

# THE PRISONIZATION OF AMERICA'S PUBLIC SCHOOLS

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## I. INTRODUCTION

Dozens of students stand in the freezing cold waiting to enter their Title I public high school in Washington, D.C. I join the end of the line and wait patiently with the students. After fifteen minutes pass, I finally go to the front, identify myself as a licensed substitute teacher who teaches an elective course at the school, and gently inquire as to the cause of the line. The uniformed guard at the door does not realize I am in fact a lawyer/administrator with the Marshall-Brennan Constitutional Literacy Project,<sup>1</sup> and he mumbles something about how everybody just has to wait. I observe that there are only two guards to shepherd in approximately 800 students—one making sure students go through the metal detector, and another monitoring backpacks and bags that students place on the conveyor. Each student stands in line, files into this ominous concrete building, submits to a fairly invasive search and then enters into a building with cameras, police officers, and other intrusions on their privacy every day, for 182 days per year. This scene is a common one. Today, millions of school-age children across America experience similar inconveniences and privacy intrusions every single school day in the name of school safety.

American public schools look very different today than they did twenty-five years ago. My interest in school violence began as an eleven-year-old whose suburban Chicago elementary school was attacked by a woman with mental health problems who shot six children,

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1. The Marshall-Brennan Constitutional Literacy Project is a national program that trains law students to teach constitutional rights and responsibilities in public high schools around the country. *The Marshall-Brennan Constitutional Literacy Project*, AM. U. WASH. C. L., <https://www.wcl.american.edu/marshallbrennan> (last visited Aug. 1, 2017).

killing little Nicholas Corwin.<sup>2</sup> Overnight, our school district became hyper-aware of security, utilizing police officers and installing metal detectors—only to remove them months later.

Across America, public schools now routinely incorporate various crime-related tools ostensibly to prevent school violence.<sup>3</sup> These tools include metal detectors, drug-sniffing dogs, on-site police officers, harsh zero-tolerance disciplinary policies, and so forth.<sup>4</sup> According to one survey, in the 2013 to 2014 school year, 75% of public schools in America had one or more security cameras, compared with just 61% in the 2009 to 2010 school year.<sup>5</sup> In 2017, approximately 29% of public schools have sworn police officers on campus.<sup>6</sup>

This Article coins the term “prisonization” to refer to the transformation of public schools, like the Washington, D.C., school described above, into prisons where students’ mobility is policed and severely restricted. Prisonization includes use of metal detectors, police officers (or school resources officers (“SROs”)), cameras, referral of misbehavior in school to the criminal justice system, harsh disciplinary policies, including zero-tolerance, and drug-sniffing dogs. Because of how quickly prisonization has become ingrained in our society and in our schools, some may immediately defend these practices as necessary in the post-Columbine, post-9/11 America. However, these policies and practices have emerged in the past generation as a response to a *false perception* of increased mass school violence, which the next Part explores fully.<sup>7</sup>

Part II explains that prisonization practices plaguing American public schools are problematic because they are not evidence-based.<sup>8</sup> Part III offers targeted suggestions to address the problem of mass violence in public schools.<sup>9</sup> Finally, the Article concludes that prisonization of public schools is not the answer to mass school

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2. Phil Rogers, *Remembering the Laurie Dann Spree*, NBC 5 CHI. (Dec. 14, 2012, 2:24 PM CST), <http://www.nbcchicago.com/news/local/Remembering-The-Laurie-Dann-Spree183533341.html>.

3. Randall R. Beger, *Expansion of Police Power in Public Schools and the Vanishing Rights of Students*, 29 SOC. JUST., nos. 1–2, 2002, at 119, 123-24.

4. See Derek W. Black, *ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE* 88-96 (2016); Beger, *supra* note 3, at 120-23.

5. Caroline Porter, *Spending on School Security Rises*, WALL ST. J. (May 21, 2015, 12:00 AM), <https://www.wsj.com/articles/spending-on-school-security-rises-1432180803>.

6. *Which Students are Arrested the Most?*, EDUC. WK., <http://www.edweek.org/ew/projects/2017/policing-americas-schools/student-arrests.html#/overview> (last visited Aug. 1, 2017).

7. See *infra* Part II.

8. See *infra* Part II.

9. See *infra* Part III.

violence.<sup>10</sup> In the very institutions designed specifically to develop citizenship and a sense of commitment to public good, prisonization practices tip the constitutional scale too far in favor of security over individual rights.<sup>11</sup>

## II. DEFINING THE PROBLEM

Prisonization is based on incorrect assumptions about the frequency of mass school violence and where school violence occurs. Thanks to the advent of social media and sensationalistic accounts of isolated cases, public perception of these incidents is that they are far more frequent than they actually are.<sup>12</sup>

This disproportionate fear has led to the rise in prisonization efforts. Some even argue there should be *more* weapons in schools to combat existing weapons,<sup>13</sup> despite the associated dangers, which include accidental misuse, purposeful misuse, and conflicting values. One example of misuse is a school security guard leaving his gun in the bathroom by accident.<sup>14</sup> Thankfully, the weapon was recovered before anything bad happened.<sup>15</sup> Even in the most secure fortress of a school (an unattainable fiction because of human error and constant changes in institutions' rules, conditions, and staffing), it seems people who want to commit violent crime will find a way to do so.

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10. See *infra* Part IV.

11. See *infra* Part IV.

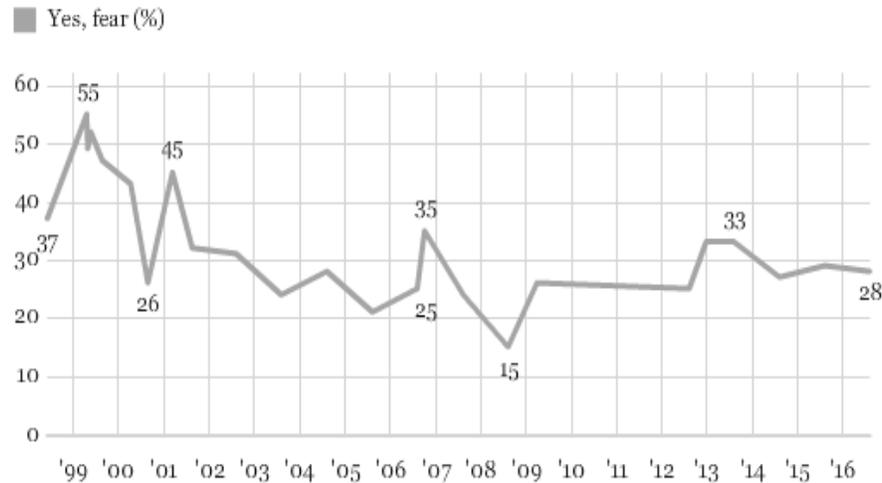
12. Zac Auter, *U.S. Parents' Fears for Child's Safety at School Unchanged*, GALLUP (Aug. 19, 2016), <http://www.gallup.com/poll/194693/parents-fears-child-safety-school-unchanged.aspx>.

13. See, e.g., Dan Merica, *Citing Grizzlies, Education Nominee Says States Should Determine School Gun Policies*, CNN (Jan. 18, 2017, 8:42 PM), <http://www.cnn.com/2017/01/17/politics/betsy-devos-grizzly-bears-donald-trump-guns> (statement of Betsy DeVos) ("I will refer back to Sen. Enzi and the school he is talking about in Wyoming. I think probably there, I would imagine there is probably a gun in a school to protect from potential grizzlies."); David Nakamura & Tom Hamburger, *Put Armed Police in Every School, NRA Urges*, WASH. POST (Dec. 21, 2012), [http://articles.washingtonpost.com/2012-12-21/politics/35950179\\_1\\_gun-regulation-national-school-shield-program-gun-violence](http://articles.washingtonpost.com/2012-12-21/politics/35950179_1_gun-regulation-national-school-shield-program-gun-violence) (statement of National Rifle Association Executive Vice President Wayne LaPierre) ("I call on Congress today to act immediately to appropriate whatever is necessary to put armed police officers in every single school in this nation.").

14. *Armed School Security Guard Clark Arnold Leaves Gun Unattended in Student Bathroom*, HUFFINGTON POST (Jan. 18, 2013, 2:21 PM), [http://www.huffingtonpost.com/2013/01/18/armed-school-security-gua\\_n\\_2505747.html](http://www.huffingtonpost.com/2013/01/18/armed-school-security-gua_n_2505747.html).

15. *Id.*

*FIGURE 1: U.S. PARENTS' CONCERN FOR THEIR CHILDREN'S SAFETY AT SCHOOL: THINKING ABOUT YOUR OLDEST CHILD, WHEN HE OR SHE IS AT SCHOOL, DO YOU FEAR FOR HIS OR HER PHYSICAL SAFETY?<sup>16</sup>*



#### GALLUP<sup>17</sup>

Further, ironically, or perhaps not ironically, given the general well-documented over-policing of minorities, prisonization has largely occurred in urban schools that enroll predominantly low-income and minority students. In almost all of the unspeakable acts of mass violence of the last three decades—from Winnetka, Illinois, to Littleton, Colorado, to Newtown, Connecticut—the shooters were white males, the schools consisted of mostly white, middle- or upper-middle class students, and the schools were located in suburban or rural settings.<sup>17</sup> In fact, school-associated violent deaths are quite rare. The number has remained stable in the twenty-five years the Centers for Disease Control (“CDC”), the U.S. Department of Education (“ED”), and the U.S. Department of Justice (“DOJ”) have been tracking school violence.<sup>18</sup>

16. Auter, *supra* note 12. Figure 1 is republished with permission of Gallup, Inc., as conveyed through Copyright Clearance Center, Inc.

17. See, e.g., Rogers, *supra* note 2; see Maureen Linke et al., *Deadly School Shootings in the Last 50 Years*, USA TODAY (Dec. 15, 2012, 12:16 PM), <http://www.usatoday.com/story/news/nation/2012/12/15/school-shootings-timeline-history/1771271>.

18. CTRS. FOR DISEASE CONTROL & PREVENTION, UNDERSTANDING SCHOOL VIOLENCE: FACT SHEET 1 (2016), [http://www.cdc.gov/violenceprevention/pdf/school\\_violence\\_fact\\_sheet-a.pdf](http://www.cdc.gov/violenceprevention/pdf/school_violence_fact_sheet-a.pdf).

The agencies work together “to gather and analyze data from a variety of sources to gain a more complete understanding of school violence.”<sup>19</sup> The CDC’s School Associated Violent Death Study has concluded that:

[B]etween 1% and 2% of all homicides among school-age children happen on school grounds or on the way to and from school or during a school sponsored event. So the vast majority of students will never experience lethal violence at school.<sup>20</sup>

This percentage has remained constant since 1992, the first year for which the CDC has data.<sup>21</sup> Further, in 2010, public school students actually were safer in and on their way to and from school than they were in 1992.<sup>22</sup>

However, during this same period, American public schools have become increasingly prison-like. Relatively infrequent, but highly publicized, episodes of school violence have led to greater concerns of safety in public schools.<sup>23</sup> With fifty million school-age children nationwide,<sup>24</sup> the topic of school safety understandably strikes a chord. Many school districts have spent millions of dollars on metal detectors, police officers, and drug-sniffing dogs.<sup>25</sup> There are a number of serious, far-reaching consequences of prisonization efforts. With strong police presence in schools, school children are now punished criminally for a range of offenses traditionally handled by teachers.<sup>26</sup> Increased police presence leads to greater contact with the criminal justice system.<sup>27</sup>

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19. *School Violence: Data & Statistics*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/data\\_stats.html](http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/data_stats.html) (last updated June 8, 2017).

20. *Id.*; see also *School-Associated Student Homicides --- United States, 1992--2006*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan. 18, 2008), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5702a1.htm>.

21. *School-Associated Student Homicides --- United States, 1992--2006*, *supra* note 20.

22. NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 41 (Melissa Sickmund & Charles Puzzanchera eds., 2014), <https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>.

23. KATHERINE S. NEWMAN ET AL., RAMPAGE: THE SOCIAL ROOTS OF SCHOOL SHOOTINGS 49-52 (2004).

24. *About School Violence*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/> (last updated May 12, 2017).

25. Professor Sarah Jane Forman talks about “ghetto education,” which means over-policing of students, limiting students to substandard education, and preparing students for a life of crime. Sarah Jane Forman, *Ghetto Education*, 40 WASH. U. J.L. & POL’Y 67 (2012).

26. Beger, *supra* note 3, at 120-24 (explaining that metal detectors, locker searches, security personnel, stricter dress codes, barbed-wire security fences, book and electronic device restrictions, “lock down drills,” and “SWAT team” rehearsals have become common).

27. See *id.* at 121-24, 127 (“In the name of safety, students are being spied on with hidden cameras, searched without suspicion, and subjected to unannounced locker searches by police with

Some argue that students should have full constitutional rights in schools if they are going to be subject to criminal sanctions.<sup>28</sup>

Besides the practical concerns related to prisonization practices (costs, referral to criminal justice systems, inefficiencies such as having to wait in long lines rather than learning, etc.) that have been well-documented by legal scholars and advocates, there are serious related moral and legal concerns.<sup>29</sup> In our democracy, until the past two decades or so, society expected individual liberty to outweigh security unless a true need were to arise to tip the scale of constitutional analysis in the other direction. In the context of school safety, the absence of reliable evidence supporting the need for prisonization practices logically means that no extreme measures will be taken until it is clear they are necessary. However, although school-related shootings are statistically rare, the increased prisonization of all schools, but particularly urban, minority public schools, has led to practices that violate millions of students'—particularly African American and Latino children's—privacy and other constitutional rights every day.<sup>30</sup>

The U.S. Supreme Court has repeatedly held that while students' rights in schools are not quite as strong as outside of school because of the special circumstances of the school environment, students do in fact have rights—privacy and others—that apply in the school setting.<sup>31</sup> While the Supreme Court has recognized the importance of individual liberties, it has simultaneously expanded the reach of law enforcement into the school setting,<sup>32</sup> a problematic, unsupported, and shortsighted approach to keeping schools safe.<sup>33</sup>

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drug-sniffing dogs. Concurrently, federal and state lawmakers have significantly increased penalties for crimes committed on school property. Trivial forms of student misconduct that used to be handled informally by teachers and school administrators are now more likely to result in arrest and referral to a juvenile or adult court.”).

28. *See id.* at 126.

29. See, for example, the scholarship of Professors Derek Black, Jason P. Nance, and Sarah Redford, as well as the work performed by the American Civil Liberties Union, Justice Policy Institute, Advancement Project, and others.

30. *See* Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 40-85 (2016).

31. *See, e.g.*, *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368-77, 379 (2009) (holding that the strip search of a teenage girl invaded her reasonable expectation of privacy in the school setting); *New Jersey v. T.L.O.*, 469 U.S. 325, 333-37 (1985) (holding that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-07 (1969) (“[S]tudents [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

32. *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 271-77, 281 (2011) (concluding that a student's age should be a factor in determining custody for *Miranda* purposes in a school setting);

While it would have been preferable to design safety interventions based on research findings prior to implementation—rather than afterwards—on the bright side, research is underway to examine the effects of certain interventions. There are studies underway to make the threshold determination of whether more police officers, more metal detectors, and other privacy intrusions will actually decrease school violence.<sup>34</sup> It will be a few more years before the findings are published because many of the National Institute of Justice-funded studies have a multi-year time frame.<sup>35</sup> In the meantime, given practical and theoretical concerns about the balance between safety and rights, this Article calls for a moratorium on prisonization practices given the steep cost-benefit analysis that results in the invasion of *millions* of students' rights every single day.

Even if one or more of the factors are shown to be effective in decreasing the likelihood of school violence, the question will still remain whether there are other interventions that are just as, or even more, successful. Instead of resorting to deprivations of liberty, there are other ways to address safety concerns that align better with the realities of the problem of mass violence. The next Part digs below the constitutional and policy concerns to examine the root problems associated with actual cases of mass violence and proposes proxies for prisonization practices. First, there ought to be better resources to support parents in raising children.<sup>36</sup> The next Part discusses that, although in many instances of mass violence the shooters kill themselves, thereby making it difficult to assess motives, what is clear is that in nearly every instance, the shooters have a background of mental health issues.<sup>37</sup> Finally, gun control is explored.<sup>38</sup>

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Morse v. Frederick, 551 U.S. 393, 401-10 (2007) (upholding a school's right to punish a student for speech perceived to promote drug use).

33. See *School to Prison Pipeline*, NAACP LEGAL DEF. FUND (July 11, 2010), <http://www.naacpldf.org/case/school-prison-pipeline> (providing information about how the school-to-prison pipeline raises Equal Protection issues); *Student Speech and Privacy*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/technology-and-liberty/students> (last visited Aug. 1, 2017).

34. See, e.g., RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE PROGRESS REPORT 17-18 (2014), <http://www.aecf.org/m/resourcedoc/aecf-2014JDAIProgressReport-2014.pdf>; Evie Blad, *Impact of School Police: Many Unanswered Questions*, EDUC. WK. (Jan. 24, 2017), <http://www.edweek.org/ew/articles/2017/01/25/impact-of-school-police-many-unanswered-questions.html> (“In 2014, the National Institute of Justice launched its Comprehensive School Safety Initiative, awarding \$75 million in grants to fund research in [areas involving school safety and] awarded additional waves of grants in 2015 and 2016.”).

35. Blad, *supra* note 34.

36. See *infra* Part III.A.

37. See *Mass Shootings and Mental Disability Rights in the United States*, AM. U. WASH. C. L., <http://www.wcl.american.edu/humright/center/massshootings.cfm> (last visited Aug. 1, 2017);

### III. POLICY SUGGESTIONS

This Part seeks to align evidence-based risk factors for engaging in violence with policy suggestions to address those risk factors, including promoting policies and programs recommended by the CDC,<sup>39</sup> strengthening provisions of the Family and Medical Leave Act of 1993 (“FMLA”)<sup>40</sup> to allow for coverage while caring for children and young adults with mental health concerns,<sup>41</sup> strengthening mental health support in schools and communities,<sup>42</sup> and tightening access to guns and other weapons.<sup>43</sup> The CDC has played a critical role in understanding causes of school violence. In solving public health problems, the CDC’s approach is first to “[d]efine the problem,” then “[i]dentify risk and protective factors,” next “[d]evelop and test prevention strategies,” and, finally, “[e]nsure widespread adoption.”<sup>44</sup> The goal, in the case of school violence, is to stop it from happening in the first place.

In examining data on perpetrators of school violence, the CDC has identified factors that may increase the risk of a youth engaging in violence at school, including the following:

- Prior history of violence;
- Drug, alcohol, or tobacco use;
- Association with delinquent peers;
- Poor family functioning;
- Poor grades in school; and
- Poverty in the community.<sup>45</sup>

Further, the CDC identified several prevention strategies to specifically address the risk factors, including the following<sup>46</sup>:

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*infra* Part III.B.

38. *See infra* Part III.C.

39. *See infra* notes 43-57 and accompanying text.

40. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601(f)–2654 (2012)).

41. *See infra* Part III.A.

42. *See infra* Part III.B.

43. *See infra* Part III.C.

44. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 2.

45. *Id.* (recognizing that the mere presence of these risk factors does not always mean that a young person will become an offender, but merely that based on analyses of known cases, the presence of many of these factors may increase the likelihood of engagement in violence at school).

46. *Id.*

- Universal, school-based prevention programs can significantly lower rates of aggression and violent behavior.<sup>47</sup>
- Parent- and family-based programs can improve family relations and lower the risk of violence by children especially when the programs are started early.<sup>48</sup>
- Street outreach programs can significantly reduce youth violence.<sup>49</sup>

In aligning practices with identified prevention strategies, the CDC performs many activities “that help us to understand and effectively prevent school violence.”<sup>50</sup> Such activities include the Youth Risk Behavior Surveillance System (“YRBSS”),<sup>51</sup> the School-Associated Violent Death Study,<sup>52</sup> the School Health Policies and Practices Study (“SHPPS”),<sup>53</sup> the Health Curriculum Analysis Tool (“HECAT”),<sup>54</sup> the School Health Index,<sup>55</sup> the National Centers for Youth Violence

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47. *Id.* “These programs are delivered to all students in a school or grade level. They teach about various topics and develop skills, such as emotional self-awareness and control, positive social skills, problem solving, conflict resolution, and teamwork.” *Id.*

48. *Id.* “These programs provide parents with education about child development and teach skills to communicate and solve problems in nonviolent ways.” *Id.*

49. *Id.* “These programs connect trained staff with at-risk youth to conduct conflict mediation, make service referrals, and change beliefs about the acceptability of violence.” *Id.*

50. *Id.*

51. *Id.* “The YRBSS monitors health-risk behaviors among youth, including physical fighting, bullying, weapon carrying, and suicide. Data is collected every two years and provide nationally representative information about youth in grades 9-12.” *Id.* For further information on the YRBSS, see *Youth Risk Behavior Surveillance System (YRBSS)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyyouth/data/yrbs/index.htm> (last updated Aug. 11, 2016).

52. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 3; see *School-Associated Student Homicides --- United States, 1992--2006*, *supra* note 20 (explaining a collaboration with the Departments of Education and Justice to “monitor[] school-associated violent deaths at the national level”).

53. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 3; see *School Health Policies and Practices Study (SHPPS)*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/healthyyouth/shpps](http://www.cdc.gov/healthyyouth/shpps) (last updated Oct. 13, 2015) (assessing health and safety “policies and practices at the state, district, school, and classroom levels”).

54. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 3; see *Health Education Curriculum Analysis Tool (HECAT)*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/healthyyouth/hecat](http://www.cdc.gov/healthyyouth/hecat) (last updated Sept. 1, 2015) (containing guidance, appraisal tools, and resources to help schools conduct an analysis of health education curricula based on the National Health Education Standards and CDC’s Characteristics of an Effective Health Education Curriculum, which can help schools select or develop curricula to address topics such as violence prevention).

55. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 3; see *School Health*

Prevention (“YVPCs”),<sup>56</sup> the Guide to Community Preventative Services,<sup>57</sup> and Striving to Reduce Youth Violence Everywhere (“STRYVE”).<sup>58</sup> Parents and others truly concerned about safety may identify these resources and ask how their local schools use them, and, if not, how they may begin to utilize them. In addition to supporting the CDC’s programs and tools designed to directly address the risk factors associated with school violence, this Article proposes several other responses to the risk factors, including strengthening FMLA provisions to allow for coverage of caring for mentally ill children and young adults,<sup>59</sup> strengthening mental health supports in schools and communities,<sup>60</sup> and tightening access to guns and weapons.<sup>61</sup>

#### A. *Strengthening the Family and Medical Leave Act*

The United States offers the least protection to families out of all peer and many developing nations.<sup>62</sup> In terms of (1) paid leave, (2) paternity leave, (3) the scope of who is protected, (4) the length of leave, and (5) all other measures, the United States falls behind other

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*Index*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/healthyouth/shi](http://www.cdc.gov/healthyouth/shi) (last updated Oct. 20, 2016) (providing resources for schools to use to improve their health and safety policies).

56. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 3; see *National Centers of Excellence in Youth Violence Prevention*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/ViolencePrevention/ACE](http://www.cdc.gov/ViolencePrevention/ACE) (showing collaboration between researchers and local organizations, and the YVPCs work with high risk communities to carry out and evaluate a multifaceted, science-based approach for reducing youth violence).

57. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 3; see *Your Online Guide of What Works to Promote Healthy Communities*, GUIDE TO COMMUNITY PREVENTIVE SERVICES, [www.thecommunityguide.org](http://www.thecommunityguide.org) (last visited Aug. 1, 2017) (recommending ways to improve public health and examining youth violence prevention strategies such as firearm laws, therapeutic foster care, universal school-based violence prevention programs, and transfer of juveniles to adult courts).

58. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 18, at 3; see *STRYVE: Striving to Reduce Youth Violence Everywhere*, CENTERS FOR DISEASE CONTROL & PREVENTION, [www.cdc.gov/ViolencePrevention/STRYVE](http://www.cdc.gov/ViolencePrevention/STRYVE) (last updated Apr. 4, 2016) (explaining the national initiative to provide information, training, and tools to “[i]ncrease public health leadership to prevent youth violence[,] [p]romote the widespread adoption of youth violence prevention strategies[,] and [r]educe the rates of youth violence on a national scale”).

59. See *infra* Part III.A.

60. See *infra* Part III.B.

61. See *infra* Part III.C.

62. See Gretchen Livingston, *Among 41 Nations, U.S. Is the Outlier When it Comes to Paid Parental Leave*, PEW RES. CTR. (Sept. 26, 2016), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave>; Margaret Talbot, *America’s Family-Leave Disgrace*, NEW YORKER (Jan. 22, 2015), <http://www.newyorker.com/news/daily-comment/paid-family-leave-obama-work>.

countries.<sup>63</sup> The United States has only offered comprehensive job protection to its employees who have or adopt babies for just over twenty years.<sup>64</sup> The federal protection under the FMLA only mandates twelve weeks of *unpaid* leave for *eligible* workers who meet certain requirements.<sup>65</sup> An eligible employee is someone who has worked for the employer for at least twelve months, has worked a minimum of 1250 hours in the preceding twelve months (approximately twenty-three hours per week for fifty-two weeks), and “is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.”<sup>66</sup> The FMLA covers the following situations: to care for oneself, one’s children, one’s spouse, or one’s parents for a serious medical illness, and the birth or adoption of a child.<sup>67</sup>

State and local governments, as well as individual employers, may offer more protection than what is required by federal law, but often there is no immediately apparent financial incentive to do so.<sup>68</sup> Only a handful of states currently offer paid family leave, paid sick leave, and/or paid school/parental leave, although the number of states is increasing.<sup>69</sup> According to one study, large and medium size businesses (those of at least 100 employees) with unpaid leave for mothers went from 33% to 61%, and even to 84% following FMLA, but paid leave remained constant between 2% to 3% before and after the FMLA’s passage.<sup>70</sup> Under current law, “[o]nly 12 percent of U.S. private sector workers have access to paid family leave through their employer.”<sup>71</sup> For the remaining 88% of workers who must weigh costs and benefits of

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63. See Livingston, *supra* note 62; Talbot, *supra* note 62.

64. 29 U.S.C. § 2601 (2012).

65. *Id.* § 2612 (a)(1), (c). *But see id.* § 2653 (encouraging more generous leave policies beyond the minimums established in section 2612).

66. GERALD MAYER, CONG. RES. SERV., R42758, THE FAMILY AND MEDICAL LEAVE ACT (FMLA): AN OVERVIEW 3 (2012).

67. *Id.* at 4-5.

68. See generally NAT’L P’SHIP FOR WOMEN & FAMILIES, PAID FAMILY AND MEDICAL LEAVE: SECURING FINANCIAL STABILITY AND GOOD HEALTH FOR WORKING FAMILIES (2012), [http://www.nationalpartnership.org/site/DocServer/Paid\\_Leave\\_Briefing\\_Book\\_FINAL.pdf](http://www.nationalpartnership.org/site/DocServer/Paid_Leave_Briefing_Book_FINAL.pdf) (explaining that paid leave policies support worker retention and productivity, which are longer-term financial gains to employers).

69. *State Family and Medical Leave Laws*, NAT’L CONF ST. LEGIS. (July 19, 2016), <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> (outlining the three states that currently offer paid family leave, five that require paid sick leave, and nine that provide a limited number of hours to parents for attending their children’s school-related events).

70. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL’Y ANALYSIS & MGMT. 281, 285-86 (1999).

71. *DOL Factsheet: Paid Family and Medical Leave*, U.S. DEP’T OF LAB. (2015), <https://www.dol.gov/wb/paidleave/PDF/PaidLeave.pdf>.

taking unpaid leave, many cite affordability as their reason for foregoing taking leave because they simply cannot pay bills without the missed income.<sup>72</sup>

The limitations under the FMLA and state laws have tremendous implications for child welfare. Researchers have found a link between paid parental leave, the length of leave, and child health.<sup>73</sup> In general, “states and countries that have instituted paid family leave [report better] bonding between newborns and parents, lower infant mortality, improved health in children, and mothers who breastfeed longer.”<sup>74</sup> One study found more generous paid leave is correlated with fewer deaths of infants and children.<sup>75</sup> That study compared sixteen European countries and concluded that “parental leave may be a cost-effective method of bettering child health.”<sup>76</sup>

Research indicates parents and guardians who have the opportunity to watch and monitor children’s behavior, seek resources when necessary, and offer consistent love and care will have better adjusted and educationally successful children.<sup>77</sup> Considerable research now documents the contributions of parent involvement to positive outcomes, such as the following: (1) higher academic achievement; (2) student sense of well-being; (3) student school attendance; (4) student and parent perceptions of classroom and school climate; (5) positive student attitudes and behavior; (6) student readiness to do homework; (7) increased student time spent with parents; (8) better student grades; (9) higher educational aspirations among students and parents; and (10) parent satisfaction with teachers.<sup>78</sup> For parents to have those opportunities, they need time with their children, especially in their children’s early years.<sup>79</sup> However, despite the overwhelming, documented benefits of parental engagement, under protections offered

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72. *Id.*

73. Christopher J. Ruhm, *Parental Leave and Child Health*, 19 J. HEALTH ECON. 931, 945-52, 956-57 (2000).

74. Breastfeeding is an intensely individual decision and as such, the author expressly declines to promote it, but there are mothers who would like to continue breastfeeding who simply cannot because they have to work and there is research to support their desire to continue breastfeeding. Hana Schank & Elizabeth Wallace, *Beyond Maternity Leave*, ATLANTIC (Dec. 19, 2016), <https://www.theatlantic.com/business/archive/2016/12/beyond-maternity-leave/500063>.

75. *See* Ruhm, *supra* note 73, at 945-47.

76. *Id.* at 931, 936-42.

77. *See What Research Says About Parent Involvement in Children’s Education in Relation to Academic Achievement*, MICH. DEP’T OF EDUC. (2002), [https://www.ag.ndsu.edu/gearupkindergarten/documents/Final\\_Parent\\_Involvement\\_Fact\\_Sheet\\_14732\\_7.pdf](https://www.ag.ndsu.edu/gearupkindergarten/documents/Final_Parent_Involvement_Fact_Sheet_14732_7.pdf) (discussing the benefits that result when parents involve themselves in their children’s education).

78. *Id.*

79. *Id.*

by current laws, only a small fraction of parents can afford to effectively engage in their children's upbringing.

Research clearly supports the need for better support for parents and guardians, but support should also extend to the needs of caretakers of physically and mentally ill children. Caring for individuals with mental health issues may take a significant toll on the caretaker, and often leads to exhaustion and quitting.<sup>80</sup> The Supreme Court has held that states cannot be sued if they do not let their workers take time off for their own serious medical problems.<sup>81</sup> Therefore, Congress must step in and expand the FMLA in many ways.

First, the length of federally-protected leave should be expanded to at least six months, which is reasonable because six months is the length of time recommended for nursing (for those who nurse) in developed countries,<sup>82</sup> and also because it is still not as long as most peer nations, limiting the impact on the U.S. economy.<sup>83</sup>

Second, *all employees* should be covered. Review of the legislative history indicates that the limits were decided arbitrarily and inappropriately. "Clearly, the Government's dictating an arbitrary 12-week unpaid leave benefit destroys this important flexibility for both employee and employer [and] attracts costly lawsuits."<sup>84</sup> As addressed earlier, the FMLA has a number of limitations, resulting in only 60% of workers being eligible for its protections.<sup>85</sup> Whether due to the number of employees being less than fifty, working for less than one year, or less than 1250 hours, approximately 40% of American workers do not qualify.<sup>86</sup>

Third, the FMLA leave should be paid. Although some pro-business people resist the idea of paid leave, both major political parties would be warmly received if they presented a pro-family, pro-business reform that included paid leave. A significant majority of Americans

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80. Wendy Brennan, *The Family Role in Recovery: Understanding the Illness and Embracing the Process*, NAT'L ALLIANCE ON MENTAL ILLNESS, <http://www.namikitsap.org/images/newsletters/Articles/The-Family-Role-in-Recovery.pdf> (last visited Aug. 1, 2017).

81. *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 35-44 (2012).

82. See Michael S. Kramer & Ritsuko Kakuma, WORLD HEALTH ORG., THE OPTIMAL DURATION OF EXCLUSIVE BREASTFEEDING: A SYSTEMATIC REVIEW 10-18 (2002), [http://www.who.int/nutrition/publications/optimal\\_duration\\_of\\_exc\\_bfeeding\\_review\\_eng.pdf](http://www.who.int/nutrition/publications/optimal_duration_of_exc_bfeeding_review_eng.pdf).

83. See Livingston, *supra* note 62.

84. 139 CONG. REC. 2048 (1993) (statement of Rep. Kim).

85. See Debra L. Ness, *Why the U.S. Desperately Needs a National Paid Family and Medical Leave Program*, WHAT TO EXPECT, <http://www.whattoexpect.com/tools/photolist/why-the-u.s.-desperately-needs-a-national-paid-family-and-medical-leave-program.aspx> (last visited Aug. 1, 2017).

86. *Id.*

support strengthening family leave, as demonstrated both by polls and by the increasing number of states offering some type of paid leave.<sup>87</sup> When paid parental leave is available, mothers are 93% more likely to remain in their jobs nine to twelve months later, 40% less likely to need food stamp assistance, and 39% less likely to need public assistance.<sup>88</sup> Benefits should extend to fathers and children as well.<sup>89</sup> If other nations have figured it out, the United States should as well.<sup>90</sup>

Finally, the FMLA should specifically protect care for dependent children and adults with mental health problems so that parents can support their children instead of worrying about keeping their jobs. In addition to providing greater support to parents caring for children with mental health problems through the FMLA, schools can do a better job of caring for children's mental health needs.

### B. Addressing Mental Health

While those of us who experience mental illness are no more likely to be involved in violent crime than others,<sup>91</sup> "mass shooters are often mentally ill and socially marginalized."<sup>92</sup> Unfortunately, far too many children and young adults in America live with mental health issues that could be addressed more effectively.<sup>93</sup> While as a society we are becoming more aware and willing to explore our mental health, it is still a huge challenge and millions of children fly under the radar screen every year with undiagnosed and untreated conditions.<sup>94</sup> Every school should have a licensed mental health worker who monitors students. In the event that the attendant cost is prohibitive, existing staff should be

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87. Kathleen Weldon, *Public Opinion on the Family and Medical Leave Act*, HUFFINGTON POST (Aug. 9, 2016, 2:51 PM), [http://www.huffingtonpost.com/entry/fmla-and-public-opinion\\_us\\_57aa1807e4b091a07ef7e9c4](http://www.huffingtonpost.com/entry/fmla-and-public-opinion_us_57aa1807e4b091a07ef7e9c4); see also *State Family and Medical Leave Laws*, *supra* note 69.

88. Ness, *supra* note 85.

89. *Id.*

90. HEATHER BOUSHEY & SARAH JANE GLYNN, CTR. FOR AM. PROGRESS: THE EFFECTS OF PAID FAMILY AND MEDICAL LEAVE ON EMPLOYMENT STABILITY AND ECONOMIC SECURITY 17-19 (2012), [http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/Boushey\\_EmploymentLeave1.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/Boushey_EmploymentLeave1.pdf).

91. *Mental Health Myths and Facts*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.mentalhealth.gov/basics/myths-facts/index.html> (last visited Aug. 1, 2017).

92. Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 240 (2015).

93. *Children's Mental Health: Why is Children's Mental Health Important?*, AM. PSYCHOL. ASS'N, <http://www.apa.org/pi/families/children-mental-health.aspx> (last visited Aug 1, 2017).

94. See generally Pierre André Michaud & Eric Fombonne, *ABC of Adolescence: Common Mental Health Problems*, 330 BRIT. MED. J. 835 (2005) (indicating that it is difficult to diagnose adolescents).

trained to direct students to appropriate, existing community resources. These efforts should be required by federal law, and paid for by Congress. School is the one place all students have in common, so it is the logical place to begin to address mental health issues.

The first national survey of school mental health services was conducted by the federal Substance Abuse Mental Health Services Administration (“SAMHSA”) and released in 2005.<sup>95</sup> It surveyed public elementary, middle, and high schools.<sup>96</sup> According to the survey, current school-based mental health resources are insufficient.<sup>97</sup> In fact, less than 20% of children and adolescents receive the mental health support they need.<sup>98</sup>

According to another SAMHSA study, approximately 2.2 million adolescents between the ages of twelve and seventeen reported a major depressive episode in 2004 and nearly 60% did not receive any treatment.<sup>99</sup> A 2002 study confirmed that students are significantly more likely to seek help for mental health issues when school-based mental health services are available.<sup>100</sup> While it is difficult to ascertain exactly how many schools offer an appropriate continuum of resources, it is clear that the current offerings are insufficient.<sup>101</sup> Parents, even educated, well-connected, wealthy ones with access to resources, struggle to navigate the complicated labyrinth of mental health, including figuring out insurance coverage; completing paperwork; identifying strong, accessible providers; and at the end of all that, convincing their child or children to take advantage of the therapy and medication. Therefore school-based assessments of mental health provide a good model to ensure mental health is better addressed.

There are quite a few measures that Congress and state legislatures can implement to strengthen mental health resources for youth. For example, the United States needs to make it easier for a family to get a potentially dangerous person into mandated treatment, and we should

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95. SUSAN FOSTER ET AL., U.S. DEP’T. OF HEALTH & HUM. SERVS., SCHOOL MENTAL HEALTH SERVICES IN THE UNITED STATES: 2002–2003 (2005), <http://files.eric.ed.gov/fulltext/ED499056.pdf>.

96. *Id.* at 10, 47-55.

97. *Id.* at 59-61.

98. *Mental Health Myths and Facts*, *supra* note 91.

99. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DEP’T HEALTH & HUMAN SERVS., RESULTS FROM THE 2004 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 88, 91 (2005), <http://medicalmarijuana.procon.org/sourcefiles/2k4results.pdf>.

100. *Id.* at 97.

101. See PETE EARLY, CRAZY: A FATHER’S SEARCH THROUGH AMERICA’S MENTAL HEALTH MADNESS 117-20 (2006); see also Liza Long, *I Am Adam Lanza’s Mother*, BLUE REV. (Dec. 15, 2012), <http://thebluereview.org/i-am-adam-lanzas-mother>.

require protocols for health insurance companies with minimum level of services and coverage for more inpatient and intensive outpatient services.<sup>102</sup> There are many other proposals to explore, but the bottom line is that society can and should do a much better job of addressing children's mental health needs through public schools, the one place universally accessible to all children.

### C. *Limiting Access to Guns and Weapons*

Limiting access to guns and weapons is the most direct but perhaps most difficult solution to eliminating or minimizing incidents of school violence. In the same way that September 11, 2001, sparked the creation of the now nearly sixty-seven billion dollar Department of Homeland Security,<sup>103</sup> some predicted that the second-deadliest school shooting in American history on December 14, 2012, at Sandy Hook Elementary School, would spark similar federal action focused on gun control. However, it has not.

In contrast, in 1996, a gunman killed thirty-five and wounded twenty-three at a seaside resort in Australia.<sup>104</sup> It was the deadliest shooting in Australian history.<sup>105</sup> Public outcry and a newly elected Prime Minister led to the enactment of much stricter gun control laws.<sup>106</sup> Specifically, the government launched a buyback program and collected over 600,000 semi-automatic shotguns and rifles (approximately one-fifth of the guns in circulation in Australia at the time), “prohibited all private sales, required that all weapons be individually registered to their owners, and required that gun buyers present a ‘genuine reason’—other than self-defense—for the purchase at the time of sale.<sup>107</sup> According to more recent studies, the policies led to a tremendous drop in firearm-related suicide and homicide rates, and had little effect on non-firearm-related deaths.<sup>108</sup>

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102. See “*I Am Adam Lanza’s Psychiatrist*”: *A Response from the Mental Health Trenches to “I Am Adam Lanza’s Mother”*, XOJANE (Dec. 17, 2012), <http://www.xojane.com/issues/a-response-to-i-am-adam-lanzas-mother-from-a-doctor-in-the-trenches-i-am-adam-lanzas-psychiatrist>.

103. U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2017, at 9 (2017), [https://www.dhs.gov/sites/default/files/publications/FY2017\\_BIB-MASTER.pdf](https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf).

104. Will Oremus, *How Many Shootings Will It Take for America to Control Its Guns?*, SLATE (Dec. 16, 2012, 10:00 PM), [http://www.slate.com/blogs/crime/2012/12/16/gun\\_control\\_after\\_connecticut\\_shooting\\_could\\_australia\\_s\\_laws\\_provide\\_a.html](http://www.slate.com/blogs/crime/2012/12/16/gun_control_after_connecticut_shooting_could_australia_s_laws_provide_a.html).

105. *Id.*

106. *Id.*

107. *Id.*

108. See Andrew Leigh & Christine Neill, *Do Gun Buybacks Save Lives? Evidence from Panel Data*, 12 AM. L. & ECON. REV. 509, 512-17 (2010).

There is a debate in the U.S. over whether gun control would be an effective solution to school violence and gun violence in general. There is no guarantee such efforts would succeed. However, there is no disputing that the U.S. has greater gun ownership, more relaxed gun control measures, and much greater rates of gun-related crimes than its peer nations.<sup>109</sup> Whatever Second Amendment right to bear arms arguments may exist, many agree that it is too easy to get a semi-automatic gun in the United States.<sup>110</sup> One potential hurdle is that there are far more semi-automatic shotguns and rifles in the United States and Americans have the highest rate of gun ownership—by far—of any population in the world.<sup>111</sup> The potential benefits of automatic gun control reform—and not just to curb mass violence in suburban schools—are enormous and worth pursuing.

In the weeks after Sandy Hook, then-President Barack Obama met with experts and worked on proposals with Congress.<sup>112</sup> Despite President Obama's efforts, five years later, gun control legislation has not been passed in the United States.<sup>113</sup> It only took the Australian government twelve days to announce their bipartisan deal with both state and local governments to enact unparalleled gun-control measures.<sup>114</sup>

#### IV. CONCLUSION

Schools are traditionally places for students to learn by falling and getting back up. However, in the past several decades, the U.S. has allowed fear, misperceptions, and private business interests to lead to the

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109. German Lopez, *How Gun Control Works in America, Compared with 4 Other Rich Countries*, VOX (June 24, 2016), <https://www.vox.com/policy-and-politics/2015/12/4/9850572/gun-control-us-japan-switzerland-uk-canada>.

110. See, e.g., Andy Campbell & Roque Planas, *It Took Us Just 38 Minutes to Buy an AR-15 in Orlando*, HUFFINGTON POST (June 24, 2016, 7:18 PM), [http://www.huffingtonpost.com/entry/ar-15-orlando\\_us\\_576059f3e4b0e4fe5143fd4d](http://www.huffingtonpost.com/entry/ar-15-orlando_us_576059f3e4b0e4fe5143fd4d) (demonstrating how easy it was to purchase a similar semi-automatic weapon as the one used in the Orlando shooting even during a state of emergency); Helen Ubiñas, *I Bought an AR-15 Semi-Automatic Rifle in Philly in 7 Minutes*, PHILLY.COM (June 13, 2016, 10:04 PM), [http://www.philly.com/philly/columnists/helen\\_ubinas/20160614\\_Ubinas\\_I\\_bought\\_an\\_AR-15\\_semi-automatic\\_rifle\\_in\\_Philly\\_in\\_7\\_minutes.html](http://www.philly.com/philly/columnists/helen_ubinas/20160614_Ubinas_I_bought_an_AR-15_semi-automatic_rifle_in_Philly_in_7_minutes.html).

111. See Max Fisher, *What Makes America's Gun Culture Totally Unique in the World, in Four Charts*, WASH. POST (Dec. 15, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/15/what-makes-americas-gun-culture-totally-unique-in-the-world-as-demonstrated-in-four-charts>.

112. See Michael D. Shear, *Obama Vows Fast Action Pressing for Gun Control*, N.Y. TIMES, Dec. 20, 2012, at A1.

113. See Meghan Keneally, *4 Years After Sandy Hook, Obama Leaves a Legacy of Little Progress on Gun Laws*, ABC NEWS (Dec. 14, 2016, 5:01 AM), <http://abcnews.go.com/Politics/years-sandy-hook-obama-leaves-legacy-progress-gun/story?id=44163755>.

114. See Oremus, *supra* note 104.

prisonization of public schools.<sup>115</sup> In the process of implementing prisonization practices without evidence to support them, we have allowed the concern for safety to outweigh our concern for privacy in a way that violates basic constitutional values, a topic addressed in Part II.<sup>116</sup>

On the safety side of the balance, public schools, like juvenile courts, have the responsibility to act in the place of parents.<sup>117</sup> During the school day, teachers and administrators are responsible for the education and safety of students.<sup>118</sup> In weighing school safety and students' privacy rights, teachers and administrators understandably tend to favor safety because of an interest in safety and other reasons, such as potential liability.<sup>119</sup> The lethal mix of this natural tendency for safety concerns with sensationalized cases of school violence has led to over-policing and growth of the school-to-prison pipeline in recent years.<sup>120</sup> These unsubstantiated practices of questionable value have led to the expenditure of billions of taxpayer dollars to provide police officers and various types of policing equipment to schools.<sup>121</sup>

To underscore the questionable value of prisonization efforts, recall the introductory story about waiting in line to get through the security at a Washington, D.C., public high school.<sup>122</sup> Students have said that their peers know how to get around the "security" by putting weapons on the persons of children in wheelchairs (who do not have to go through the metal detectors), having a friend open an alternate door elsewhere in the building, or depositing weapons on the perimeter of the school in bushes until the guards went on their breaks, at which point, they would slip out of class to go pick them up and slide through the front door, undetected. In most instances of mass school violence, the shooter entered the school without a problem.

On the individual rights side, the Supreme Court has ruled that "students [generally do not] shed their constitutional rights . . . at the schoolhouse gate."<sup>123</sup> In a range of cases regarding students' rights in the

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115. See generally Beger, *supra* note 3.

116. See *supra* Part II.

117. See *Morse v. Frederick*, 551 U.S. 393, 413-16 (2007) (Thomas, J., concurring).

118. See *id.*

119. See *id.* at 424-25 (Alito, J., concurring).

120. Peter Price, Comment, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 543-50 (2009).

121. Melinda D. Anderson, *When Schooling Meets Policing*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348/>.

122. See *supra* Part I.

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

First, Fourth, and Fourteenth Amendment contexts, the Court has been careful to recognize and balance the challenging role of school officials to act in place of parents to ensure safety and learning with students' constitutional rights to speech, religion, and privacy, amongst others.<sup>124</sup> In fact, the underlying goal of the Bill of Rights in general, and the Fourth and Fifth Amendments specifically, was to protect us from overreach of state power.<sup>125</sup>

A related and problematic negative consequence of prisonization is that it has led to court challenges of various policing practices in schools. Advocates argue that criminal consequences for school behavior should attach criminal rights.<sup>126</sup> Even Justice William Brennan, lauded as perhaps the greatest public school and children's rights advocate ever to serve on the Supreme Court, advanced this argument in his dissent in favor of thirteen-year-old T.L.O., who was referred for criminal prosecution after a search of her purse at school revealed evidence of drug use and distribution.<sup>127</sup>

While it may seem like a good idea to challenge bad practices, when a court vindicates a right, schools and other institutions scramble to create infrastructures to recognize and protect these rights, and infrastructures are difficult to dismantle once they have been created. By way of example, the Transportation Security Administration ("TSA") was created post-9/11 to ensure safety in our nation's airports. However, despite the consistent evidence that banned materials still make it through security, the TSA continues to operate without significant changes.<sup>128</sup>

Similarly, in 2011 when the Supreme Court decided in *J.D.B. v. North Carolina*<sup>129</sup> that a student's age should be taken into account in a custodial interrogation conducted at school, the Court implicitly validated the idea of a custodial interrogation taking place at school. An unintended consequence is the promotion of the practice of SROs

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124. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

125. See *Feldman v. United States*, 322 U.S. 487, 490 (1944).

126. See Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, *BYU EDUC. & L.J.*, Winter 1999, at 25, 67-69; see also Beger, *supra* note 3, at 124-26 (arguing that school resource officers and police officers should follow commonly accepted standards of police conduct in investigating and interrogating crime in schools); Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 *LOY. L. REV.* 39, 78-95 (2006).

127. See *T.L.O.*, 469 U.S. at 353-68 (Brennan, J., dissenting).

128. David A. Graham, *The TSA Doesn't Work—and Never Has*, *ATLANTIC* (June 2, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-tsa-doesnt-work-and-maybe-it-doesnt-matter/394673/>.

129. 564 U.S. 261 (2011).

conducting in-school criminal investigations for off-campus behavior without the presence of parents.

The irony of recognizing more rights in school is that focus shifts to systems—additional equipment, provision of regulations, policies, and lawyers—to address the statistically low probability that school violence will occur. In fact, the prisonization policies are more common in urban, high poverty schools where mass violence has not traditionally occurred. A more critical focal point is the statistically high chance in those schools that students will drop out.<sup>130</sup>

Public schools are exactly—and, in many instances, the only place—where young people learn to be civic actors: voters, jurors, and generally engaged citizens. To favor security over individual rights sends the wrong message to students about our Nation's values. To favor prisonization as the method for dealing with an erroneous perception of mass violence in schools is simply counter-constitutional.<sup>131</sup>

Curtailing students' privacy rights and overreliance on law enforcement sabotages students' educational experience and may lead to long-term negative consequences such as stigmatization, criminalization, and widening of the achievement gap.<sup>132</sup> While it is tempting to succumb to disproportionate fear about violent crime, particularly in the post-Columbine and post-9/11 era, American policy makers must resist the urge to continue building a criminal infrastructure within schools, and consider funding other solutions. Instead of paying for more prisonization practices, tax dollars should go to assessing mental health and providing incentives for paid leave.

Advocates ought to focus on decreasing police presence in schools, reducing gun availability, strengthening the FMLA, and providing

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130. Dropout rates in most urban districts where prisonization is most common hovers around fifty percent. See Daniel de Vise, *New Figures Show High Dropout Rate*, WASH. POST (May 10, 2007), <http://www.washingtonpost.com/wpdyn/content/article/2007/05/09/AR2007050902411.html>. See generally CIVIC ENTERS. ET AL., BUILDING A GRAD NATION: PROGRESS AND CHALLENGE IN ENDING THE HIGH SCHOOL DROPOUT EPIDEMIC (2015), [http://gradnation.americaspromise.org/sites/default/files/d8/2016-11/18006\\_CE\\_BGN\\_ES\\_Web\\_v4.pdf](http://gradnation.americaspromise.org/sites/default/files/d8/2016-11/18006_CE_BGN_ES_Web_v4.pdf) (indicating that dropout rates are still high, but graduation rates have been steadily climbing).

131. See Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 129-35 (arguing that when “conducting random, suspicionless searches [which] promote[] an environment that is antithetical to learning[,]” students should be afforded greater, rather than diminished, privacy rights in school).

132. See Jennie Rabinowitz, Note, *Leaving Homeroom in Handcuffs: Why an Over-Reliance on Law Enforcement to Ensure School Safety Is Detrimental to Children*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 153, 169-73 (2006); see also SHARON LEWIS ET AL., COUNCIL OF THE GREAT CITY SCH., A CALL FOR CHANGE: THE SOCIAL AND EDUCATIONAL FACTORS CONTRIBUTING TO THE OUTCOMES OF BLACK MALES IN URBAN SCHOOLS 16-75 (2010), [http://www.edweek.org/media/black\\_male\\_study.pdf](http://www.edweek.org/media/black_male_study.pdf).

therapeutic interventions in schools rather than adding layers to the increasing prisonization of public schools. Schools exist to educate and help young people, not to preemptively treat them as prisoners.

Real solutions—including those explored in Part III of this Article<sup>133</sup>—to the problem of mass school violence may be time-consuming and challenging to implement and maintain. However, not only are prisonization practices financially costly to implement and maintain, we may soon discover that there are tremendous social costs. If we, as Americans, really are concerned about our children, their education, and the future of the country, we must demand that lawmakers, justices, and policy drafters resist the urge to convert schools into prisons and dig deeper to address real causes of mass violence in schools with real solutions.

Some may say that ineffective enforcement of prisonization is the problem. However, as a constitutional law teacher, the author argues that this assertion obscures the real focus. In fact, a fundamental philosophical difference is the problem: Do we view public school students as prisoners and public schools as prisons, or do we view students as learners and schools as places for learning and exercising skills important to participation in a vibrant democracy?

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133. *See supra* Part III.