

University of the District of Columbia School of Law

Digital Commons @ UDC Law

Journal Articles

Publications

2021

Removing Police from Schools Using State Law Heightened Scrutiny

Christina Payne-Tsoupros

Follow this and additional works at: https://digitalcommons.law.udc.edu/fac_journal_articles



Part of the [Education Law Commons](#), [Juvenile Law Commons](#), [Law Enforcement and Corrections Commons](#), and the [State and Local Government Law Commons](#)

Fall 2021

Removing Police From Schools Using State Law Heightened Scrutiny

Christina Payne-Tsoupros

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njlsp>



Part of the [Disability and Equity in Education Commons](#), [Education Law Commons](#), [Law and Race Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Christina Payne-Tsoupros, *Removing Police From Schools Using State Law Heightened Scrutiny*, 17 *Nw. J. L. & Soc. Pol'y.* 1 (2021).

<https://scholarlycommons.law.northwestern.edu/njlsp/vol17/iss1/1>

This Article is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

Removing Police From Schools Using State Law Heightened Scrutiny

Christina Payne-Tsoupros*

ABSTRACT

This Article argues that school police, often called school resource officers, interfere with the state law right to education and proposes using the constitutional right to education under state law as a mechanism to remove police from schools.

Disparities in school discipline for Black and brown children are well-known. After discussing the legal structures of school policing, this Article uses the Disability Critical Race Theory (DisCrit) theoretical framework developed by Subini Annamma, David Connor, and Beth Ferri to explain why police are unacceptable in schools. Operating under the premise that school police are unacceptable, this Article then analyzes mechanisms to effect the abolition of police in schools, focusing on solutions to school policing that are consistent with DisCrit principles.

This Article proposes using the state law constitutional right to education as that mechanism. Every state, in its constitution, provides for some form of a right to education. While an imperfect solution, this Article considers the state constitutional right to education as an approach to remove police from schools with broader ramifications for dismantling the school-to-prison pipeline.

Keywords: school police, resource officers, right to education, state law, heightened scrutiny, race, Disability Critical Race Theory, abolition, constitutional law, school-to-prison pipeline

Table of Contents

INTRODUCTION

I. STRUCTURE OF SCHOOL POLICING

A. *Brief History of School Policing*

B. *Roles and Effectiveness of SROs*

II. DISCRIT ANALYSIS OF SCHOOL POLICING

A. *Disability Critical Race Theory (DisCrit)*

B. *Using DisCrit to Analyze School Policing*

1. *Examples of Activism Within the Police Free Schools Movement*

2. *Abolition Versus Reform*

* Visiting Assistant Professor of Law, University of the District of Columbia David A. Clarke School of Law. Thank you to Derek Black, Joshua Weishart, and Philip Lee for their helpful comments on an earlier draft of this Article. Thanks also to the editors of the *Northwestern Journal of Law and Social Policy* for their work editing this piece. All errors are my own.

3. Envisioning a Police-Free School
- III. STATE LAW HEIGHTENED SCRUTINY AS A MECHANISM TO REMOVE POLICE FROM SCHOOLS
 - A. *Right to Education*
 1. Right to Education Under Federal and State Law
 2. Significance of a Fundamental Right: Heightened Scrutiny
 - B. *Proposal: Subject the Use of SROs to State Law Heightened Scrutiny*
 1. Summary of Black’s Theory that Expulsions and Suspensions Violate the State Law Right to Education
 2. Extension of Black’s Theory to Challenge the Use of School Police
 - a. Use of SROs violates state right to education
 - i. Use of SROs interferes with constitutional right to education
 - ii. Use of SROs interferes with a state’s duty to provide quality education
 - b. Positioning the proposal within DisCrit
 - c. Limitations of the proposal

CONCLUSION

INTRODUCTION

School police are a common presence in elementary and secondary schools across the nation. The National Center for Education Statistics found that 51.2% of K–12 schools had a sworn law enforcement officer¹ during the 2017-2018 school year.² School police, often called “school resource officers” (SROs), are fully commissioned police officers assigned to a particular school or set of schools.³ The stated purposes and goals of SROs

¹ U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Stats., *Percentage of Public Schools with Security Staff Present at School at Least Once a Week, by Type of Security Staff, School Level, and Selected School Characteristics: 2005–06, 2015–16, and 2017–18*, DIGEST OF EDUC. STATS. tbl. 233.70b (2019), https://nces.ed.gov/programs/digest/d19/tables/dt19_233.70b.asp (“School Resource Officers (SROs) include all career sworn law enforcement officers with arrest authority who have specialized training and are assigned to work in collaboration with school organizations. Under ‘[a]ny sworn law enforcement officers,’ schools that reported having both SROs and other sworn law enforcement officers were counted only once.”).

² *Id.*

³ Federal law includes two definitions of “school resource officer.” Under the Safe and Drug Free Schools and Communities Act, an SRO is:

[A] career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department to a local educational agency to work in collaboration with school and community based organizations to--
 (A) educate students in crime and illegal drug use prevention and safety;
 (B) develop or expand community justice initiatives for students; and
 (C) train students in conflict resolution, restorative justice, and crime and illegal drug use awareness.

20 U.S.C. § 7161.

Under the Crime Control and Law Enforcement Act:

“[S]chool resource officer” means a career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with schools and community-based

include addressing crime issues in and around schools, developing crime prevention programs, training students in conflict resolution, serving as a resource to school staff members, and developing safety protocols for schools.⁴ At best, research remains mixed as to whether SROs effectuate these objectives.⁵

While SROs are not typically expected to be involved in school discipline, in practice, they often are actively involved. Across all levels of school discipline, including interactions with school police, Black children face disproportionate levels of punishment. For the 2017–2018 school year, Black students represented 15.1% of nationwide public-school enrollment, yet 28.7% of the students referred to law enforcement and 31.6% of the students subject to school-based arrest.⁶ This disproportionate distribution of punishment also holds true within the population of disabled students. According to the Department of Education’s Office for Civil Rights, for the 2017-2018 school year, students with disabilities represented 13.2% of student enrollment,⁷ yet 26.1% of the students referred to law enforcement and 25.8% of the students subject to school-based arrest.⁸ Within the population of disabled students, these discrepancies across racial lines remain consistent. For the 2017-2018 school year, Black students represented 17.7%⁹ of the students receiving special education services under the Individuals with Disabilities Education Improvement Act (the federal special education law), yet 32% of the students referred to law enforcement and 35.3% of the students subject to school-based arrest.¹⁰

organizations—

(A) to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school;

(B) to develop or expand crime prevention efforts for students;

(C) to educate likely school-age victims in crime prevention and safety;

(D) to develop or expand community justice initiatives for students;

(E) to train students in conflict resolution, restorative justice, and crime awareness;

(F) to assist in the identification of physical changes in the environment that may reduce crime in or around the school; and

(G) to assist in developing school policy that addresses crime and to recommend procedural changes.

34 U.S.C. § 10389(4).

⁴ See *infra* Part I.0

⁵ See *infra* Part I.0

⁶ U.S. DEP’T OF EDUC., OFF. FOR C.R., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES IN PUBLIC SCHOOLS FOR THE 2017-18 SCHOOL YEAR 3, 21 (2021), <https://ocrdata.ed.gov/assets/downloads/crdc-exclusionary-school-discipline.pdf> [hereinafter, U.S. DEP’T OF EDUC., OFF. FOR C.R., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES]. This disparity across racial lines has continued from prior years. For example, for the 2015-2016 school year, Black students represented 15% of nationwide public-school enrollment, yet 31% of students who were arrested or referred to law enforcement. U.S. DEP’T OF EDUC., OFF. FOR C.R., 2015–16 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 3 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf> [hereinafter U.S. DEP’T OF EDUC., OFF. FOR C.R., 2015–16 CIVIL RIGHTS DATA COLLECTION].

⁷ U.S. DEP’T OF EDUC., OFF. FOR C.R., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES, *supra* note 6, at 13.

⁸ Ed.gov, *2017-18 State and National Estimations*, CIVIL RIGHTS DATA COLLECTION, available at <https://ocrdata.ed.gov/estimations/2017-2018> (select “School Climate” then “Arrests” to view data on 2017-2018 referrals to law enforcement and school-based arrests).

⁹ *Id.* (select “Student Enrollment” then “2017-18 Estimations for Enrollment” to view data on enrollment of students receiving services under the IDEA).

¹⁰ *Id.*; see also DANIEL J. LOSEN, PAUL MARTINEZ, & GRACE HAE RIM SHIN, THE CTR. FOR C.R. REMEDIES, *DISABLING INEQUITY: THE URGENT NEED FOR RACE-CONSCIOUS RESOURCE REMEDIES* 42–43 (2021),

Despite these disparities, SROs continue to be prevalent in schools, causing children to be harmed. In fall of 2019, an SRO in Orlando, Florida arrested two six-year-old children; the incident was widely publicized in the mainstream media.¹¹ One of the children, a first-grader, had a temper tantrum in class and was charged with battery.¹² While there may be short-lived shock and outrage among the general public when an SRO arrests a Black first-grader, handcuffs a Black third-grader,¹³ or punches a Black high-school student in the face, sending him sprawling to the ground,¹⁴ these events currently tend to be treated as isolated incidents rather than parts of a pervasive system of criminalizing and hurting children.

This Article argues that these discrepancies across race and disability, coupled with the threat and harm that SROs pose to Black students, particularly Black disabled students, make the presence of police in schools unacceptable. This Article uses Disability Critical Race Theory (DisCrit) to analyze school police reform and abolition efforts and proposes a mechanism to effect abolition. Much of the current academic scholarship advocates for various reforms to improve school policing, while leaving its infrastructure largely intact. This Article rejects reform, instead advocating for abolition of school police.

This Article proceeds in three parts. Part I begins by examining the legal structure of SROs. This Part positions the current era of school police as an outgrowth of the “tough on crime” era of the 1980s and 1990s. This Part also considers the different roles of SROs and summarizes research on their effectiveness.

Part II of this Article uses the DisCrit theoretical framework developed by Professors Subini Annamma, David Connor, and Beth Ferri to illustrate how SROs may pose different risks to Black children, particularly Black children with disabilities.¹⁵ This Part then examines the Police Free Schools Movement under a DisCrit analysis, which has received increased national attention in the current political climate. This Part explores some of the differences in reform measures versus abolition and concludes with a discussion of what schools could look like if police were removed and the respective funds associated with school police were thus reinvested in other sources.

Part III considers legal theories that would allow for removal of police from schools,

<https://www.civilrightsproject.ucla.edu/research/k-12-education/special-education/disabling-inequity-the-urgent-need-for-race-conscious-resource-remedies/final-Report-03-22-21-v5-corrected.pdf> (reporting racial disparities in referrals to law enforcement among disabled students in selected large districts). From the Department of Education’s Civil Rights Data Collection, for this analysis, Losen et al. limited the pool of samples to those schools that enrolled a minimum of 100 Black secondary students with disabilities. *Id.* at 42. In 2018, the U.S. Government Accountability Office reported that for the 2013-2014 school year, among Black disabled students, Black students represented 19% of the population yet comprised 36% of the students who were arrested or referred to law enforcement. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 16 (2018).

¹¹ See, e.g., Mariel Padilla, *Orlando Officer Is Terminated After Arresting 6-Year-Olds*, N.Y. TIMES (Sept. 23, 2019), <https://www.nytimes.com/2019/09/23/us/6-year-old-orlando-florida.html>.

¹² *Id.*

¹³ Elizabeth A. Shaver & Janet R. Decker, *Handcuffing a Third Grader? Interactions Between School Resource Officers and Students with Disabilities*, 2017 UTAH L. REV. 229, 229–30 (2017).

¹⁴ *Video Shows Indianapolis Police Officer Punching Student Outside High School*, FOX 2 NOW (Aug. 30, 2019), <https://fox2now.com/news/video-shows-indianapolis-police-officer-punching-student-outside-high-school/>.

¹⁵ Subini Ancy Annamma, David J. Connor & Beth A. Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 J. RACE ETHNICITY & EDUC 5 (2013).

with the intent of proposing changes that are consistent with DisCrit. To that end, Part III focuses on how the use of SROs can be subject to heightened judicial scrutiny. Specifically, this Article considers Professor Derek Black’s 2016 article proposing using state law to subject school expulsion and suspension practices to heightened scrutiny. This Article proposes extending this theory to encompass the use of SROs.¹⁶ This Part then situates this proposal in the context of DisCrit. This Part also recognizes and addresses limitations of this proposal, with respect to both legal and political anticipated challenges.

In closing, this Article addresses important related areas for future study, including other populations of children who may be at risk of harm from SROs and issues with school policing that have developed amid the COVID-19 pandemic.¹⁷

I. STRUCTURE OF SCHOOL POLICING

This Part provides a brief overview of school policing in the United States. Federal law provides the infrastructure for school policing by providing conditions for funding. The authority to install police in schools comes from state (or local) law, school board policies, and/or school board contracts with law enforcement.¹⁸

There is significant variation among school policing structures from state-to-state and district-to-district. In addition to the variations in school policing structures, the actual number of police in schools remains unknown. For example, the National Association of School Resource Officers (NASRO) estimates that there are 14,000 to 20,000 SROs deployed in schools nationwide.¹⁹ The National Center for Education Statistics reported that there were at least 52,100 SROs (full and part-time) staffed in public schools in 2015-16.²⁰ An additional complexity occurs in the employment structure of SROs. In some jurisdictions, the school district itself employs the SRO. However, in most jurisdictions, the local law enforcement agency employs SROs.²¹ The variations in employment structure contribute to the lack of transparency in the number of SROs, as well as to oversight and accountability issues, as school personnel have less control (including hiring and firing authority) over officers employed by the law enforcement agency.

This Part sets forth a brief history of school policing, particularly the federal laws of the 1980s and 1990s that set the stage for the modern era of school policing. This Part then discusses the roles and functions of school police officers and summarizes research on the

¹⁶ Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1 (2016).

¹⁷ Given the broad scope of disability, this Article interchangeably uses identity-first (e.g., “disabled children”) and person-first language (e.g., “children with disabilities”).

¹⁸ For a comprehensive report of school policing across the country, see ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *WE CAME TO LEARN: A CALL TO ACTION FOR POLICE-FREE SCHOOLS* (2019), <https://advancementproject.org/wecametolearn/>.

¹⁹ NAT’L ASS’N OF SCH. RES. OFFICERS, *Frequently Asked Questions*, <https://www.nasro.org/faq/> (last visited Oct. 13, 2021).

²⁰ U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STAT., 2015–16 SCHOOL SURVEY ON CRIME AND SAFETY (SSOCS) tbl. 1 (2016), https://nces.ed.gov/surveys/ssocs/tables/tab_my01_2016_all.asp (listing number of school resource officers, number of public schools, and the number of public schools with school resource officers, by full- and part-time school resource officer status: 2003–04 through 2015–16). As of the time of publication, this is the most recent available estimate of the number of SROs by the National Center for Education Statistics.

²¹ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 946 (2016).

effectiveness of school police.

A. *Brief History of School Policing*

While police have been assigned to schools since the 1940s,²² the current version of school policing is often tied to the 1999 massacre at Columbine High School. As the first mass shooting caught on camera, the shooting “forever alter[ed] society’s view of school policing.”²³ Enhanced security measures, including increased funding for SROs, often receive heightened attention and funding in the aftermath of mass school shootings.²⁴

While the tragedies of widely publicized school shootings are often the impetus for increased SRO presence, the “tough on crime” and “three strikes” laws and culture of the 1980s established the legal framework to do so. Following the 1988 failed presidential bid of Democratic nominee Michael Dukakis, Democratic politicians were keen to appear “tough on crime” in their law making and public messaging.²⁵ This political shift to be “tough on crime” contributed to the zero tolerance regimes of the 1990s, which are still reflected in schools today. This section briefly outlines these laws and policies, for purposes of providing the context for the current era of school policing.

As part of the “War on Drugs,” the Anti-Drug Abuse Act of 1986²⁶ incorporated enhanced penalties for drug offenses that disproportionately affected Black and brown adults.²⁷ These stricter penalties includes so-called “three strikes” laws (also called habitual offender laws), which imposed strict penalties, including up to life imprisonment as well

²² ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *supra* note 18, at 17 (citing Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591 (2006)); *see also* CATHY GIROUARD, U.S. DEP’T OF JUST., OFF. OF JUST. REFORMS, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, SCHOOL RESOURCE OFFICER TRAINING PROGRAM (2001).

²³ ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *supra* note 18, at 22; *see also* Danielle Weatherby, *Student Discipline and the Active Avoidance Doctrine*, 54 UC DAVIS L. REV. 491, 503–04 (2020) (“after a series of school shootings beginning with the one at Columbine High School, the public became increasingly concerned about violence among students, and the [Gun Free Schools Act] was aimed at minimizing what was perceived to be a grave risk to student safety” (internal citations omitted)).

²⁴ ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *supra* note 18, at 22.

²⁵ Michael Dukakis’s failed presidential bid stood in recent memory as a cautionary tale for Democratic politicians who risked appearing soft on crime. During the 1988 presidential campaign, George H.W. Bush criticized Michael Dukakis as soft on crime by tying him to Willie Horton. Horton, a Black man who had been convicted of murder, was allowed a weekend furlough and was subsequently convicted of assault, armed, robbery, and rape for actions committed during the furlough. The Horton ad, coupled with Dukakis’s weak debate performance on the issue of capital punishment, was considered devastating for the Dukakis campaign. Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited#>. In contrast, during the 1992 campaign, Arkansas governor and presidential hopeful Bill Clinton denied the appeal for clemency for and oversaw the execution of Ricky Ray Rector, a mentally disabled inmate who was executed. Peter Ablebome, *The 1992 Campaign: Death Penalty; Arkansas Execution Raises Questions on Governor’s Politics*, N.Y. TIMES (Jan. 25, 1992), <https://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html>.

²⁶ 21 U.S.C. § 801.

²⁷ For a timeline and summary of the Anti-Drug Abuse Act of 1986, *see* Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, THE ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/>.

as mandatory minimum sentences for certain drug-related offenses.²⁸

During this era, Congress modeled its juvenile offender laws after the strict and punitive adult offender laws.²⁹ In 1994, President Bill Clinton signed into law two bills that had profound implications for the future of school policing. The Gun Free Schools Act of 1994³⁰ made statewide receipt of federal funds contingent on schools adopting “zero tolerance” policies, which required automatic expulsion from school for certain offenses.³¹ The Gun Free Schools Act created new student-police interaction, as the Act required school districts receiving federal funds to have a policy in place obligating school officials to refer to law enforcement any students who bring weapons to school.³² During this time, some states also passed laws criminalizing student misbehavior, thereby creating additional student-police interaction.³³

Also in 1994, the Violent Crime Control and Law Enforcement Act³⁴ created the Office of Community Oriented Policing Services (“COPS”).³⁵ As explained by the Advancement Project and the Alliance for Educational Justice (AEJ), the COPS program created the COPS in Schools grant, which dramatically increased the number of police in schools.³⁶ Other factors contributed to the expansion of policing in this era, including, as Professor Jason Nance explained, students’ limited constitutional rights at school.³⁷

Thus, while Columbine—and every mass school shooting since—brought increased attention to school policing to the forefront, the groundwork for the modern presence of police in schools began in the 1980s.

²⁸ *Id.*

²⁹ Nance, *supra* note 21, at 930–31 (describing the public “moral panic” with the increase in rates of juvenile violent crime from the mid-1980s to mid-1990s (quoting Donna M. Bishop & Barry C. Feld, *Juvenile Justice in the Get Tough Era*, ENCYC. OF CRIMINOLOGY AND CRIM. JUST. 2766, 2768 (Gerben Bruinsma & Davis Weisburd eds., 2014))).

³⁰ 20 U.S.C. § 7161. For an in-depth analysis of the implications of zero-tolerance policies on school discipline, see Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL’Y 289 (2005). “Zero tolerance policies emerged into the realm of public education when Congress passed the Gun-Free Schools Act of 1994.” Weatherby, *supra* note 23, at 503 (citation omitted); see also *id.* at 497–503 (tracing the history of school discipline through its history of corporal punishment to exclusionary practices such as out-of-school suspensions and expulsions. Following the Supreme Court’s decision in *Goss v. Lopez*, 419 U.S. 565 (1975), schools shifted to the use of in-school suspension as alternatives to out-of-school suspensions and expulsions).

³¹ See Nance, *supra* note 21, at 932–34 (summarizing provisions of the Gun Free Schools Act).

³² See Jason P. Nance, *Rethinking Law Enforcement Officers in Schools*, 84 GEO. WASH. L. REV. ARGUENDO 151, 154 (2016) (citation omitted).

³³ *Id.*

³⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796.

³⁵ See generally U.S. DEP’T OF JUST., CMTY. ORIENTED POLICING SERVS., <https://cops.usdoj.gov/> (last visited Oct. 13, 2021).

³⁶ ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *supra* note 18, at 22.

³⁷ Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 328–29 (2016). In addition to the weakening of students’ constitutional rights in this era, Nance also cites the development of high-stakes testing laws, which had “the unintended consequence of encouraging schools to push out ‘problem’ or low-performing students to improve schools’ overall performance on high-stakes achievement tests.” *Id.* at 329–30; Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 94–95 (2014); see also Weatherby, *supra* note 23, at 506–07 (noting that “[m]any states also adopted statutory mechanisms that allowed for the arming of teachers during the school day, charging classroom teachers with quasi-security guard duties” (internal citation omitted)).

B. Roles and Effectiveness of SROs

Often described as a “triad model,” SROs have three main roles: as educators, counselors, and law-enforcement officers.³⁸ This model conceptualizes that the SRO will fill the educator role by guest lecturing; the counselor role by intervening and assisting in student conflict issues; and the law-enforcement officer role by “handl[ing] school-related matters that police traditionally would have handled, including off-campus activities that involve students, making arrests or issuing citations on campus for particular conduct, and taking action against unauthorized persons on school grounds.”³⁹ This Article is particularly focused on the law-enforcement role.

A recent article by Professors Benjamin W. Fisher and Deanna N. Devlin is instructive to conceptualize how the triad model plays out in day-to-day school life. Fisher and Devlin released the results of a national longitudinal study in which they empirically derived three common role profiles of SROs, which they named (i) Low Engagement (infrequently engaged in typical SRO tasks, more of a “presence” in schools); (ii) Full Triad (engaged in mentoring and teaching as well as law enforcement activities); and (iii) Reactionary (engaged primarily in law enforcement activities).⁴⁰ Fisher and Devlin noted that previous studies on the effects of SROs focused on their presence or absence, but did not address nor account for the fact that an individual SRO’s role within a school can vary across the responsibilities envisioned by the triad model. Fisher and Devlin therefore focused on “identifying patterns of [SRO] roles that are particularly common.”⁴¹ They based their analysis on interviews with school principals regarding whether the SROs assigned to their campuses engaged in the following common SRO activities:

- (a) security enforcement and patrol,
- (b) maintaining school discipline and safety,
- (c) coordination with local police and emergency team,
- (d) identifying problems in the school and proactively seeking solutions to those problems,
- (e) training teachers and staff in school safety or crime prevention,
- (f) mentoring students, and

³⁸ NAT’L ASS’N OF SCH. RES. OFFICERS, *supra* note 19 (“NASRO considers it a best practice to use a ‘triad concept’ to define the three main roles of school resource officers: educator (i.e. guest lecturer), informal counselor/mentor, and law enforcement officer”); BARBARA RAYMOND, U.S. DEP’T OF JUSTICE, OFF. OF CMTY. ORIENTED POLICING SERVS., ASSIGNING POLICE OFFICERS TO SCHOOLS 3–6 (2010), https://rems.ed.gov/docs/DOJ_AssigningPoliceOfficers.pdf (stating that “the three most typical roles of SROs are safety expert and law enforcer, problem solver and liaison to community resources, and educator”); *see also, e.g.*, Shaver & Decker, *supra* note 13, at 235 (describing the triad model of the SRO as “law enforcement officer, law-related counselor, and law-related education teacher” (citing Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, 12 YOUTH VIOLENCE & JUV. JUST. 137, 138 (2014))).

³⁹ Shaver & Decker, *supra* note 13, at 235 (citing NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2 (2013)); *see also, id.* (noting that the triad model is incorporated into the definitions of SRO that is set forth in federal law, specifically 20 U.S.C. § 7161(11) (2012) (repealed 2015) and 42 U.S.C. § 3769dd-8(4) (2012)).

⁴⁰ Benjamin W. Fisher & Deanna N. Devlin, *School Crime and the Patterns of Roles of School Resource Officers: Evidence from a National Longitudinal Study*, 65 CRIME & DELINQ. 1, 9 (2019).

⁴¹ *Id.* at 4.

(g) teaching a law-related education course or training students (e.g., drug-related education, criminal law or crime prevention courses).⁴²

This framing of role profiles can be helpful to understand how children interface with SROs in schools, as it identified the specific activities in which SROs were most commonly engaged. Fisher and Devlin noted that schools with Reactionary SROs also used other enhanced security measures, including locked/monitored doors, had clear book bag policies, and required student ID badges more than schools with other SRO profiles.⁴³ Fisher and Devlin’s findings appear consistent with other research, which found that, despite the triad model, SROs spend most of their time engaged in law enforcement activities.⁴⁴

With respect to the overall effectiveness of SROs at improving school safety, research remains mixed, at best. Citing a study from the Center for American Progress, Professor Maryam Ahranjani reported: “[T]here is no evidence-based support for the idea that having police officers stationed in public schools deters crime or makes schools safer.”⁴⁵ This finding is particularly true with respect to research regarding school resources as a deterrent or solution to school shootings.

Further, according to the Congressional Research Service Report:

The body of research on the effectiveness of SRO programs is noticeably limited, both in terms of the number of studies published and methodological rigor of the studies conducted. The research that is available draws conflicting conclusions about whether SRO programs are effective at reducing school violence. In addition, the research does not address whether SRO programs deter school shootings, one of the key reasons for renewed congressional interest in these programs.⁴⁶

Despite the absence of research on whether SROs are, in fact, effective at deterring school shootings, school shootings often serve as an impetus for increasing numbers of and funding for SROs. With respect to school safety more generally, Nance summarizes existing research on SROs in his 2016 article “Rethinking Law Enforcement Officers in

⁴² *Id.* at 8.

⁴³ *Id.* at 10–11.

⁴⁴ See RAYMOND, *supra* note 38, at 6 (citing surveys that report SROs spend “at least half their time engaging in law enforcement activities.”); Shaver & Decker, *supra* note 13, at 235 (“although the triad model is the proposed model for SRO responsibilities, several studies have shown that SROs spend a majority of their time in law enforcement activities.” (citing David C. May & George E. Higgins, *The Characteristics and Activities of School Resource Officers: Are Newbies Different than Veterans?*, 11 J. POLICE CRISIS NEGOTS. 96, 98 (2011)); Chongmin Na & Denise C. Gottsfredson, *Police Officers in Schools: Effects on School Crime and Processing of Offending Behaviors*, 30 JUST. Q. 619, 633 (2013)).

⁴⁵ Maryam Ahranjani, *School “Safety” Measures Jump Constitutional Guardrails*, 44 SEATTLE U. L. REV. 273, 281 (2021) (citing Bayliss Fiddiman, Ashley Jeffrey & Scott Sargrad, *Smart Investments for Safer Schools*, CTR. FOR AM. PROGRESS (Dec. 19, 2018), <https://www.americanprogress.org/issues/education-k-12/reports/2018/12/19/464445/smart-investments-safer-schools/>); see also, e.g., Christopher A. Mallet, *The School-to-Prison Pipeline: A Critical Review of the Punitive Paradigm Shift*, 33 CHILD & ADOLESCENT SOC. WORK J. 15, 21 (2016) (“The major policy problem is that the utilization of police officers in schools is significantly greater than the evidence of their positive impact on school safety.”).

⁴⁶ JAMES & MCCALLION, *supra* note 39, at 10–11.

Schools,” noting that while research is unclear on whether SROs are effective at preventing school violence, there is research evidencing the drawbacks of SROs.⁴⁷ Nance cites research on the numerous costs of SROs, including findings that SROs “can harm the learning climate by alienating students and generating mistrust” and “contribute to the so-called ‘school-to-prison pipeline’ by unnecessarily involving students in the justice system.”⁴⁸ Nance’s empirical study found that SROs’ regular presence at schools predicted greater odds of referral to law enforcement for lower-level infractions.⁴⁹ Nance also cites evidence that “SROs themselves arrest students on their own accord for routine discipline matters, even over the objection of school officials or teachers” and that SRO programs are extremely costly to the school district, particularly if more experienced officers are involved.⁵⁰ Thus, school policing disproportionately inflicts harm on Black children, including Black disabled children, in the absence of evidence demonstrating that school police make schools safer overall.

II. DISCRIT ANALYSIS OF SCHOOL POLICING

The “school-to-prison pipeline” refers to the national trend where children (predominantly minority and socioeconomically disadvantaged children) are pushed out of school and into the criminal justice system.⁵¹ According to a Dear Colleague letter issued by the U.S. Departments of Justice and Education: “National, state, and local data *across all settings and at all school levels* clearly demonstrate that school administrators and teachers discipline minority students, particularly African-American students, more harshly and more frequently than similarly-situated white students.”⁵² There is no evidence that Black children misbehave in schools at greater rates than white children.⁵³ Yet, as stated previously, Black students comprise 15.1% of the population, yet represent 28.7% of the students referred to law enforcement and 31.6% of the students subject to school-based arrest.⁵⁴

Students with disabilities are disproportionately disciplined in schools, compared

⁴⁷ Nance, *supra* note 32, at 153 (citing JAMES & MCCALLION, *supra* note 39).

⁴⁸ *Id.* at 154.

⁴⁹ Nance, *supra* note 21, at 975–76; *see also* Nance, *supra* note 32, at 154–55 (discussing same).

⁵⁰ Nance, *supra* note 32, at 155.

⁵¹ *See, e.g.*, ACLU, *School-to-Prison Pipeline*, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Oct. 13, 2021); *see also* Nance, *supra* note 21, at 923 (“the term ‘school-to-prison pipeline’ (‘Pipeline’) connotes the intersection of the K–12 public education system and law enforcement, and the trend of referring students directly to law enforcement for committing offenses at school or creating conditions that increase the probability of students eventually becoming incarcerated, such as suspending or expelling them” (citation omitted)).

⁵² Nance, *supra* note 37, at 318 (citing U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3 (2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>).

⁵³ *See, e.g.*, Sarah E. Redfield & Jason P. Nance, *American Bar Association Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 20–30 (2016) (“the concerning differences and disproportionality are not simply attributed to the stigmatized group behaving ‘badly’ relative to their peers or socioeconomic factors” (internal citation omitted)).

⁵⁴ *See* U.S. DEP’T OF EDUC., OFF. FOR C.R., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES, *supra* note 6.

to nondisabled peers, including via referral to law enforcement and school-based arrest.⁵⁵ In the 2015-2016 school year, Black students with disabilities, while comprising 17.7% of the student population with disabilities, represented 32% of students with disabilities referred to law enforcement and 35.3% of students subjected to school-based arrest.⁵⁶ Given the discrepancies in school discipline against Black children, this Article views the “school safety” discussion as incomplete if it does not account for these disparities.

These disparities are not new, yet they persist. Part II of this Article analyzes school policing using the DisCrit framework, which accounts for these disparities across racial and disability lines. Beyond documenting demographic disparities, DisCrit focuses on *why* Black students, particularly Black disabled students, face particular danger from school police and uses DisCrit to argue that police should be removed from schools. This argument does not claim that every person affected by school policing wants the abolition of school police. Rather, this piece seeks to contextualize the argument for removal of school police within DisCrit. This Part begins with a brief introduction of the DisCrit framework. Part II draws on “A DisCrit Call for Abolition of School Police,” coauthored by this author and DAWN Executive Director Najma Johnson in the forthcoming volume, *DisCrit Expanded: Inquiries, Reverberations & Ruptures*, to analyze school policing via DisCrit and highlight how traditional reforms are insufficient.⁵⁷ This Part then situates the call for Police Free Schools within the broader abolitionist movement and briefly describe a picture of “police free schools.”

A. Disability Critical Race Theory (DisCrit)

DisCrit is an intersectional⁵⁸ framework that grew out of Critical Race Theory and Disability Studies.⁵⁹ DisCrit “incorporates a dual analysis of race and ability” and analyzes “why the location of being both a person of color *and* a person labeled with a dis/ability is qualitatively different for students of color than white students with a dis/ability.”⁶⁰ Formally introduced by Professors Subini Annamma, David Connor, and Beth Ferri in their 2013 article, “Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability,” DisCrit’s origins lie in the field of special education.⁶¹ Special

⁵⁵ Jyoti A. Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 294–95 (2019) (citing Courtney Perkes, *Report: Students with Disabilities Disciplined Twice as Often as Peers*, DISABILITY SCOOP (Feb. 28, 2018), <https://www.disabilityscoop.com/2018/02/28/report-disciplined-twice/24783/>); Redfield & Nance, *supra* note 53, at 64–70 (citing data from the U.S. Department of Education’s Civil Rights Data Collection and other available local data as analyzed by the American Bar Association’s Joint Task Force on Reversing the School-to-Prison Pipeline).

⁵⁶ Ed.gov, *supra* notes 9–10.

⁵⁷ Christina Payne-Tsoupros & Najma Johnson, *A DisCrit Call for Abolition of School Police*, in DISCRIT EXPANDED: INQUIRIES, REVERBERATIONS & RUPTURES (Subini A. Annamma, David J. Connor & Beth Ferri eds., forthcoming 2022).

⁵⁸ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 140 UNIV. CHI. L. FORUM 139–67 (1989).

⁵⁹ Annamma, Connor & Ferri, *supra* note 15, at 5.

⁶⁰ *Id.* at 8.

⁶¹ *Id.*; see generally DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION (David J. Connor, Beth A. Ferri & Subini A. Annamma eds.) (2016) [hereinafter DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION] (1st volume; using DisCrit to address educational inequities).

education and K–12 education represent microcosms of larger society and the racism, ableism, and power structures in play.⁶² Annamma, Connor, and Ferri noted that “[t]he ways in which over-representation of students of color in special education currently works reinforces the racial hierarchies the U.S. subscribes to,” specifically, “the continual over-representation of African-Americans [in special education] across the United States, regardless of social class, positions them as the continual problem in American education.”⁶³ Given the discrepancy in treatment by school police, particularly among Black students with disabilities, DisCrit is a useful theoretical lens to analyze school policing.

Annamma, Connor, and Ferri developed seven tenets of DisCrit “to operationalize what kinds of specific questions and issues can be illuminated from a DisCrit approach.”⁶⁴ Because of DisCrit’s intersectional focus on race and disability, DisCrit allows for an analysis of how racism and ableism work together to position Black students with disabilities as exceptionally vulnerable to harm from school police. Specifically, DisCrit contextualizes the power structures that enforce and reinforce the broader school policing system as well as resistance thereto. DisCrit situates the current school policing infrastructure in the broader legal and historical structure of school policing. In so doing, DisCrit offers a challenge to the idea of reforming school police. DisCrit shows that reform does not sufficiently acknowledge the unique vulnerability of Black disabled children to school police.

B. Using DisCrit to Analyze School Policing

DisCrit demonstrates how current laws and policies are steeped in the country’s legal and historical infrastructure. Black children with disabilities in schools reflect and connect to the broader legal and historical contexts of how legal systems target Black disabled adults today. Among the modern police killings of Black people, estimates are that one-

DISCRIT EXPANDED: INQUIRIES, REVERBERATIONS & RUPTURES (2d volume), *supra* note 57.

⁶² Annamma, Connor & Ferri, *supra* note 15.

⁶³ *Id.* at 16 (citing Nirmala Erevelles, Anne Kanga & Renee Middleton, *How Does It Feel to Be a Problem, in WHO BENEFITS FROM SPECIAL EDUCATION? REMEDIATING (FIXING) OTHER PEOPLE’S CHILDREN 77–99* (E. Brantlinger ed., 2006)).

⁶⁴

1. DisCrit focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy.
2. DisCrit values multidimensional identities and troubles singular notions of identity such as race or dis/ability or class or gender or sexuality, and so on.
3. DisCrit emphasizes the social constructions of race and ability yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms.
4. DisCrit privileges voices of marginalized populations, traditionally not acknowledged within research.
5. DisCrit considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens.
6. DisCrit recognizes Whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of White, middle-class citizens.
7. DisCrit requires activism and supports of all forms of resistance.

Annamma, Connor & Ferri, *supra* note 15, at 11.

third to one-half of the killings are of Black disabled people.⁶⁵ Much of the analysis under DisCrit may apply also to Black children without disabilities as a result of racism and ableism reinforcing each other. For example, with respect to “the law’s contribution to the conception of disability,” Professor Zanita E. Fenton traces eugenics statutes and practices to their racist origins following the passage of the Thirteenth Amendment.⁶⁶ Further explaining how law constructs views of disability, Nanda explains that the disproportionate use of stigmatized disability categories was “predicted at the inception of the IDEA.”⁶⁷ Nanda explains that while disability activists advocated for special schools for deaf and blind children, the intelligence testing movement emerged among growing anti-immigrant sentiment.⁶⁸

In this way, DisCrit illustrates the law’s role in both reflecting and informing societal views. The legal structures setting up the infrastructure for school policing go hand in hand with the history of school policing. While enhanced policing was authorized as a response to mass school shootings, its implementation bears little resemblance to that issue. Instead, in effect it criminalized Black and brown children.

Drawing on research from Professors Jyoti Nanda, D.L. Adams, and Nirmala Erevelles, Payne-Tsoupros and Johnson use DisCrit to show that Black children with disabilities are situated differently than white peers with respect to SROs.⁶⁹ Black children are overrepresented in stigmatized disability categories, attend overpoliced and underresourced schools, and are disproportionately subject to school based arrest.⁷⁰ These differences contribute to the disproportionate effect of school policing on Black children with disabilities.

DisCrit requires analyzing how Black children, including Black children with disabilities, experience a different position in schools compared to white peers and to consider the legal and historical infrastructure that created and maintains these systems. For example, Black children are more likely to be labeled with disabilities that reflect subjective determinations by the teacher. These determinations for Black students often include stigmatizing disability labels of emotional disturbance and intellectual disability,⁷¹

⁶⁵ See Abigail Abrams, *Black, Disabled and at Risk: The Overlooked Problem of Police Violence Against Americans with Disabilities*, TIME (June 25, 2020), <https://time.com/5857438/police-violence-black-disabled/>.

⁶⁶ Zanita E. Fenton, *Disability Does Not Discriminate: Toward a Theory of Multiple Identity through Coalition*, in DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION, *supra* note 61, at 203, 204.

⁶⁷ Nanda, *supra* note 55, at 283.

⁶⁸ *Id.* at 283–85. Payne-Tsoupros & Johnson, *supra* note 57; see also Darrell D. Jackson, *Teaching Tomorrow’s Citizens: The Law’s Role in Educational Disproportionality*, 5 ALA. C.R. & C.L. L. REV. 215 (2014) (arguing that the laws “create racial disproportionality of youth placed into special education, disciplined in schools, and funneled into the juvenile justice system,” using Colorado and the Rocky Mountain states as examples).

⁶⁹ Payne-Tsoupros & Johnson, *supra* note 57.

⁷⁰ *Id.* (citing Nance, *supra* note 37, at 331–36; Redfield & Nance, *supra* note 53, at 51). In his empirical study published in 2016, Jason Nance found that the percentage of enrollment in school of children of color predicted the use of heightened security measures, including SROs. Nance, *supra* note 21, at 975–76.

⁷¹ D.L. Adams & Nirmala Erevelles, *Shadow Play: DisCrit, Dis/Respectability, and Carceral Logics*, in DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION, *supra* note 61, at 131, 135; Nanda, *supra* note 55, at 307–14 (discussing the “so-called ‘soft disabilities,’” such as emotional disturbance that have “become catchalls for broad classes of learning challenges and antisocial behaviors that are often applied to Black and Latinx children given the bias that may seep in during the attribution

whereas white children demonstrating similar behaviors instead frequently receive diagnoses of autism or ADHD.⁷² The differences in disability categorization among children with disabilities contribute to the sorting and criminalization of Black students by their disability.⁷³ Nanda attributes the differences in disability labels among students with disabilities to the subjectivity built into the [Individuals with Disabilities Education Improvement Act of 2004, as amended],⁷⁴ hyper-disciplined school environments, and racial and cultural biases of teachers and administrators regarding the way Black and Latinx students should act and perform.⁷⁵ In other words, the structure of the law, here, the IDEA, coupled with school discipline culture and teacher expectations, leads to different disability classifications across racial lines.

By offering a lens to challenge the status quo systems, DisCrit invites an approach that challenges a system with its origins in enslavement and eugenics. In this way, DisCrit invites a discussion of *reform* or *abolition* of school police as part of the broader system of criminalization of school discipline, in a way that is consistent with the Police Free Schools Movement. In contrast to traditional reforms, which generally seek to improve upon the existing school policing model, the Police Free Schools Movement calls for more drastic changes. The Police Free Schools Movement started receiving increased national attention with the uprisings in spring and summer 2020 after the police killings of Breonna Taylor, George Floyd, and others, alongside broader calls to defund the police. The Police Free Schools Movement represents a collective of Black and brown youth-led advocacy groups. The “collective definition” of Police Free Schools, developed by youth organizers in partnership with AEJ is: “dismantling school policing infrastructure, culture, and practice; ending school militarization and surveillance; and building a new liberatory education system.”⁷⁶

process”); Redfield & Nance, *supra* note 53, at 60–63; *see also* Steven L. Nelson, *Special Education, Overrepresentation, and End-Running Education Federalism: Theorizing Towards a Federally Protected Right to Education for Black Students*, 20 LOY. J. PUB. INT. L. 205 (2019).

⁷² Adams & Erevelles, *supra* note 71, at 137–38; *see also* LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381 (2018) (discussing the advantageous outcomes for children identified with autism and how autism has become coded “white;” compared to those identified with emotional disturbance or intellectual disability, which have become coded “black”).

⁷³ Adams & Erevelles, *supra* note 71, at 136–38; Nanda, *supra* note 55, at 314–20. Nanda explains that children attending under resourced schools: are provided fewer special education resources, more likely to be taught in segregated classrooms separate from their peers who are not disabled, more highly surveilled and thereby disciplined, more likely to end up in a continuation school, and thus more likely to be suspended, expelled, and criminalized. This is in sharp contrast to students in well-funded school districts where . . . resources are more plentiful; there is a higher likelihood of teaching special education students in mainstream classes (inclusion), less surveillance, more college counselors, more access to special education resources, including attorneys, and students are thereby less likely to be suspended, expelled, and criminalized. Nanda, *supra* note 55, at 315.

⁷⁴ The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400 (“IDEA”), is the federal law guaranteeing children with disabilities the right to an education. Notably, the IDEA contains procedural safeguards when disciplining children for behavior that may be a “manifestation of the child’s disability.” 34 C.F.R. §§ 300.530-300.536.

⁷⁵ Nanda, *supra* note 55, at 302 (citing Paul L. Morgan & George Farkas, *The Wrong and Right Ways to Ensure Equity in IDEA*, EDUCATION NEXT (Aug. 10, 2016), <https://www.educationnext.org/the-wrong-and-right-ways-ensure-equity-idea/> (alteration in original)); *Id.* at 271 (“among children displaying the same clinical needs, [w]hite children are more likely to receive special education services than racial or ethnic minority children”).

⁷⁶ Alliance for Educational Justice (@4EdJustice), TWITTER (May 30, 2020, 09:05 AM),

The goals of the Police Free Schools Movement squarely confront the very practice of school policing itself. Beyond the removal of officers, the Police Free Schools Movement seeks investment in a “new liberatory education system.”⁷⁷ In this way, the Police Free Schools Movement explicitly establishes itself as abolitionist in nature in that it demands a broad decarceralization of schools.

This section briefly discusses the Police Free Schools Movement using two advocacy groups—Black Organizing Project in Oakland, California, and Black Swan Academy in Washington, D.C—as examples. This section then considers the abolitionist framings of Police Free Schools as it fits with DisCrit. This section concludes by envisioning “police free school.”

1. Examples of Activism Within the Police Free Schools Movement

The youth and community-led activist groups at the forefront of the Police Free Schools Movement call for the removal of school police and the dismantling of the greater school policing infrastructure. For example, the Black Organizing Project (BOP) in Oakland, California, is one of the longest running groups in the modern Police Free Schools Movement. BOP launched its campaign to remove police from schools (“Bettering Our School System”) following the murder of Raheim Brown, a twenty-year-old Black man who was murdered in 2011 on school property by an Oakland school police officer.⁷⁸ BOP’s demands included eliminating the Oakland School Police Department (a separate agency from the Oakland Police Department), barring future contracts between the Oakland Unified School District and law enforcement, and reinvesting those funds “into increased supports for the whole child and for students with disabilities[, which] will more effectively provide for student safety.”⁷⁹ After over a decade of organizing and advocacy, BOP earned a significant win on behalf of students and the community when the Board of Education of the Oakland Unified School District passed Resolution No. 1920-0260, the George Floyd Resolution to Eliminate the Oakland School Police Department.⁸⁰ The resolution eliminated the separate Oakland School Police Department and directed the superintendent to “reallocate the school police funds to student support positions.”⁸¹

In Washington, District of Columbia, in the 2018–2019 school year, Black children represented 66% percent of the student population, and 92% of the school-based arrests.⁸²

<https://twitter.com/4EdJustice/status/1266732552678670336>.

⁷⁷ *Id.*

⁷⁸ ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *supra* note 18, at 70; BLACK ORGANIZING PROJECT, THE PEOPLE’S PLAN FOR POLICE-FREE SCHOOLS (2019), <https://blackorganizingproject.org/wp-content/uploads/2021/07/The-Peoples-Plan-2019-Online-Reduced-Size.pdf>.

⁷⁹ BLACK ORGANIZING PROJECT, *supra* note 78, at 3. The resolution eliminated the separate Oakland School Police Department (a department separate from the Oakland Police Department) and directed the superintendent “to reallocate the school police funds to student support positions.” BOP had been seeking the abolition of the Oakland School Police Department for years, and this was a significant win.

⁸⁰ *The George Floyd Resolution*, BLACK ORGANIZING PROJECT, <https://blackorganizingproject.org/george-floyd-resolution/> (last visited Oct. 13, 2021).

⁸¹ *Id.*

⁸² *Testimony of the Washington Lawyers’ Committee for Civil Rights and Urban Affairs Budget Oversight Hearing of the Committee on Education and the Committee of the Whole of the Council of the District of Columbia*, WASHINGTON LAWYERS’ COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS (2020), <https://www.washlaw.org/wp-content/uploads/2020/06/WLC-Education-Budget-Testimony-June-2020.pdf>.

Black Swan Academy, a youth-focused organization, has been at the forefront of the call for Police Free Schools in the District of Columbia. Black Swan Academy demands that the District “DIVEST from all form of police in D.C. schools including DC police officers and security officers contracted through the Metropolitan Police Department” and “INVEST in resources that will create a safer, healthier, more equitable environment.”⁸³

2. Abolition Versus Reform

BOP and Black Swan Academy illustrate the Police Free Schools Movement’s abolitionist nature. In the context of policing, abolition means more than removal of police officers from school campuses. Payne-Tsoupros and Johnson position the abolitionism of the Police Free Schools Movement within Professor Liat Ben-Moshe’s “disepistemology” of abolition wherein Ben-Moshe defines “carceral locales” as:

referring to more than prisons to encompass a variety of enclosures such as psychiatric hospitals, detention centers and residential institutions for people with disabilities, to name a few. By “carceral” I am also referring to not only physical spaces but to particular logics and discourses that abolition (penal/prison/carceral) opposes.⁸⁴

Ben-Moshe’s framing of “carceral locales” is consistent with Professor Maryam Ahranjani’s discussion of “prisonization” of schools: “Prisonization practices are policies and procedures that treat students like prisoners, even unintentionally. Policies usually manifest as zero tolerance policies, and procedures often include the installation of metal detectors, surveillance cameras, security personal, and armed faculty and staff on school campuses.”⁸⁵ As opposed to the current carceral, “prisonization” of schools, the Police Free Schools Movement seeks to “move beyond the removal of school police, by changing the culture of policing with the goal of “building a new liberatory education system.”

School policing exists within the greater system of policing. At the same time as youth-led advocacy groups called for police-free schools, growing demands to “defund” and “abolish” the police in the spring and summer 2020 uprisings against police brutality brought greater attention to policing generally. Related to recognizing the goals of the Police Free Schools Movement as broader than removing officers from school building, abolitionist organizers have sought to clarify that the demands to “defund the police” extend beyond reducing the police budget. As an example, organizers behind the “Stop Police Terror Project DC” in the District of Columbia, include the following as part of its “#DefundMPD” initiative: movement in the District of Columbia, define “defunding the police” as:

Defund the DC Metropolitan Police Department.
Ban Stop-and-Frisk In DC.
De-Militarize The DC Police.

⁸³ *Police-Free Schools*, BLACK SWAN ACADEMY, <https://www.blackswanacademy.org/policefree-schools> (last visited Oct. 13, 2021).

⁸⁴ Liat Ben-Moshe, *Dis-epistemologies for Abolition*, 26 *CRITICAL CRIMINOLOGY* 341, 342 (2018).

⁸⁵ Ahranjani, *supra* note 45, at 278.

All Forms Of Police Out Of DC Schools.
 Protection For Sex Workers.
 Dissolve Police Unions.
 No New Jail.
 Defund Metro Transit Police.
 End DC Government Collusion With ICE.⁸⁶

Thus, efforts to remove school police are part of a broader effort to abolish police and invest the associated funds in communities.

Divesting from police represents one strategy toward the goal of dismantling the deeply entrenched policing culture and infrastructure. In this way, the Police Free Schools Movement reflects the theory of DisCrit in the framing of school policing as a systemic issue. In contrast, reforms that rely on the current structures, with schools as a “carceral locale,” do not challenge the system in the same way. While traditional reform and the Police Free Schools Movement highlight perhaps a bright line between reform of school police and abolition of school police, Ben-Moshe explains that “[i]n practice, reform and abolition are on a continuum,” citing distinctions in prison abolitionist literature between “reformist reforms” and “non-reformist reforms.”⁸⁷ The former “are situated in the status quo, so that any changes are made within or against the existing framework.”⁸⁸ In contrast, “[n]on-reformist reforms imagine a different horizon and are not limited by a discussion of what is possible at present.”⁸⁹ In this continuum, youth organizers, such as BOP and Black Swan Academy, push for “a new liberatory education system” that contravenes the current system of policing.

Illustrating Ben-Moshe’s argument that reform and abolition exist on a continuum in practice, while BOP and Black Swan Academy have explicitly abolitionist goals, they also have won certain discrete reforms. For example, BOP won a school district-wide complaint system and also successfully pressured the Oakland Unified School District to enter into a memorandum of understanding with the Oakland School Police Department.⁹⁰ In the District of Columbia, under pressure from Black Swan Academy and other stakeholders, the Council of the District of Columbia voted to move the security contract for the District of Columbia Public Schools from the Metropolitan Police Department to the school district.⁹¹ In addition, the District of Columbia’s State Board of Education, an independent agency that provides advocacy and policy guidance to the District of Columbia Public Schools, passed a resolution recognizing the importance of removing police from District of Columbia schools.⁹² These reforms, however, fall short of the organizers’ demands, as

⁸⁶ #DefundMPD, STOP POLICE TERROR PROJECT DC, <https://www.sptdc.com/defund-mpd> (last visited Oct. 13, 2021).

⁸⁷ Ben-Moshe, *supra* note 84, at 348–49 (citing THOMAS MATHIESEN, *THE POLITICS OF ABOLITION* (1974)). Cf. Ahrajani, *supra* note 45, at 300–01 (explaining that “defunding” the police refers to “right-sizing” police departments while “abolishing” school police would mean “completely defund school police, remove zero tolerance policies, eliminate threat harassment regimes, abolish restraint and seclusion, and stop or curb other prisonization practices”).

⁸⁸ Ben-Moshe, *supra* note 84, at 348.

⁸⁹ *Id.*

⁹⁰ See ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *supra* note 18.

⁹¹ BLACK SWAN ACADEMY, *supra* note 82 (follow “Download Police-Free Schools Toolkit” hyperlink).

⁹² *State Board of Education, SR20-10, Resolution to Recognize the Importance of Removing All Police from D.C. Public and Charter Schools*, DISTRICT OF COLUMBIA STATE BOARD OF EDUCATION (July 15, 2020),

they leave the police infrastructure intact.

In viewing reform and abolition on a continuum, recent and robust reforms that seek to challenge the broader culture of enhanced security and surveillance in schools, such as those proposed by Professor Jason Nance, may be illustrative. These broader reforms include eliminating zero-tolerance policies; reducing or eliminating the use of other enhanced security measures, such as “metal detectors, drug-sniffing dogs, drug testing, and random searches of students’ lockers, personal belongings, and persons;” “dramatically” reducing the numbers of students expelled, suspended or referred to law enforcement; replacing harsh disciplinary approaches with evidence-based approaches to improve the school climate and school safety; and trainings and strategies to reduce teacher bias.⁹³ Thus, these more robust reforms move closer to the abolition of school police that many youth organizers seek.

3. Envisioning a Police-Free School

A common question in the context of contemplating the abolition of school police is what to do instead. Who will stop a school shooter? Who will break up fights? What if kids have drugs at school? These questions reflect the view of school police as protectors, despite the data showing that (1) there is no evidence regarding SROs’ deterrence of school shootings and (2) SROs are much more often involved in low-level school discipline infractions.⁹⁴ This question also shows the entrenchment of the carceral or “prisonization” view of schools, and the influence of the deceptive perception of SROs on laws and policies.

As noted above, the Police Free Schools employs a broader vision than solely removing officers and continuing schooling under the status quo. Instead, it encompasses the entirety of “reforms” proposed by Nance, adopted in a school- and community-specific manner. Moreover, the vision of a police-free school is not novel: it is the current schooling environment for many children across the United States, in schools that are comprised of predominantly upper-middle class white students. One of many impediments to this “new liberatory education system” is the presence of SROs. The next Part therefore proposes a mechanism to remove police from schools as one step toward a “new liberatory education system.”

III. STATE LAW HEIGHTENED SCRUTINY AS A MECHANISM TO REMOVE POLICE FROM SCHOOLS

As set forth above, too often school police make schools unsafe for many Black students, including Black students with disabilities. Further, traditional reforms, such as better training and grievance procedures, do not disrupt the legal and historical infrastructure of school policing and do not meet the demands of many students most affected by school police.

This Part proposes subjecting state and local laws and policies that install police in schools to a standard of heightened judicial scrutiny based on the state right to education.

<https://simbli.eboardsolutions.com/Meetings/Attachment.aspx?S=9000&AID=180499&MID=6006>.

⁹³ Nance, *supra* note 37, at 340–43.

⁹⁴ See *supra* Part I.B.

Federal courts apply strict scrutiny to state laws that infringe upon fundamental rights or suspect classifications.⁹⁵ Under a strict scrutiny analysis, a law must be narrowly tailored to meet a compelling government interest.⁹⁶ In federal court, the heightened analysis of strict scrutiny often results in the striking down of the law in question. The U.S. Supreme Court has declined to recognize the right to education as a fundamental right.⁹⁷ This Article therefore proposes using the state right to education as the mechanism to trigger heightened scrutiny. This Article argues that the use of SROs is an inappropriate means to achieve the ends of school safety.

Every state provides a state law right to education. This Part proposes a theory by which the use of SROs would face heightened scrutiny in state court, via the state right to education. In doing so, this Part seeks to extend the theory proposed by Professor Derek Black in his 2016 article “Reforming School Discipline” in the *Northwestern University Law Review*, regarding the use of heightened scrutiny in state court as a mechanism to limit suspensions and expulsions.⁹⁸ Black’s argument connects educational equality with discipline practices, specifically focusing on suspension and expulsion. Black argued that these practices undermine the state’s role to provide an adequate or equal education to all students.⁹⁹ This Article seeks to expand this argument to the use of SROs in a manner consistent with DisCrit principles.

This Part begins with a brief overview of the right to education as it currently exists at the federal and state level, including the significance of a fundamental right to education and the protections it provides. It then discusses the framework articulated by Black to use the state law right to education as the mechanism to enact a heightened level of judicial scrutiny for suspensions and expulsions. The concern driving Black’s proposal mirrors that raised in this Article: the disproportionate punishment imposed on Black children, including Black children with disabilities. Thus, this Article suggests extending Black’s proposal to SROs. Additionally, this Part explores why extending Black’s proposal aligns with the DisCrit analysis discussed in Part II.

This Part closes with a discussion acknowledging both the legal and political limitations regarding this proposal as a mechanism to remove police from schools. Despite these limitations, this Article concludes that pursuing the state right to education is the most viable option by which to secure relief from SROs in the near term. Critically, this mechanism also functions to pursue abolition of school police—not reform. This Article proffers that the removal of school police via state law heightened scrutiny can be one step among many in dismantling the broader school-to-prison pipeline.

A. *Right to Education*

The U.S. Constitution is silent with respect to a right to education, and the U.S. Supreme Court declined to imply such a right. Since the Court’s 1973 decision in *San Antonio Independent School District v. Rodriguez*, which held that the U.S. Constitution does not include an implied right to education,¹⁰⁰ adjudication of school reform has largely

⁹⁵ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997).

⁹⁶ *Id.*

⁹⁷ *See infra* Part III.A.

⁹⁸ Black, *supra* note 16.

⁹⁹ *Id.*

¹⁰⁰ 411 U.S. 1 (1973).

taken place in state court, with mixed success. Since the *Rodriguez* decision, advocates have continued to advance a myriad of theories arguing for a fundamental right to education.

This section briefly surveys the theories articulating the need for and the existence of the federal right to education to provide context for the proposal that follows to remove police from schools, as well as state court litigation around the right to education.¹⁰¹ This section also discusses the significance of heightened scrutiny in right to education cases. If education constitutes a fundamental right, then infringement upon it should impose a heightened form of judicial scrutiny. This standard gives the least deference toward the government actor, in this case the state or the local school board who installs the SRO, thereby providing greater agency to students bringing constitutional claims.

1. Right to Education Under Federal and State Law

In “Implying a Federal Constitutional Right to Education,” Black categorizes the main theories as falling on grounds of equal protection, substantive due process, minimally adequate fundamental right to education, a hybrid of equal protection and substantive due process, and originalism.¹⁰²

Recent federal court litigation has relied on these theories in arguing for a fundamental right to education. For example, in a tumultuous trajectory of orders and reversals, the fundamental federal right to education was temporarily revived in spring 2020 with the Sixth Circuit’s decision in *Gary B. v. Whitmer*.¹⁰³ The plaintiffs were Detroit schoolchildren who alleged, among other things, that the state of Michigan had violated their access to literacy under the Due Process Clause because of the school system’s teacher vacancies, building hazards, and overcrowding, among other conditions.¹⁰⁴ While the district court ruled for the State of Michigan, holding that access to literacy was not a fundamental right under the federal Due Process Clause, the Sixth Circuit reversed the lower court’s ruling on the “central claim,” declaring that “the Constitution provides a fundamental right to a basic minimum education.”¹⁰⁵ This case relied on the “minimally adequate education” theory of a right to education.¹⁰⁶ Less than a month after the decision, after the parties reached a settlement, the Sixth Circuit issued an en banc opinion sua sponte

¹⁰¹ See A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY (Kimberly Jenkins Robinson ed., 2019) for a thorough analysis of the arguments around the federal right to education, including its existence and scope [hereinafter A FEDERAL RIGHT TO EDUCATION].

¹⁰² Black summarizes each of these theories. Broadly, equal protection means “that education encompasses more than just the right to enter a school building; states must also deliver certain qualitative level of education therein,” Derek W. Black, *Implying a Federal Constitutional Right to Education*, in A FEDERAL RIGHT TO EDUCATION, *supra* note 101, at 139; substantive due process means that there is “a right to some threshold level of education and to challenge inequities in access to it,” *id.* at 151; the argument for a fundamental right to a minimally adequate education is based on theories regarding the states’ restriction of individual liberty or stigmatic harm, *id.* at 144–45; hybrid theories “suggest[] that a right to education might emanate from the combined force of due process and equal protection principles,” *id.* at 145; and the originalism theories claim that “the original intent of the Fourteenth Amendment was to protect education,” *id.* at 147.

¹⁰³ 957 F.3d 616, 621 (6th Cir. 2020).

¹⁰⁴ *Gary B. v. Snyder*, 313 F. Supp. 3d 344, 348 (E.D. Michigan 2018).

¹⁰⁵ 957 F.3d at 33.

¹⁰⁶ *Id.*

which vacated the Sixth Circuit’s panel decision.¹⁰⁷ The Court then dismissed the case. The Sixth Circuit panel decision has no precedential value. With the exception of the short-lived victory in *Gary B. v. Whitmer*, right to education cases have, thus far, not had success in federal court.

Post-*Rodriguez*, reformers turned to state court, relying on language in state constitutions to challenge school finance systems. While the claims appear largely the same, they differ in that the state law claims rely on clauses in the state constitution. Every state constitution includes an affirmative duty to deliver education. Typically, states frame the right as an obligation to provide an “equal” or “adequate” education.¹⁰⁸ Reformers use these provisions in school funding litigation. Under the “equity” theory, which marked the “second wave” of school finance litigation from 1973 to 1989, plaintiffs argued that inequities in school funding schemes violated state constitutional requirements to provide an equal opportunity to education (generally meaning equal spending).¹⁰⁹ *Rose v. Council for Better Education*¹¹⁰ marks the “third wave” of school finance litigation, in which the Kentucky Supreme Court held that the state must provide students an “adequate” education.¹¹¹ Under the adequacy theory, plaintiffs argued for a certain minimum threshold of school funding that would provide what the state deemed an adequate level of resources to all students.¹¹²

The adequacy and equity theories are necessarily interrelated, and plaintiffs have continued to pursue school-funding claims based on both theories.¹¹³ This Article looks to school-funding litigation, because that is the body of law interpreting the education clauses in state constitutions.

2. Significance of a Fundamental Right: Heightened Scrutiny

The U.S. Constitution protects fundamental rights at the highest level from government encroachment. Fundamental rights include the right to marry, privacy, contraception, travel, voting, custody of one’s children, and procreation. If education constituted a federal fundamental right, the scrupulous protections afforded to it could act

¹⁰⁷ *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

¹⁰⁸ See, e.g., Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 960–67 (2016).

¹⁰⁹ The “first wave” was litigation brought under the Equal Protection Clause, prior to the *San Antonio v. Rodriguez* decision. See, e.g., Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L. J. 1613 (2007) (describing the wave theory of school finance litigation and the shift from adequacy to equity).

¹¹⁰ 790 S.W.2d 186 (Ky. 1989).

¹¹¹ See Adams, *supra* note 109, at 1613.

¹¹² Carmel Martin, Ulrich Boser, Meg Benner, and Perpetual Baffour, *Lessons from State School Finance Inform a New Federal Right to Equal Access to a High-Quality Education*, in A FEDERAL RIGHT TO EDUCATION, *supra* note 101, at 283.

¹¹³ See, e.g., Weishart, *supra* note 108, at 920 (“[the] two strands of the right to education once thought to be diametrically opposed—equality of educational opportunity and educational adequacy—are interlocked through the right’s forms and functions”); see also Martin, *supra* note 112, at 285–90 (summarizing the debates in equity and adequacy school finance litigation); accord Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WILLIAM & MARY L. REV. 215, 224–41 (2017); see also Black, *supra* note 16, at 13–14 (stating that in most of the school finance litigation cases, the specific legal challenge “is based on the theory that the state must ensure that existing educational inputs and opportunities are sufficient to produce academic success”).

as a powerful mechanism to remove police from schools. Alleged governmental infringements of fundamental rights trigger an analysis under strict scrutiny.¹¹⁴ To survive strict scrutiny, a law must be (i) narrowly tailored (the means) (ii) to achieve a compelling government interest (the ends).¹¹⁵ Laws not meeting that standard will be struck down as unconstitutional.¹¹⁶ The standard of review often determines the outcome of the case. In its 1992 opinion in *Burson v. Freeman*, the U.S. Supreme Court stated: “It is a rare case in which we have held that a law survives strict scrutiny.”¹¹⁷ Generally, when analyzing laws not subject to strict scrutiny (because they do not infringe upon a fundamental right or create a suspect classification), courts will apply the rational basis test. A law will survive rational basis if the law is rationally related to a legitimate government interest.

Scholars have argued extensively for a federal fundamental right to education, as noted above. Given the reluctance of the federal courts to find such a right to education, this path appears closed for the foreseeable future. For this reason, this Article considers the heightened judicial scrutiny mechanisms of state court. While relying on state courts has limitations, as discussed below, the use of heightened judicial scrutiny in state court creates a mechanism by which to subject the use of SROs to heightened scrutiny.

While standards of scrutiny in state court generally operate in a similar fashion to that in federal court when employing a version of a heightened scrutiny or rational basis test, there are certain differences. In the federal context, “[l]egislative means that are based on suspect classifications or that burden fundamental rights rarely withstand strict scrutiny (because they are usually not necessary, narrowly tailored, or least restrictive.)”¹¹⁸ In addition, the ends themselves are typically not challenged as much due to separation of powers concerns, as ends scrutiny in particular can be viewed as encroaching upon the other branches of government.¹¹⁹

In contrast, Professor Joshua E. Weishart chronicled that the state court heightened scrutiny in school funding challenges has transformed into a “bare bones means-ends review.”¹²⁰ Interestingly, and especially relevant for this Article, state courts have focused more on the “ends” analysis, which Weishart argued has developed into an “ends-to-fit” review.¹²¹ Weishart explains that in education clause cases, the means-ends analysis has been applied differently than in other contexts. In other contexts, courts scrutinize both the means and the ends under an analysis of “(1) the legislative means, (2) the legislative or constitutional ends, and (3) the fit between the means and the ends.”¹²² In other words, the court examines (1) what the law actually requires or prohibits, (2) the goals of the law, and (3) how well what the law requires or prohibits serves the goals of the law. This analysis

¹¹⁴ See Areto Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J. L. & PUB. POL’Y 46, 53, n.36 (2011) (noting that the significance of a declaring a right to be fundamental is that the government infringement upon it triggers strict scrutiny).

¹¹⁵ CHEMERINSKY, *supra* note 95, at 529.

¹¹⁶ See, e.g., Imoukhuede, *supra* note 114, at 53.

¹¹⁷ 540 U.S. 191, 211 (1992) (this case served as an exception to this general maxim, as the law did in fact survive strict scrutiny review).

¹¹⁸ Weishart, *supra* note 113, at 261.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 221.

¹²¹ *Id.* at 259–66 (“over the three waves [of school finance litigation], state courts that declined to specify a standard of review for education clause claims ultimately assessed whether the legislature did enough (means) to provide a constitutionally adequate education (end)”).

¹²² *Id.* at 260.

allows the court to interrogate the means and the ends, as well as how well the means serve the ends. In contrast, Professor Weishart explains that in education clause cases, (1) “ends scrutiny has not been used to ‘smoke out’ illicit motives or improper purposes,”¹²³ because the state education clause sets forth the purpose for the legislation and courts have generally continued to assume that legislators acted in “good faith,” despite finding “the excuses for legislative inaction unsatisfactory or intolerable;” and (2) “means scrutiny . . . has been notably absent in school finance cases.”¹²⁴

Courts have found that educational clauses in state constitutions create rights or duties in school finance litigation. In these cases, “courts have held that students can enforce education clauses in state constitutions against the state.”¹²⁵ Thus, as Black states, these cases have a “direct bearing on school discipline,”¹²⁶ and this Article argues that SROs do as well.

B. Proposal: Subject the Use of SROs to State Law Heightened Scrutiny

Under a novel theory advanced by Black to promote school discipline reform efforts, Black uses the affirmative right to education and the duties found in state constitutions to advance two arguments to protect students from suspensions and expulsions. First, Black argues that students have a state constitutionally protected individual right to education.¹²⁷ Suspensions and expulsions interfere with this right and therefore should trigger heightened scrutiny.¹²⁸ Black argues that this framing would force states to justify suspension and expulsion, the practical effect of which would be to prompt schools to engage in pedagogically sound practices.¹²⁹ Second, Black argues that disciplinary practices that undermine educational quality violate the state constitution’s obligation to provide an equal or adequate education to all students.¹³⁰ Therefore, state constitutions should require states to intervene by reforming school discipline practices and improving the educational climate.¹³¹

¹²³ *Id.* at 261–62.

¹²⁴ *Id.* at 262; *see id.* at 262–63 (listing some of the reasons state courts have given for not scrutinizing the means, including school budgets as within the purview of the state legislature or executive, the intricate details of education policymaking, and balance of powers). For these reasons, Weishart calls for an “equal liberty analysis” under which there would be a two-part test: “(1) whether the state’s actions improve equity and adequacy in tandem; and (2) whether the margin between equity and adequacy remain proportional so as to protect children from harms of educational disparities.” *Id.* at 223; *see also* Weatherby, *supra* note 23, at 529. Weatherby discusses concerns that arise due to courts’ hesitation “to second-guess the discretionary authority of school officials.” *Id.* Weatherby’s analysis is in the context of a burden-shifting framework, noting that “it doubly disadvantages the less powerful of the parties, making it almost impossible for students to overcome the presumption that the educational institution acted reasonably.” *Id.* While the precise legal mechanism differs in the school finance litigation cases, the deference awarded to school officials is similar.

¹²⁵ Black, *supra* note 16, at 13.

¹²⁶ *Id.*

¹²⁷ *Id.* at 40–44.

¹²⁸ *Id.*

¹²⁹ *Id.* at 41–44.

¹³⁰ *Id.* at 46–51.

¹³¹ Weishart, *supra* note 108, at 936 (arguing that the right to education in state court has taken the form of a claim right held by children which thereby triggers associated duties held by the state); *see also* Weishart, *supra* note 113, at 255–57 (discussing potential issues with tiers of scrutiny analysis in the context of positive rights).

This section begins by summarizing Black’s proposals. This section then explores how these arguments could extend to the use of SROs. This section first considers, drawing on Black’s work, how plaintiffs could challenge the use of SROs as interfering with their constitutionally protected right to education. Then, this section addresses how plaintiffs could show that the use of SROs means that the state failed in its duty to deliver an adequate or equal educational opportunity. This section then situates this new challenge to SROs in DisCrit principles, specifically with respect to acknowledging the historical and legal power structures and centering the concerns of those most affected by school policing. Finally, this section addresses the limitations of this proposal, both legal and political.

1. Summary of Black’s Theory that Expulsions and Suspensions Violate the State Law Right to Education

Black argues that students have a constitutional right to education, and exclusion from school via suspension or expulsion violates this right.¹³² All state constitutions contain an affirmative duty to provide education.¹³³ Tracing decisions in school finance litigation that focused on the obligation of the state to provide an “equal” or “adequate” education, Black argues that most court decisions have assumed or applied an individual right framework, even if not explicitly stated.¹³⁴ Black notes that education in state law evolved as courts in over half of states recognize education as a constitutional right of students or a constitutional duty of states.¹³⁵ Black uses these findings to support the proposition that “students have an individual constitutional right to education under state constitutions that schools cannot simply take away without meeting some form of heightened scrutiny.”¹³⁶

Black derives several principles developed in school finance litigation with implications for school discipline, which are discussed here and subsequently extended to the use of SROs. First, “courts have held that students can enforce education clauses in state constitutions against the state.”¹³⁷ With respect to school discipline, this means that a student who is removed from the educational setting is denied access to a constitutional right.¹³⁸ Second, in most state court school funding cases, “the precise legal challenge . . . is based on the theory that the state must ensure that existing educational inputs and opportunities are sufficient to produce academic success.”¹³⁹ If the school discipline policy affects overall education, then the state assumes an obligation to intervene.¹⁴⁰ Third, “states have an obligation to ensure that their education policies and practices—even if good in

¹³² Black, *supra* note 16, at 40–44.

¹³³ *Id.*

¹³⁴ *Id.* at 41–42 (“All state constitutions include an affirmative duty to provide education . . . An individual right is the logical corollary of an enforceable constitutional duty, even if a right is not explicitly stated. Consistent with that notion, most courts appear to assume or imply an individual right to education in school finance cases.”). *Id.* at 34 (“at worst, school finance precedent does not explicitly declare [education to be a constitutional right]. In other words, the question of whether students have an individual personal right to education may be an open question in precedent, but it is not foreclosed”).

¹³⁵ *Id.* at 6.

¹³⁶ *Id.*

¹³⁷ *Id.* at 13.

¹³⁸ *Id.*

¹³⁹ *Id.* at 14.

¹⁴⁰ *Id.*

theory or effective for most students—work for those students who are most in need.”¹⁴¹ Because of the disproportionality in how “at-risk” students are subject to harsh disciplinary practice, this should trigger the state’s obligation to help these students to overcome academic barriers—rather than making it solely the responsibility of the students.¹⁴² Fourth, the state constitutional right to education is broad enough “to encompass any number of educational policies that affect educational opportunity.”¹⁴³ Thus, school discipline is within the scope of the state constitution education clause.¹⁴⁴ Fifth, “the state is ultimately responsible for the educational opportunities that students do and do not receive.”¹⁴⁵ Thus, states ultimately have responsibility over school discipline.¹⁴⁶

Black proposes focusing on suspensions and expulsions imposed for minor student misbehavior, because (1) these cases would merit an analysis of the “ends” in that this sort of misbehavior is not a threat to school safety and (2) excluding students via suspension or expulsion for routine misbehavior would show that these exclusions are overbroad and not narrowly tailored to the means.¹⁴⁷ Black therefore frames the question as “whether the state has a sufficient justification and narrowly tailored method for withdrawing that right [to education] from students who do not pose a serious threat to safety or order.”¹⁴⁸ The state would then be unable to show “any clear, important, or compelling interests in excluding students for minor misbehavior. Even if it does [demonstrate the requisite interest], far less intrusive means are available to achieve the state’s interests, which narrowly tailoring would require.”¹⁴⁹ Thus, if there is a constitutional right to education, then the state would be unable to justify taking away the right to education (by suspension or expulsion) for minor misbehavior that does not pose any serious safety threat when there are other strategies available that do not deprive students of the right to education.

Black’s second argument explicitly connects educational climate and discipline policy. Black argues that discipline policies and practices that undermine quality education violate the state’s obligation to provide an equal and adequate education to all students.¹⁵⁰ Black uses social science research to contextualize individual student misbehavior and the associated discipline decisions within broader school culture. Challenging the premise that excluding misbehaving students benefits the learning environment for everyone else, Black highlights education research findings that high suspension rates depress academic achievement, highlighting that the school’s response to student misbehavior affects the learning environment.¹⁵¹ Black highlights the need for preventative, proactive, and supportive approaches to student discipline, rather than exclusion.¹⁵² Importantly, Black notes the racial discrepancies in how punitive practices are meted out to children:

¹⁴¹ *Id.* at 15.

¹⁴² *Id.*

¹⁴³ *Id.* (citations omitted).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 17 (citations omitted).

¹⁴⁶ *Id.* at 19.

¹⁴⁷ *Id.* at 18.

¹⁴⁸ *Id.* at 44.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 46–47; *id.* at 8 (“[S]tates lack a sufficient justification to exclude students from regular school for extended periods of time when all they have done is engage in minor misbehavior”).

¹⁵¹ *Id.* at 47–57.

¹⁵² *Id.*

For decades, social science has attributed the racial achievement gap to poverty, segregation, and unequal access to resources. No doubt, these factors still influence the achievement gap. But recent studies reveal that a substantial portion of the achievement gap is attributable to problematic discipline policy and practices, *which just so happens to be more prevalent in predominantly poor and minority schools*.¹⁵³

Black contextualizes the social science research on school discipline within the state's duty to provide and equal or adequate education. Under this theory, states have the responsibility and obligation to ensure equal or adequate opportunities, which "extends beyond just money to nearly any educational policy or practice that deprives students of the educational opportunity their state constitution mandates. It also includes monitoring and supporting local districts to ensure students receive these opportunities."¹⁵⁴ Black cites social science research that underpins the connection between discipline, school quality, and academic achievement, specifically research around quality schools and orderly environments, low quality schools, and disproportionate effects on minority students.¹⁵⁵

The inquiry under this theory is "whether the state is carrying out its constitutional duty to provide equal and adequate educational opportunities."¹⁵⁶ The plaintiff must establish the state's constitutional duty to deliver education and that "(i) this duty includes the duty to maintain effective discipline policies, (ii) the ineffective discipline policy causes a substantial educational harm, (iii) the state (not the student or another factor) is the cause of the harm, and (iv) strategies are available to reduce or remedy the harm."¹⁵⁷ This is not new doctrine—the plaintiffs would need to make an "evidentiary case connecting discipline policies and data to school quality and achievement."¹⁵⁸

2. Extension of Black's Theory to Challenge the Use of School Police

This section extends Black's theory to the use of SROs. Building on Black's proposal, which makes a claim that expulsions and suspensions violate students' rights to equal and adequate education, this section first extends that argument to the use of SROs. Then this section considers the argument that the use of SROs interferes with the state's duty to provide quality education. This section situates these proposals within DisCrit, exploring how the proposals seriously reckon with the legal and historical infrastructure of school policing. This section contends that of the two proposals, the individual rights theory would be more effective at removing school police and is more aligned with DisCrit (as well as with the goals of youth organizers).

There are several limitations to this proposal, addressed below, including the lack of clarity in state courts regarding a consistent formulation and application of a standard for claims warranting heightened scrutiny, and the politics around school policing. Despite these limitations, this Article contends that in this political moment, removing police from schools has more support than ever before.

¹⁵³ *Id.* at 53–54 (internal citations omitted) (emphasis added).

¹⁵⁴ *Id.* at 46.

¹⁵⁵ *Id.* at 47.

¹⁵⁶ *Id.* at 46.

¹⁵⁷ *Id.* at 58.

¹⁵⁸ *Id.*

a. Use of SROs violates state law right to education

This section builds on Black’s theories, described above, extending them to the use of SROs. First, this section proposes challenging the use of school police on the grounds that the presence of SROs deprives students of their right to education under state law. Second, this section argues that the use of SROs interferes with the state’s obligation to provide students a quality education.

i. *Use of SROs interferes with constitutional right to education*

Black argues that students have an individual right to education based on precedent established in school finance litigation cases.¹⁵⁹ Under this theory, the deprivation of education via suspension or expulsion should trigger heightened scrutiny.¹⁶⁰ With respect to the individual constitutional right to education, the argument attacking SROs is arguably more complex. As noted above, if a student is suspended or expelled—and therefore removed from the learning environment—that student has been deprived of their constitutional right to education, which should then trigger heightened scrutiny. In the context of SROs, the student may be removed from the learning environment via arrest by an SRO; in addition, students may also experience learning disruptions by the presence of SROs more broadly within the school.

In the context of SROs, advocates could frame the lens for the deprivation of education as encompassing academic deprivation as well as the related fear, intimidation, and violence experienced by many students in the context of school policing. BOP reported an analysis from the *California Healthy Kids Survey* which demonstrated that compared to white peers, children of color reported feeling less safe with police presence in their communities and schools, with Black students the least likely to report that police made them feel safer.¹⁶¹ As discussed earlier, prior studies demonstrate that SROs can disrupt the learning environment by “alienating students and generating mistrust.”¹⁶² This sort of culture, where children do not feel safe in the learning environment, should be considered in a deprivation of education analysis.

Arrests by SROs are a more obvious example of a deprivation of education, as the arrested student is removed from the learning environment. An arrest is a significant event. Professor Jason Nance details the harsh academic and socio-emotional consequences of an arrest.¹⁶³ For example, schools may refuse to readmit the student; the student may face

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 73.

¹⁶¹ BLACK ORGANIZING PROJECT, *supra* note 78 (citing Jonathan Nakamoto, Rebeca Cerna & Alexis Stern, *High School Students Perceptions of Police Vary by Student Race and Ethnicity: Findings from an Analysis of the California Healthy Kids Survey, 2017/18*, WESTED, <https://www.wested.org/wp-content/uploads/2019/05/resource-high-school-students-perceptions-of-police.pdf>).

¹⁶² *See supra* notes 47–50 and accompanying text.

¹⁶³ Nance, *supra* note 21, at 955–56; *see also* Weatherby, *supra* note 23, at 510 (“zero tolerance policies and high rates of suspensions foster fear and disengagement among all students, even those with no history of misconduct” (citing DEREK W. BLACK, *ENDING ZERO TOLERANCE: THE CRISIS OF ABSOLUTE SCHOOL DISCIPLINE* 156 (Nancy E. Dowd ed., NYU Press 2016))); Ahranjani, *supra* note 45, at 278 (“several unintended negative consequences” of stringent security measures: “students feel *less safe* with higher levels of security; students are more likely to be referred to law enforcement for smaller infractions, like

embarrassment and stigma if readmitted; the student may face increased monitoring by school officials and SROs; the student is likely to incur lower standardized test scores; and the student has a higher likelihood of dropping out and of interaction with the criminal justice system.¹⁶⁴ While arrests may be what generates public attention and outcry, school police are an issue in schools at a much wider (and complex) level vis-à-vis the arrested student. Arrest and threat of arrest are part of the broader culture of school policing and affect more students than the one arrested. As noted above, there is greater police presence in poor schools with high numbers of Black and brown students. Research shows that greater police presence in schools leads to higher prevalence of interaction with school police. This increased interaction with school police leads to a host of negative outcomes, including higher numbers of arrests and referrals to law enforcement, and higher rates of dropping out of school, which are disproportionately borne by Black children with disabilities. While this type of deprivation of education is less concrete than physical removal from school via arrest (or via suspension or expulsion), these increased rates of negative outcomes should constitute an increased risk of deprivation of education on a systemic basis.

Another possible avenue when considering deprivation of education via SROs could be similar to the plaintiffs' allegations in the *Gary B.* complaint. The plaintiffs cited, among other things: the schools' "decrepit and unsafe physical conditions."¹⁶⁵ As noted earlier, *Gary B.* was a federal right to education case that was ultimately unsuccessful. However, advocates in other jurisdictions have picked up on this "unsafe" theme and extended its application. For example, in *Deminsky v. Pitt County Board of Education*, North Carolina Advocates for Justice submitted an amicus curiae brief on behalf of the plaintiffs' claim of a violation of the right to education under the North Carolina constitution.¹⁶⁶ Noting that *Gary B.* considered "safety" in the context of the facilities themselves, the North Carolina Advocates for Justice sought to apply "safety" to the context of physical and sexual harassment: "[T]he foundational premise remains the same: the physical safety and security of students is a necessary prerequisite to student learning, and, indeed to the provision of a constitutionally adequate education."¹⁶⁷ Advocates might consider similar framings with respect to claiming SROs interfere with students' constitutional right to education.

Once the prima facie case is established, the burden then shifts to the state to (i) defend the use of SROs as narrowly tailored (the means) and (ii) achieve the compelling interest of school safety (the ends). With respect to the means, this Article contends that the widespread use of school police is not narrowly tailored. In state court, means scrutiny is largely absent in school funding challenges, essentially to avoid separation of powers concerns.¹⁶⁸ In contrast, this Article favors a more traditional means-ends testing where the

theft and vandalism, than they would be without law enforcement; and students of color and students with disabilities are disproportionately harmed" (citation omitted)).

¹⁶⁴ Nance, *supra* note 21, at 955–56.

¹⁶⁵ Class Action Complaint at 84, *Gary B v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2016) (No. 16-13292).

¹⁶⁶ Brief for Appellant, *Deminsky v. State Bd. of Educ.*, 842 S.E.2d 600 (N.C. 2020) (No. 17-15159).

¹⁶⁷ *Id.* at 15. This brief also referred to several states whose laws explicitly include safe learning environments as part of the students' right to education. *See, e.g., id.* at 13–14 (citing New York state regulations under which schools are required to "assure the security and safety of students and school personnel" (citation omitted) and the New Jersey Constitution which provides for school safety generally).

¹⁶⁸ Weishart, *supra* note 113, at 261.

means (providing school safety through the use of SROs) are actually scrutinized. Under such an analysis, a court is unlikely to consider as narrowly tailored the installation of SROs in schools with wide-ranging authority. Strict scrutiny may be more workable in this context than in school funding cases because this argument is essentially a negative rights argument—a right not to be subject to SROs and the abuse therefrom. This analysis makes no affirmative demands on the state to improve school safety or eliminate disparities, other than those caused by the SROs. In contrast, in school funding cases, the plaintiffs seek additional funds from the state.

A question at this point may be—what if the use of SROs was narrowly tailored, by ensuring some version of the reforms set forth above? For example, many people have called for various kinds of SRO reform, including specialized training for working with children, particularly for working with children with disabilities, and clarity about the specific duties of the SRO. Other types of SRO reforms promote creating a grievance procedure available to students and families and ensuring that the school principal has the authority to remove an SRO.¹⁶⁹ To what extent does this analysis change if the SROs are well trained, have specific training around children with disabilities, school staff does not call them in for discipline issues, or they have a very limited role in the school that is perhaps focused on the educator or counselor role with some security-guard type functions? In this theory, the argument would be that the SRO role is too broad, not that the SROs are inherently problematic. In response, this Article contends that it is superficial to view the SRO role as separate from the broader culture of school criminalization/ “prisonization” as discussed in Part II. The criminalization of school discipline and “prisonization” of schools means that SROs cannot actually be narrowly tailored.

With respect to the ends of school safety, this Article does not question the state’s authority to determine the interests of its citizens. Rather, this Article asks to consider safety *for which children*. Black children are disproportionately affected by school policing yet are too often not the stakeholders considered when analyzing school policing. The ends set forth in the state constitution provide some form of a constitutionally adequate education, which this Article is not challenging.

ii. Use of SROs interferes with a state’s duty to provide quality education

Black’s second argument uses the state’s obligation to provide an equal or adequate education to challenge disciplinary practices under the theory that the practice interferes

¹⁶⁹ See, e.g., Erin R. Archerd, *Restoring Justice in Schools*, 85 U. CIN. L. REV. 761, 811–13 (2017) (summarizing strategies to “encourage school resource officers to limit disproportionate punishment”); Shaver & Decker, *supra* note 13, at 276 (discussing recommendations include better training and clearer policies for SROs); ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST., *supra* note 18, at 42–43 (discussing BOP’s successful campaign to develop “a complaint system for students and families to report school police interactions, violence, and abuse”). State legislatures across the country have proposed various forms of legislation to address problems with school police, including eliminating criminalizing certain student behaviors (those that do not endanger others); eliminating the use of suspensions, expulsions, and referrals to law enforcement for low-level offenses, clarifying the distinction between discipline that is referred to educators and referred to law enforcement, providing funding for SRO training that focuses on dealing with students with disabilities and LGBTQ+ GNC students, supporting restorative justice practice, and requiring more detailed data reporting relating to the disproportionalities in school discipline and juvenile detention. Redfield & Nance, *supra* note 53, at 80–83. These legislative proposals track many of the traditional reform efforts advocated by proponents of dismantling the school-to-prison pipeline.

with a state's duty to provide quality education. If discipline policy affects overall education, then the state is obligated to intervene. As noted above, this claim requires establishing four elements. First, that the state's constitutional duty to deliver education includes the duty to keep children safe from harm, such as harm from SROs. An alternative framework could mirror Black's argument—the duty includes the duty to maintain effective discipline policies, as an alternative way to attack the use of SROs. However, while Black establishes that the discipline policies should fall within the scope of the duty to provide an adequate or equitable education, this analysis differs with respect to SROs. Best practices of SROs provide that SROs should *not* be involved in formal school discipline.¹⁷⁰ While practice shows that SROs are, in fact, frequently involved in school discipline, this element may pose an obstacle. As noted above, the equity and adequacy clauses are typically broad enough to encompass policies and practices that affect educational outcomes and therefore are within the scope.¹⁷¹ Black cites as examples lawsuits challenging school districting boundaries, teacher tenure, and a state's cap on the number of charter schools when exploring the breadth of the scope of claims that state courts have held fall within the scope of a right to education.¹⁷² Thus, because the scope of the right is broad, the use of SROs should fall within the breadth of this right. As in the context of suspensions and expulsions, the breadth of the scope of the right to educational opportunity “rests on [the] foundational principal [that] the state is ultimately responsible for the educational opportunities that students do and do not receive.”¹⁷³

As Black notes, the challenge is “in making the factual showing that the policy or practice in question—whatever it might be—is the actual cause of substantial and systematic injury to students.”¹⁷⁴ In the context of suspensions and expulsions, when a student is physically removed from the learning environment, “the student is losing access to a constitutional right or an opportunity that the state is constitutionally obligated to deliver,” which should therefore trigger heightened scrutiny.¹⁷⁵ Thus, while the school district may attempt to counter that the use of SROs may not formally fall within school discipline, it is fair to position their use as an educational policy or practice because the use of SROs falls within the “category of educational policies that affect education outcomes.”¹⁷⁶

Second, with respect to showing that the policy—the use of SROs—causes a substantial educational harm, plaintiffs would need to establish that the policy (i) affects students' educational opportunities, and (ii) those effects are substantial enough to deprive students of an equal or adequate education—in other words, the harms are significant

¹⁷⁰ *NASRO Position Statement on Police Involvement in Student Discipline*, NASRO, <https://www.nasro.org/aboutnasro/nasro-position-statement-on-police-involvement-in-student-discipline/> (last visited Oct. 13, 2021) (stating as a best practice a memorandum of understanding that “[p]rohibits SROs from becoming involved in formal school discipline situations that are the responsibility of school administrators”).

¹⁷¹ As Black notes, the right to education in state court is broad enough that “[a]ny state policy substantially impairing educational opportunity is potentially subject to constitutional challenge.” Black, *supra* note 16, at 16.

¹⁷² *Id.* at 58–59.

¹⁷³ *Id.* at 16–17.

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Id.* at 18.

¹⁷⁶ *Id.* at 60.

enough to rise to the level of a constitutional harm.¹⁷⁷ Black notes that this causation element is the most challenging for plaintiffs because social science data “rarely establish causation in any absolute sense”—instead, social science research shows some level of correlation from which courts must infer a causal relationship.¹⁷⁸ In the context of suspension and expulsion, Black pointed to studies showing that negative climates, high suspension rates, and disorderly environment affect educational opportunity.¹⁷⁹ Black also relied on Nance’s empirical study to establish the connection between discipline and the overall educational quality of the school.¹⁸⁰ While a similar challenge with respect to causation exists with SROs, advocates could highlight the research on the negative effects of SROs discussed earlier. Advocates could also make use of students’ personal testimonies and expert statements as ways to show a deprivation of education.

With respect to the third element, the state’s responsibility for the harm (in this case, the use of SROs)—unlike the challenges to expulsion and suspension policies—appears more straightforward. The state bears the ultimate responsibility for installing the SROs in schools.

Finally, with respect to remedies—the state has viable remedies available. In the context of suspensions and expulsions, Black cites to research regarding the prevention of student misbehavior.¹⁸¹ By training and investing in school staff and developmentally appropriate behavior supports and interventions, schools can minimize some of the unwanted behaviors and punitive reactions. With respect to SROs, remedies are to “improve” or remove the SROs. The funds currently allocated to SROs should be reinvested into mental health, counseling, and other services, consistent with the demands of youth organizers.

Much of Black’s analysis regarding the pros and cons of the two approaches transfers to the proposals here. Black stresses the interrelatedness of his two proposals, with the second (systemic) proposal as the one with the most potential for widespread change in the context of school discipline reform.¹⁸² The factual causation challenges that Black identifies will be shared in the context of school policing.

In the context of school policing, the heightened scrutiny theory is more aligned with the abolitionist framework whereas the systemic claim is more reform-spirited. Given the crisis of school policing and the entrenchment of the school policing infrastructure, which makes successful reform arguably unlikely, this Article prioritizes a mechanism by which to remove police. As discussed further below, the success of any effort to remove school police depends in large part on political will.

b. Positioning the proposal within DisCrit

DisCrit privileges the perspectives of marginalized populations, “traditionally not acknowledged within research” and “requires activism and supports all forms of resistance.”¹⁸³ These tenets, in conjunction with the others previously mentioned, direct

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 61–62.

¹⁸¹ *Id.* at 69.

¹⁸² *Id.* at 72–73.

¹⁸³ Annamma, Connor & Ferri, *supra* note 15, at 11.

that proposals and solutions support and highlight the demands of those who are most impacted by school policing. Most significant for this Article, DisCrit “considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens.”¹⁸⁴ Thus, an approach that supports students most likely to be affected by school police; namely Black children, including Black children with disabilities, is consistent with DisCrit.

Black’s framing of student misbehavior as a function of school culture is consistent with DisCrit principles, because his framing recognizes the power structures around school discipline. It provides a framework where student misbehavior can be appropriately viewed as a response to the decisions made by the adults around them, instead of, as Black notes, a framework where the interests of the “good” kids are balanced against the interests of the “bad” kids.¹⁸⁵ It shifts—or at least shares—the responsibility for school discipline from the students to the schools and teachers. This shift is important because teachers and other school personnel are the ones with the power to change these practices. Related, Black’s framing represents a shift from the “deficit” model too often (and wrongly) attributed to poor and minoritized children.¹⁸⁶ Black’s analysis therefore puts the responsibility for change on a broader institutional level.

The Police Free Schools Movement seeks the removal of police from schools as one of several goals toward dismantling the carceral system of education. The proposal to subject the use of SROs to heightened scrutiny based on state law is one way to achieve this goal. This proposal challenges the school policing apparatus in a way that recognizes how school police have been weaponized against Black children. By pursuing a strategy where the use of school police is subject to heightened scrutiny, the proposal places responsibility for change on the party in power—the school and state. In this way, the proposal contemplates the legal and historical infrastructure that has been used to marginalize segments of the population. The heightened scrutiny standard puts the burden where it belongs—on the party in power to make change.

c. Limitations of the proposal

There are several limitations to relying on the heightened judicial scrutiny in state court as the mechanism used to remove police from schools. There are both legal limitations, and—perhaps most importantly—political limitations.

With respect to legal limitations, as Black noted, while there are strong indications that there is an individual right to education in state court that can be enforced via the equity or adequacy clause of the state constitution, this right has not been explicitly declared as

¹⁸⁴ *Id.*

¹⁸⁵ Black, *supra* note 16, at 47–50 (discussing, for example, social science research that disrupts conventional narrative that “excluding misbehaving students ensures orderly learning environment for everyone else”).

¹⁸⁶ See, e.g., Cinzia Pica-Smith & Carmen Veloria, “At Risk Means a Minority Kid:” *Deconstructing Deficit Discourse in the Study of Risk in Education and Human Services*, 2 PEDAGOGY & THE HUM. SCIENCES 33, 34 (2012) (explaining that under a cultural deficit model, the at-risk “construct has placed the locus of dysfunction in individuals of color, single-parent families . . . low-income communities, and people with disabilities,” thereby “ignor[ing] institutionalized structures of inequality and a systemic analysis of what places youth at risk”).

fundamental by every state court.¹⁸⁷ Moreover, numerous state courts have not yet explicitly declared a right to education based on the language of the constitution.¹⁸⁸

Beyond this specific proposal, there are other limitations to pursuing state court relief in education cases more generally. Professor Kimberly Jenkins Robinson notes that state court challenges in urban minority districts often face more intense resistance to change because relief often depends on states having sympathetic and powerful coalitions.¹⁸⁹ Robinson explains how history demonstrates that a federal response is more effective than depending on states to effect meaningful change, citing federal school desegregation cases and the passage of the Individuals with Disabilities Education Improvement Act¹⁹⁰ as examples.¹⁹¹ This Article agrees.

Additionally, state court relief essentially amounts to a tinkering at the margins, “while leaving the expectations of middle-class suburbanites untouched.”¹⁹² These are potentially serious limitations; however at least with respect to Robinson’s last point, the theory proposed in this Article has the potential to go beyond tinkering at the margins to begin a transformation in education by removing school police.

A related political limitation to the specific proposal is the question of whether state courts will entertain the novel theory of SROs interfering with the right to education. As noted above, the data regarding the disproportionate effects of school policing on Black children is not new, and despite finding after finding, these data have not resulted in meaningful change.¹⁹³ Illustrating the somewhat artificial distinction between legal and political limitations, Senior Advisor, State and Local Partnerships at the Emerson Collective Carmel Martin et al., in a study of fifty years of school finance litigation, determined that “specific state constitutional language does not dictate the way a state or even federal court will apply a right to education Instead, advocates and reformers should focus on the policy efforts and public will to create clear change”¹⁹⁴ Thus, advocates will need to develop strategies to develop the political will and public narrative around school policing necessary to effect this kind of change.

¹⁸⁷ Black, *supra* note 16, at 71.

¹⁸⁸ *Id.*; see also Weatherby, *supra* note 23, at 512 (proposing an “Active Avoidance Doctrine” as an affirmative constitutional duty as a way to challenge zero tolerance policies). Weatherby notes that in contrast to “former challenges [that] are rooted in a school’s action targeted at a specific student,” the Active Avoidance Doctrine “would be premised upon a currently unrecognized duty to challenge the *status quo*, cease the practice of exclusionary discipline, and make sweeping reforms.” *Id.* The proposal suggested in this Article is similar in that it does not attack actions targeted at a specific student and may face similar challenges.

¹⁸⁹ Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION*, *supra* note 101, at 1, 13.

¹⁹⁰ The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. § 1400.

¹⁹¹ Kimberly Jenkins Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, in *A FEDERAL RIGHT TO EDUCATION*, *supra* note 101 at 188–93; see also Jason P. Nance, *The Justifications for a Stronger Response to Address Educational Inequalities*, in *A FEDERAL RIGHT TO EDUCATION*, *supra* note 101 at 38–46 (explaining rationales for a federal right to education based on economics, criminal justice, health, democratic principles, and fairness).

¹⁹² Robinson, *supra* note 189, at 13.

¹⁹³ Nance, *supra* note 21, at 930–31 (“what is so disturbing about these findings is that despite multiple empirical studies suggesting that more law enforcement in schools leads to more student involvement in the criminal justice system, lawmakers and school officials continue to propose the same solutions and rely on the same methods to enhance school safety in the wake of high-profile acts of school violence”).

¹⁹⁴ Martin et al., *supra* note 112, at 285.

Turning to anticipated political opposition, SROs typically enjoy support from parents of schoolchildren.¹⁹⁵ The widely shared videos of assaults on children by SROs tend to be viewed as isolated incidents and not as a symptom of a larger problem of policing of schools. A common question arises around concerns of who will be responsible for investigations or who will break up fights in the absence of school police—essentially who will do some version of policing in the absence of the police. Critiques along these lines highlight that simply removing police is not sufficient. Removal of police needs to be in concert with investments and training in noncarceral transformative justice resources. SROs are often one of the first and most common heightened security measures instituted. Yet, given the spring and summer 2020 uprisings in support of Black Lives Matter and the associated national attention to the Police Free Schools Movement, there is now more widespread attention on the harms caused by school policing than ever before.

CONCLUSION

While this Article focuses on harms to Black children, including Black children with disabilities, other populations of children may be at increased risk of harm by school police as well. There are differences in how other children of color, boys, girls, and gender nonconforming children are subject to school discipline, including referral to law enforcement and school-based arrest.¹⁹⁶ These are areas that merit further research under a DisCrit analysis.

As discussed in this Article, there are several serious considerations of how a federal fundamental right is superior to a fundamental right based in state law. This Article does not dispute these arguments. Right now, in our current political landscape and the current composition of the U.S. Supreme Court, a path to federal fundamental right remains foreclosed in the face of *San Antonio v. Rodriguez*. Perhaps that will change. Robinson notes potential future change in the federal landscape. Robinson posited that despite the losses in *Gary B.* and *Martinez*, the new cases being brought in federal court are an indication that “advocates may develop additional theories for relief in federal court that could spark further litigation” and “the return to federal court confirms what scholars and advocates have contended for some time: state courts should not remain the sole arbiters of claims regarding the inadequacies and inequities of public schools.”¹⁹⁷ If a fundamental right is recognized in federal court, that could be a powerful mechanism in the struggle

¹⁹⁵ See, e.g., Perry A. Zirkel, *An Empirical Analysis of Recent Case Law Arising from the Use of School Resource Officers*, 48 J. L. & EDUC. 305, 305 (2019) (citing a 2018 Phi Delta Kappa poll finding that “K–12 parents favored armed security personnel than any other school security measure”).

¹⁹⁶ See, e.g., Hilary Burdge, Zami T. Hyemingway & Adela C. Licona, *Gender Nonconfirming Youth: Discipline Disparities, School Push-Out and the School-to-Prison Pipeline*, GAY-STRAIGHT ALL NETWORK & CROSSROADS COLLABORATIVE, https://gsanetwork.org/wp-content/uploads/2014/10/GNC-Youth_ReportWEB.pdf (last visited Oct. 13, 2021) (finding that gender nonconforming children are disproportionately punished compared to gender conforming children); Kimberelé W. Crenshaw, Priscilla Ocen & Jyoti Nanda, *BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED*, COLUM. L. SCH. AFRICAN AMERICAN POLICY FORUM & CENTER FOR INTERSECTIONALITY AND SOCIAL POLICY STUDIES (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf (calling for increased attention to racial disparities in school discipline faced by Black girls).

¹⁹⁷ Robinson, *supra* note 189, at 18.

against school policing. Right now, however, this Article seeks to direct attention to another possible pathway to support education for our children. Heightened scrutiny in state court is one possible mechanism to remove of school police. While SROs interfering with a state constitutional right to education is a novel proposition, it could be a powerful tool to effect immediate change in school policing.

The stakes for Black children in schools across the country could not be higher. The proposals set forth in this Article seek to provide an alternative opportunity to assess school policing. If the state court venue is an option that has not yet been foreclosed or exhausted, it merits consideration.

At the beginning of March 2020, shortly before schools closed due to the COVID-19 pandemic, a school police officer assaulted a Black four-year old with disabilities.¹⁹⁸ Despite ubiquitous remote education throughout the country, school policing persisted during the COVID-19 pandemic. In August 2020, three days into the new school year, a twelve-year old Black child was suspended from virtual school for playing with a toy Nerf gun during remote instruction.¹⁹⁹ The school sent a police officer to the child's home, terrifying the family.²⁰⁰ In March 2021, police were called on a Black seven-year old child with autism for taking off his face mask on the school bus, despite a doctor's note stating that this behavior was related to his autism and he should not be excluded from school on that basis.²⁰¹ School police are not new, nor are the disproportionate effects of school policing on Black children. An opaque and complex web of law and policy have created today's massive school policing infrastructure. Given the racism and ableism underling these laws and policies, it is not difficult to recognize that the system disproportionately affects Black children and Black children with disabilities. Under a heightened scrutiny framework, striking down the policies that install school police would be a blunt and meaningful step toward a just education for all children.

¹⁹⁸ David Struett, *CPD Officer Dragged Special Ed Student, 4, Down Hallway at Uptown School, Parents Say*, CHI. SUN TIMES (Nov. 17, 2020), <https://chicago.suntimes.com/news/2020/11/17/21572232/chicago-public-schools-abuse-police-department-cpd-jamari-wright-mccutcheon-elementary-cps>.

¹⁹⁹ Edward Helmore, *Colorado School Suspends Black Boy for Playing with Toy Gun During Virtual Class*, THE GUARDIAN (Sept. 8, 2020), <https://www.theguardian.com/us-news/2020/sep/08/colorado-springs-boy-suspended-toy-gun-virtual-class-police>.

²⁰⁰ *Id.*

²⁰¹ Shomari Stone, *Parents Protect After Police Called on 7-Year-Old with Autism Who Took Off His Mask*, (April 8, 2021), 4 WASHINGTON, <https://www.nbcwashington.com/news/local/parents-protest-after-police-called-on-7-year-old-with-autism-who-kept-taking-off-his-mask/2633461/>.