017); S.C. CODE ANN. § **5-7-12 (2008)**; TENN. CODE ANN. § 49-6-4202(6) (West 2012); TEX. OCCUPATIONS CODE ANN. § 1701.262 (West 2015); UTAH CODE ANN. § 53A-11-1604 (West 2016); VT. STAT. ANN. tit. 16, § 1167 (West 2014).

253. IND. CODE ANN. § **20-26-18.2-2(a)(4)** (West 2013).

254. *Memorandum of Understanding Fact Sheet*, *supra* note 46; see also, e.g., *School Discipline & Security Personnel: A Tip Sheet for Advocates on Maximizing School Safety and Student Success*, NAT'L JUVENILE JUST. NETWORK (Oct. 28, 2015), http://www.njjn.org/uploads/digital-library/NJJN-SRO-Tip-Sheet_Oct28-2015fin.pdf; Catherine Y. Kim & I. India Geronimo, *Policing in Schools: Developing a Governance Documents for School Resource Officers in K-12 Schools*, AM. C.L. UNION (Aug. 2009), <https://www.aclu.org/other/policing-schools-developing-governance-document-school-resource-officers-k-12-schools>.

government's COPS program, the SRO's local law enforcement agency must agree to enter into an MOU with the school(s) at which he or she will be stationed.²⁵⁵ The COPS program makes recommendations on how to develop MOUs with schools, which include conflict resolution and restorative-justice techniques under the category of "an increased understanding of how to effectively interact with youth."²⁵⁶

Schools need to take the federal guidelines seriously and view MOU creation as a proactive rather than reactive process. Too often, MOUs are reformed in response to high profile altercations between police and students—as in the story of Kayleb discussed above.²⁵⁷ After Kayleb's case threw the school district into the national spotlight, the juvenile court eventually dismissed the felony charges against the sixth grader, and Lynchburg City Schools entered into a MOU with the Lynchburg Police Department requiring (among other things) additional training for SROs, clarifying that violations of school rules should be referred to school principals, and limiting arrests of students under the age of thirteen "during school operation."²⁵⁸

Another example of schools modifying their use of SROs after a lawsuit arose out of Huntsville, Alabama. Huntsville had been under a school-desegregation decree since the 1960s and when it proposed rezoning the school district in 2014, the DOJ objected.²⁵⁹ The Huntsville Board of Education entered into a consent decree with the DOJ following many months of court-ordered mediation.²⁶⁰ One of the focal points of the consent decree was school discipline. The district agreed to modify the Student Code of Conduct, eliminating out-of-

255. *COPS Office FY2016 Application Guide*, *supra* note 43, at 33.

256. *Memorandum of Understanding Fact Sheet*, *supra* note 46, at 1–2. The full bullet point reads, "an increased understanding of how to effectively interact with youth through coordinated training on topics such as basic childhood and adolescent development and age-appropriate responses, disability and special education issues, conflict resolution and de-escalation techniques, bias-free policing including implicit bias and cultural competence, restorative justice techniques, and working with specific student groups such as students with disabilities or limited English proficiency and students who are lesbian, gay, bisexual, and transgender (LGBT)." *Id.* State grant programs may also require MOUs. *See, e.g.*, IND. CODE ANN. § 10-21-1-2 (West 2013); MISS. CODE ANN. § 37-3-82 (West 2013); 24 PA. STAT. & CONS. STAT. ANN. § 13-1302-A (West 2014); VA. CODE ANN. § 9.1-110 (West 2016) (calling for state board to set funding guidelines and not specifically mentioning MOU or other contractual requirements).

257. *See supra* Part II.C.1.

258. *Memorandum of Understanding*, *supra* note 38, at 57. The limits on arrest allow exceptions for "illegal possession or use of weapons, illegal drug use or distribution, or threat of harm to any person." *Id.*

259. *Memorandum Opinion, Hereford v. Huntsville Bd. of Educ.*, No. 5:63-cv-00109 (N.D. Ala. Apr. 21, 2015), ECF No. 449.

260. *Consent Order, Hereford v. Huntsville Bd. of Educ.*, No. 5:63-cv-00109 (N.D. Ala. Apr. 24, 2015), ECF No. 450 [hereinafter *Huntsville Consent Decree*]; Claire Aiello and Daniella Perallon, *Federal Judge Issues Opinion in Huntsville School Desegregation Case*, WHNT NEWS (Apr. 21, 2015), <http://whnt.com/2015/04/21/federal-judge-issues-ruling-in-huntsville-school-desegregation-case/>.

school suspension for low-level offenses and reclassifying more offenses at lower levels.²⁶¹ It also agreed that the district would incorporate restorative-justice strategies. Each school would have at least two faculty meetings per semester in which “the appropriate role of School Resource Officers . . . and security personnel” would be discussed.²⁶² The district would also “review and amend” its MOU with the Huntsville City Police Department, with a focus on district personnel handling students’ behavior issues directly rather than calling in SROs.²⁶³ It also agreed to have school administrators meet with SROs each semester to review incidents in which SROs “were involved in the discipline, arrest or restraint of a student.”²⁶⁴

In 2014, the San Francisco Unified School District updated its MOU with the San Francisco Police Department, which had originally been entered into in 2005 as part of the federal COPS program.²⁶⁵ As in Huntsville, San Francisco was focused on diminishing the use of SROs and training school personnel to call on SROs in more limited circumstances.²⁶⁶ The new MOU requires monthly written reports to the district and three-times-yearly reporting to the San Francisco Board of Education, which must “address any efforts to reduce disproportionate minority contact with police and the juvenile justice system and reduce the rate of school-based arrests and citations while maintaining a safe school climate.”²⁶⁷ The MOU specifically provides that an SRO is not a

261. Huntsville Consent Decree, *supra* note 260, at 71.

262. The language was non-specific as to particular types of programs. The district agreed to “[i]ncorporate developmentally-appropriate tiered prevention and intervention strategies and strategies that include restorative justice strategies, such as fostering skills to resolve conflicts, involving students in resolving problems and encouraging reflection, with the goal of keeping students in the classroom to the maximum extent consistent with effective instruction.” *Id.* at 72. The decree also called for “a continuum of graduated disciplinary alternatives, such as student conferencing, plans developed by the school-based Problem Solving Teams, conflict resolution, and restorative justice strategies.” *Id.* at 72; *id.* at 74–75 (regarding SROs).

263. *Id.* at 79 (“The District will ensure that SROs and school security are focused on maintaining the safety of the District’s students and personnel and that SRO involvement is not requested in response to any situation that can be safely and appropriately handled by the District through its internal disciplinary procedures. The District will train its school level staff and SROs that incidents involving public order offenses committed by students, including disorderly conduct or disruption that does not threaten safety, should be considered school discipline issues to be handled by school officials and should not be referred to an SRO.”).

264. *Id.* at 80.

265. Memorandum of Understanding Between San Francisco Police Department and the San Francisco Unified School District (Jan. 14, 2014), <http://www.dignityinschools.org/sites/default/files/SFPD-SRO-MOU.pdf> [hereinafter San Francisco MOU]; Agenda of the Regular Meeting of the S.F. Unified Sch. Dist. Bd. Educ. 133 (Jan. 14, 2014), <http://www.sfusd.edu/en/assets/sfusd-staff/about-SFUSD/files/board-agendas/Agenda11414.pdf>. For more about the COPS program, see *supra* Part II.B.

266. San Francisco MOU, *supra* note 265, at 6.

267. San Francisco MOU, *supra* note 265, at 4.

“school disciplinarian” and that district administrators “shall prioritize alternatives to school removals and police involvement, such as the use of Restorative Practices.”²⁶⁸ It also defines a category of “low-level school-based offense” for which students receive a three-strike policy on before being arrested and taken to juvenile hall.²⁶⁹ These offenses include battery, resisting arrest, disturbing the peace, and possession of marijuana for personal use.²⁷⁰ On the first offense, SROs have discretion to “admonish and counsel or take no action.”²⁷¹ On the second offense, SROs may admonish and counsel or refer the student to a diversion program.²⁷² Only on the third offense may SROs refer students to juvenile hall.²⁷³

On the training front, the San Francisco language is less robust, saying that SROs “will be encouraged to participate in at least one training a year” and that the school district “can invite and encourage SRO participation in professional development and training opportunities in the areas of Restorative Justice/Practices . . . and other educational reform initiatives to facilitate their understanding of the school culture.”²⁷⁴ The San Francisco MOU does not limit SROs from arresting young students, but its tiered limitations on referral to outside law enforcement seek to accomplish similar goals of keeping SROs from arresting students for relatively minor offenses committed on school grounds.

D. Summary of Strategies to Encourage School Resource Officers to Limit Disproportionate Punishment.

Student misbehavior in schools is a problem. It is a problem whether or not that misbehavior is criminal. How schools choose to respond to negative behaviors is also a problem, and one that we can work to solve. But we cannot address a problem until we choose to recognize it.²⁷⁵

268. *Id.* at 7.

269. *Id.* at 9. Although the language of the provision has a discretion catch-all that allows SROs to send students to the San Francisco County Juvenile Probation Community Assessment and Referral Center (CARC) at any time.

270. *Id.*

271. *Id.*

272. *Id.*

273. San Francisco MOU, *supra* note 265, at 9. At which point, it appears the student faces charges and is sent to CARC.

274. *Id.* at 10. It is unclear why such training is merely optional, but it is possible that additional trainings were outside the scope of the SROs’ union agreement with the SFPD. Schools face a similar problem with training teachers during the school year. If this speculation is correct, however, it does highlight that limiting what SROs can do is often easier than prescribing additional things they must do.

275. David M. Osher et al., *Deconstructing the Pipeline: Using Efficacy, Effectiveness, and Cost-Benefit Data to Reduce Minority Youth Incarceration*, 99 NEW DIRECTIONS FOR YOUTH DEV. 91, 109

Communities around the country are beginning to produce the data that shows this can be done, and it is now up to dispute-resolution practitioners to spread this knowledge and work with schools to harness the authority of SROs toward an individually focused, community-oriented kind of justice.

This Article has discussed a number of potential paths for those seeking to limit SROs' overcriminalization of students. Families of children with disabilities might consider suing schools for violating the IDEA, though the remedies for violation may do little to change the ways SROs act among students with disabilities.²⁷⁶ Similarly, families of children subjected to excessive force by an SRO might attempt to sue under the U.S. Constitution, but the courts' high level of deference to police, and the prominence of nominal monetary-damage awards do little to recommend such suits. Even the possibility of injunctive relief in the form of revised practices with some input from community members would be unlikely to address the cultural roots of the problem.²⁷⁷

More promising routes involve the funders of these SRO programs, such as federal and state governments. If these funders are going to give money to schools to hire SROs, they should sanction or fine schools whose SROs are disproportionately targeting minority students or students with disabilities. Moreover, they should tie funding to actual, substantive training of SROs in restorative practices and to the use of restorative justice in schools that have SROs.²⁷⁸ Overall, the recommendations in funding programs like COPS need to have real teeth to be meaningful.

Both funders and community groups should pressure schools to create MOUs that limit the kinds of sanctions that SROs can levy on students and that include requirements for training in restorative justice and working with diverse student populations. Schools should proactively adopt this approach when they initially enter into SRO arrangements. This kind of approach could also be requested by groups suing schools or SROs, but voluntary adoption would be more in keeping with the goals of restorative practices.²⁷⁹ These MOUs should forbid criminal sanctions for most misbehavior but also encourage the entire school community to take responsibility for the reprimanding and rehabilitation

(2003) ("It is important to target the pipeline problem and focus on actions that address that problem. In Multnomah County, for example, an explicit focus on reducing racial disparities was the engine that drove the data analysis.").

276. See discussion *supra* Part II.D.2.

277. See discussion *supra* Part II.D.1.

278. See discussion *supra* Part IV.A.

279. See discussion *supra* Part IV.C.

of wrongdoers.

Restorative-justice programs, especially in schools, do present considerable costs. Teachers need to be paid for training time if it is outside the regular school year, and substitutes need to be paid if teachers are pulled out of class for training.²⁸⁰ Someone within the school or district, or an outside consultant, must be paid to help administer and monitor the program.²⁸¹ Teachers also may be skeptical about the effectiveness of restorative justice—or view it as a lack of just punishment—and so may be wary of dedicating time to restorative-justice training.²⁸²

But the school-to-prison pipeline is also costly.²⁸³ More therapeutic, and less prison-like, disciplinary interventions ultimately yield better results in return on investment to the community.²⁸⁴ In fact, research shows that more prison-like disciplinary programs—juvenile boot camps and “scared straight” programs—actually increase participants’ likelihood of committing future crime, resulting in a net loss to the community.²⁸⁵ It also appears that more individually focused interventions have a higher likelihood of success, since bringing groups of deviant youth together may increase deviant behaviors.²⁸⁶ Actors at every level of the education system, families, school boards, teachers, state and federal agencies, will have to dedicate resources to make restorative justice work. In so doing, they will have to decide whether justice in schools means criminal justice or another form of justice, one that will do more to strengthen school communities.

V. CONCLUSION

Simply doing more of the same—including a dispute-resolution component in SRO training—is not the answer to the ways in which SROs exacerbate the school-to-prison pipeline. The federal government calls for training. States call for training. These training guidelines often include portions on conflict resolution. Yet these training

280. *Can RJ Keep Schools Safe?*, *supra* note 202.

281. *Id.*

282. *See, e.g.*, McCluskey et al., *supra* note 191, at 413.

283. Russell W. Rumberger & Daniel J. Losen, *The High Cost of Harsh Discipline and its Disparate Impact*, CTR. FOR C.R. REMEDIES (June 2, 2016), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf.

284. Osher, *supra* note 275, at 93 tbl.6.1).

285. *Id.* at 108.

286. *Id.* at 101; Philipson, *supra* note 165, at 87 (suggesting that group therapy sessions for bullies reinforces bullying behavior).

guidelines have not addressed the problem, because training SROs on conflict resolution does not address the larger problem of school environment. Schools need to take responsibility for shifting their culture from a criminal justice to a restorative-justice model—and they need to bring SROs along with them.

In this Article's proposals, contractually limiting SROs' power to punish students and requiring participation in restorative-justice programs, are the way schools arrive at restorative justice and the reduction of criminal charges by SROs, but the goal is for these steps to reflect a moral shift in schools' outlook. Yes, teachers have a duty to teach, and law enforcement officers have a duty to stop criminal activity, but looking at bad behaviors simply as violations of school rules or criminal codes winds up punishing the individual without adequately addressing the effects that the individual had on the community as a whole. The goal of restorative justice is to allow students—both troublemakers and their peers—to understand the harm that they cause through their disruptive behaviors and teach them ways to prevent and deal with conflict without harming others.

Any discussion about police in schools rests within a broader conversation about police in the community as a whole, and the disproportionate punishment of African-American students and their funneling into the school-to-prison pipeline is one of many social harms that has led to movements like Black Lives Matter. Maybe keeping police in schools is unnecessary. Maybe in time, community can be brought into schools through restorative justice and police presence can be removed entirely. As schools move to limit the discretion of SROs and implement restorative justice or other programs that seek to limit retributive, exclusionary punishments, the need for law enforcement officers in the schools themselves may diminish. Local law enforcement can be called in—whether to respond to an active incident at a school or to participate in a restorative circle after harm has been done—and SROs may not need to be as much of a presence on campus.

But for now, SROs are part of the fabric of many schools throughout this country. Regardless of whether SROs can be removed from that fabric eventually, schools can make them a tool for justice *now*—but only if they start changing the way they use this resource.