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The Increasingly Covert and Invasive Surveillance of Students and Its Visible Role in the School-to-Prison Pipeline

Andy Froelich¹

*Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.*²

I. INTRODUCTION

American schools are much different places today than they were a few decades ago. Since the rise in school shootings, school districts around the country have turned to police officers and school-based surveillance technologies to keep their students safe.³ In the past twenty years, technological advances have dominated the evolution of school safety.⁴ At many schools, metal detectors at school entrances and video surveillance systems have become commonplace.⁵ More recently, schools have advanced their surveillance methods to include biometric technology, such as fingerprint identification and facial recognition, to monitor the influx of people entering schools.⁶

Schools throughout the country have utilized some sort of surveillance in order to lessen the impact of school violence, bullying, self-harm, and other safety concerns.⁷ Recently, the tragic school shooting at Marjory Stoneman Douglas High School in Parkland, Florida pushed school districts across the nation to invest in advanced technology that can more closely and covertly surveil their student bodies, on and off school property.⁸ This surveillance has significantly evolved from passive methods of metal detectors and security cameras⁹ to more active, intrusive methods.¹⁰ These expanded methods include filtering the use of school-owned technology,

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² *New Jersey v. T.L.O.*, 469 U.S. 325, 373-74 (1985) (Stevens, J., concurring in part).

³ Anya Kamenetz & Jessica Bakeman, *To Prevent School Shootings, Districts Are Surveilling Students' Online Lives*, NPR (Sept. 12, 2019), <https://www.npr.org/2019/09/12/752341188/when-school-safety-becomes-school-surveillance>.

⁴ See Mark Keierleber, *Inside the \$3 Billion School Security Industry: Companies Marketed Sophisticated Technology To 'Harden' Campuses, but Will It Make Us Safe?*, THE 74 (Aug. 9, 2018), <https://www.the74million.org/article/inside-the-3-billion-school-security-industry-companies-market-sophisticated-technology-to-harden-campus-but-will-it-make-us-safe/>; see also Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1678 (2013).

⁵ Keierleber, *supra* note 4; Ahrens, *supra* note 4.

⁶ Ahrens, *supra* note 4, at 1678; Kamenetz & Bakeman, *supra* note 3.

⁷ Student Privacy Resource Center, *School Safety and Student Privacy: An Introduction*, YOUTUBE (Jun. 3, 2019), https://www.youtube.com/watch?v=2CiDniIeE5A&feature=emb_title.

⁸ See Lori Bezhler, *We Should Be Alarmed by Schools' Creepy Plan to Monitor Students*, GUARDIAN (Oct. 18, 2019), <https://www.theguardian.com/commentisfree/2019/oct/18/school-shootings-surveillance-police-database-privacy>.

⁹ Ahrens, *supra* note 4.

¹⁰ Lois Beckett, *Under Digital Surveillance: How American Schools Spy on Millions of Kids*, GUARDIAN (Oct. 22, 2019), <https://www.theguardian.com/world/2019/oct/22/school-student-surveillance-bark-gaggle>.

monitoring students' social media activity, predictive analytics, and a visible law enforcement presence in many schools.¹¹

The role and presence of police officers in schools has become an increasingly controversial and problematic issue in communities throughout the United States. In particular, Chicago Public Schools (CPS) provide a compelling example of this public discourse. School-based law enforcement programs, commonly known as School Resource Officer (SRO) programs were originally developed as a way for police departments to build better relations between communities' youth and the police department.¹² However, this effort has transformed into 52,000 police officers patrolling the hallways of schools each year.¹³ And in the 2013-2014 school year, these SROs made an estimated 70,000 arrests nationwide.¹⁴ Until recently, the 248 officers working in CPS schools were not required to have any formalized or specialized training, nor did the Chicago Police Department (CPD) and CPS have any formalized agreement that defined the roles and responsibilities of police officers working in schools.¹⁵ In 2020, after much scrutiny and pressure from the community and the Office of the Inspector General,¹⁶ CPS and CPD finalized a Memorandum of Understanding that dictates the responsibilities of each agency pertaining to the SRO program, and the roles and limitations of the assigned SROs.¹⁷

These programs remain controversial not only in Chicago but around the country, as many organizations are calling for the termination of SRO programs.¹⁸ However, given the amount of resources and money that school systems have already invested in school policing and surveillance, the extensive number of officers currently stationed in schools, and the nationwide epidemic of school shootings, it is clear that many police officers will not be exiting the hallways of schools any time soon. However, in the aftermath of the murder of George Floyd by Minneapolis police officers, school districts across the country have begun to revisit this issue with many choosing to remove SROs entirely from their schools.¹⁹

This article will first explore how school districts use covert and invasive surveillance methods like social media monitoring, school-issued device monitoring, and predictive analytics

¹¹ Student Privacy Resource Center, *supra* note 7; see Stephen Sawchuk, *What School Districts Should Know About Policing School Police*, EDUC. WEEK (Oct. 1, 2019), <https://www.edweek.org/ew/articles/2019/10/02/what-districts-should-know-about-policing-school.html>.

¹² MICHELLE MBEKEANI-WILEY, SARGEANT SHRIVER NAT'L CTR. ON POVERTY LAW, *HANDCUFFS IN HALLWAYS: THE STATE OF POLICING IN CHICAGO PUBLIC SCHOOLS 7* (2017), <https://www.povertylaw.org/wp-content/uploads/2019/08/handcuffs-in-hallways-final.pdf>.

¹³ Sawchuk, *supra* note 11.

¹⁴ Evie Blad & Alex Harwin, *Analysis Reveals Racial Disparities in School Arrests*, PBS (Feb. 27, 2017), <https://www.pbs.org/newshour/education/analysis-reveals-racial-disparities-school-arrests>.

¹⁵ MICHELLE MBEKEANI-WILEY, *supra* note, 12, at 4, 16; CITY OF CHI. OFF. OF INSPECTOR GEN., *REVIEW OF THE CHICAGO POLICE DEPARTMENT'S MANAGEMENT OF SCHOOL RESOURCE OFFICERS 1* (2018), <https://igchicago.org/2018/09/13/review-of-the-chicago-police-departments-management-of-school-resource-officers/>.

¹⁶ See CITY OF CHI. OFF. OF INSPECTOR GEN., *supra* note 15.

¹⁷ Yana Kunichoff, *Here's a First Look at the \$33 Million Deal Between Chicago Schools and the City's Police Department*, CHALKBEAT CHI. (Jan. 15, 2020), <https://chalkbeat.org/posts/chicago/2020/01/15/heres-a-first-look-at-the-33-million-deal-between-chicago-schools-and-the-citys-police-department/>.

¹⁸ Sophie Sherry, *Pull Chicago Police from CPS Schools and use that \$33 Million on Mental Health Services Instead, Activists and Elected Leaders Say*, CHI. TRIBUNE (June 9, 2020), <https://www.chicagotribune.com/news/breaking/ct-george-floyd-chicago-police-schools-mental-health-cps-20200609-2reexackwzegjmtr3jyemokt34-story.html>.

¹⁹ Moriah Balingit et al., *Fueled by Protests, School Districts Across the Country Cut Ties with Police*, WASH. POST (June 12, 2020), <https://www.washingtonpost.com/education/2020/06/12/schools-police-george-floyd-protests/>.

as well as the eyes and ears of police officers inside school buildings. In section III, the article will provide an overview of the school-to-prison pipeline and discuss how enhanced student monitoring will increase the prevalence of this pipeline. An important implication is that this reality disproportionately affects students of color and students with disabilities. The article will also focus on Chicago as a model of how these invasive surveillance practices will only serve to fuel the school-to-prison pipeline, rather than reduce crime and gun violence. This article specifically focuses on Chicago due to CPD's expanding breadth of resources and emerging technology that shapes its harmful surveillance presence in Chicago schools. In section IV, this article will also analyze how the Supreme Court's Fourth Amendment jurisprudence applies to these forms of surveillance and argue that invasive surveillance technology in schools should be held to the higher standard of privacy under *Riley*. To conclude, the article suggests one overarching alternative method to better serving the goals of school safety: improving mental health resources in schools.

II. SCHOOL SURVEILLANCE METHODS

This section introduces some of the most prominent school surveillance methods that districts across the country, including CPS, are developing and implementing.

A. *Social Media Monitoring*

In reaction to the rise of school shootings, particularly the Parkland shooting, school districts across the country have collaborated with local law enforcement agencies and security technology companies to develop new school-based surveillance systems.²⁰ A major result is the implementation of technology that tracks students' social media accounts and school-issued electronic devices.²¹ Given the prevalence of social media in the average student's life, schools have found that many acts of violence and self-harm are foreshadowed by "a social media footprint."²² Security technology companies first developed social media monitoring systems for law enforcement agencies to track and collect information, but in the past five years, these companies have started to market this technology to American school districts.²³ Research shows that purchases of such social media monitoring technology by schools has increased significantly since 2014.²⁴ This technology, often with the aid of an analyst, collects data from students' social media posts by scanning for keywords or phrases that could indicate an occurrence of school violence, cyberbullying, self-harm, or criminal activity.²⁵ Thus, by using these technologies, schools hope not only to thwart school shootings, but also cyberbullying, self-harm, and gang or criminal activity.²⁶

²⁰ Kamenetz & Bakeman, *supra* note 3.

²¹ Beckett, *supra* note 10.

²² Kamenetz & Bakeman, *supra* note 3.

²³ Dell Cameron, *CIA-backed Surveillance Software Was Marketed to Schools*, DAILY DOT (Oct. 18, 2016), <https://www.dailydot.com/layer8/geofeedia-surveillance-software-high-school-chicago-social-media-monitoring/>.

²⁴ Faiza Patel et al., *School Surveillance Zone*, BRENNAN CTR. FOR JUST. (Apr. 30, 2019), <https://www.brennancenter.org/our-work/research-reports/school-surveillance-zone>.

²⁵ Karen Turner, *Schools Are Helping Police Spy on Kids' Social Media Activity*, WASH. POST (Apr. 22, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/04/22/schools-are-helping-police-spy-on-kids-social-media-activity/>.

²⁶ Student Privacy Resource Center, *supra* note 7.

In an effort to curb the rising level of gun violence among youth in the city, CPD, CPS, and the University of Chicago Crime Lab initiated the Connect and Redirect to Respect program (“Connect and Redirect”) to surveil CPS students’ social media accounts without their knowledge.²⁷ Through Connect and Redirect, CPS has surveilled over 25,000 students’ social media accounts since 2015.²⁸ A review of 400 reports from the 2016-2017 and 2017-2018 school years found more than 20 percent of the interventions involved police officers.²⁹ In most of the detected gang or gun-related social media posts, the schools brought in CPD’s Gang School Safety Team, a police team that CPD established in 2008 to intervene when a school-age person is a victim of gun violence.³⁰ When the Connect and Redirect began, the Gang School Safety Team’s mission expanded to include interventions from the program’s social media detections.³¹ Since the initiation of this program, only a limited number of interventions have led to arrests as CPS has sought to keep this program from becoming punitive; however, the increased police presence at schools and the secretive nature of the program is troubling.³²

The tactics of Connect and Redirect were covert from its onset. Throughout its pilot stage, CPS did not inform students or parents that they were monitoring students in this way nor were parents called to the school when students were subjected to an intervention.³³ Additionally, in 2016, only a few of the administrators at the pilot schools even knew that the social media surveillance was occurring—highlighting the lack of transparency in this pilot and method of surveillance.³⁴

In Chicago, there is no agreement between CPS and the Gang School Safety Team that dictates what CPD can do with students’ social media data after intervening at a school.³⁵ Furthermore, there is no agreement or policy restricting CPD from documenting this data or adding certain students to the city’s gang database.³⁶ Despite these concerns, the University of Chicago Crime Lab claimed in their final report on the Connect and Redirect pilot that the evidence suggested that “students attending participating high schools were at lower risk of being shooting victims; experienced fewer misconduct incidents and out-of-school suspensions; and attended school for several additional days,” compared to students at non-participating high schools.³⁷ However, there is a lack of evidence that in schools across the country, invasive efforts like social media surveillance has any real impact on school safety.³⁸

The questionable and opaque utilization of social media filtering by CPD is an emerging trend nationwide.³⁹ After the Parkland shooting, the Florida legislature passed a law that mandated

²⁷ UNIV. OF CHI. CRIME LAB, CONNECT AND REDIRECT TO RESPECT: FINAL REPORT 3 (2019) [hereinafter CRIME LAB]; Aaron Leibowitz & Sarah Karp, *Chicago Public Schools Quietly Monitors Social Media for Student Gang Activity*, WBEZ (Feb. 11, 2019), <https://www.wbez.org/shows/wbez-news/chicago-public-schools-quietly-monitors-social-media-for-student-gang-activity/f1b1584e-5860-47d8-8658-50a1df9045d0>.

²⁸ Leibowitz & Karp, *supra* note 27.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ CRIME LAB, *supra* note 27.

³⁸ See generally James H. Price & Jagdish Khubchandani, *School Firearm Violence Prevention Practices and Policies: Functional or Folly?*, 6 VIOLENCE & GENDER 154 (2019); see also Patel et al., *supra* note 24.

³⁹ Patel et al., *supra* note 24.

the development of a centralized database for people that would combine their criminal record, social-service record, and social media history.⁴⁰ This database provides school officials, law enforcement, and other state actors with a network of surveillance capabilities for potentially unknown purposes.⁴¹ As discussed below, there are several issues that privacy advocates believe could have significant consequences, especially for students of color and students with disabilities.⁴² This technology is also likely to produce false positives based on mistake, misinterpretation, and misuse.⁴³ Many of the same concerns that exist for conducting social media surveillance also hold true for monitoring school-issued electronic devices.

B. School Technology Monitoring

As of 2018, 33 percent of schools in the United States had the capabilities to offer one device for every two students, and an additional 40 percent of K–12 schools had technology systems that offered one device (tablet or laptop) per student (“1:1 technology”).⁴⁴ Students often bring these devices home to complete homework, especially with schools that offer 1:1 technology. Overall, the use of school-issued and personal devices in schools and homes has dramatically increased, making personal devices a key educational tool in most districts.

After the Parkland shooting, technology company Bark offered schools free surveillance systems that would automatically monitor students’ emails, documents, and chat messages twenty-four hours a day.⁴⁵ The system would then send an alert to school administration if it flagged certain words or phrases.⁴⁶ Similar to social media monitoring, law enforcement can receive flagged messages, emails, or searches on school-issued technology and take action.⁴⁷ Another surveillance company, Gaggle, has been contracted by more than 1,400 schools to “stop tragedies with real-time content analysis.”⁴⁸ Gaggle currently surveils over 4.8 million U.S. students by tracking anything and everything that may come across school-issued technology or any content linked to a school email address.⁴⁹

Some districts also use technology that monitors what students search for on their school-issued iPads or computers. Significantly, in some school technology monitoring systems, the monitoring does not end when a student leaves the school.⁵⁰ In these districts, school officials

⁴⁰ Benjamin Herold, *To Stop School Shootings, Fla. Will Merge Government Data, Social Media Posts*, EDUC. WEEK (July 26, 2018), <https://www.edweek.org/ew/articles/2018/07/26/to-stop-school-shootings-fla-will-merge.html>.

⁴¹ *Id.*

⁴² See Kamenetz & Bakeman, *supra* note 3.

⁴³ Patel et al., *supra* note 24.

⁴⁴ Sean Cavanagh, *Snapshot of K-12 Tech Landscape: More Districts Reach 1:1, but Equity Gaps Persist*, EDWEEK MARKET BRIEF (Jan. 5, 2018), <https://marketbrief.edweek.org/marketplace-k-12/snapshot-k-12-tech-landscape-districts-reach-1-1-equity-gaps-persist/>. Due to the COVID-19 pandemic and the switch to virtual learning, many more school districts have implemented 1:1 technology programs. See David Saleh Rauf, *Covid-19 Forces the Question: Should the Youngest Learners Have Devices?*, EDUC. WEEK (June 8, 2020), <https://www.edweek.org/ew/articles/2020/06/08/covid-19-forces-the-question-chromebooks-ipads-for.html>.

⁴⁵ Beckett, *supra* note 10.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Caroline Haskins, *Gaggle Knows Everything About Teens and Kids in School*, BUZZFEED NEWS (Nov. 1, 2019), <https://www.buzzfeednews.com/article/carolinehaskins1/gaggle-school-surveillance-technology-education>.

⁴⁹ *Id.*

⁵⁰ Turner, *supra* note 25.

could be alerted in the middle of the night based on what a student types into their Google search on a school-issued device.⁵¹

Unlike social media monitoring where the surveillance is conducted on public platforms, the school technology surveillance is monitoring messages, emails, and searches that students likely believe to be private.⁵² In 2010, a family filed a lawsuit against the Lower Merion School District in Pennsylvania for using webcams on school-issued laptops to monitor students at home.⁵³ The family discovered this practice after a teacher accused the student, Blake Robbins, of dealing drugs based on a photo taken autonomously by the computer while Blake was in his bedroom.⁵⁴ The school district never disclosed to parents that they could remotely activate the laptop cameras to take photos.⁵⁵ At the time of the lawsuit, the school district had in their possession over 56,000 photos from their loaned out laptop cameras.⁵⁶ Although this is an extreme case, it is a stark example of the scope of intrusiveness that can result from school technology monitoring.

Since the school shooting at Sandy Hook Elementary School in 2012, school districts across the country have spent millions of dollars to monitor what their students write and search for on school-issued technology.⁵⁷ This technology has given schools and their analysts the ability to search through a student's message, search, and email history on their school devices to see if there is any pattern between what they are searching, writing, and reading.⁵⁸ This begs the question: if and when data is collected, how long are schools keeping this data, and who are they sending it to?

According to the Children's Internet Protection Act of 2001, federal law requires that public schools block access to harmful websites and "[monitor] the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene, child pornography, or harmful to minors."⁵⁹ However, this law has not provided school districts with proper guidelines.⁶⁰ Therefore, many schools have been compelled to define for themselves what the law allows them to do.⁶¹ There are very few guidelines that would prevent a school from collecting and maintaining online data from their students for the entire time they are enrolled at the school.⁶² Furthermore, the student data that schools and surveillance companies are collecting may also be sent to law enforcement agencies.⁶³

With this sort of tracking, one bad decision or misunderstanding could impact a student for the rest of their life.⁶⁴ Further, as with the social media monitoring, the potential for false positives,

⁵¹ Beckett, *supra* note 10.

⁵² *Id.*

⁵³ Kashmir Hill, *Lower Merion School District and Blake Robbins Reach Settlement in Spycamgate*, FORBES (Oct. 11, 2010), <https://www.forbes.com/sites/kashmirhill/2010/10/11/lower-merion-school-district-and-blake-robbins-reach-a-settlement-in-spycamgate/#6be359ae2c60>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Beckett, *supra* note 10.

⁵⁸ *Id.*

⁵⁹ Children's Internet Protection Act, 47 U.S.C. § 254(h)(5)(B)(i) (2018).

⁶⁰ Beckett, *supra* note 10.

⁶¹ *Id.*

⁶² Student Privacy Resource Center, *supra* note 7.

⁶³ Beckett, *supra* note 10.

⁶⁴ Student Privacy Resource Center, *supra* note 7.

misunderstandings, and misuse is great. School technology monitoring analysts are likely to be older and “from different cultural backgrounds than the students they are monitoring.”⁶⁵ Thus, an analyst’s misunderstanding of a joke or slang in a message as a real threat “could expose students to law enforcement in a way they have not been in the past.”⁶⁶

C. Eyes and Ears: SRO Surveillance

Approximately 52,000 police officers patrol school hallways across the country as SROs—about 45 percent of U.S. schools have an SRO.⁶⁷ Triggered by pressure to make schools safer after the Columbine shooting in 1999, the number of police officers in schools rose 38 percent from 1997 to 2007.⁶⁸ A federally funded 2005 study by the National Institute of Justice showed that the average SRO spends roughly half of their time each work week on law enforcement activities.⁶⁹ This raises the question: what are police officers’ primary goals and objectives when they walk the halls of public schools across the country? In Chicago, the expansive police presence in schools and the lack of transparent agreements between CPS and CPD gives police officers in schools the resources and infrastructure to covertly gather information and conduct surveillance on students.⁷⁰ Even after the new Memorandum of Understanding (MOU) between CPS and CPD, many questions and concerns still remain about the presence of police officers in schools.

CPD has a system in place known as the “gang database” that allows police officers to track and find out if a person has ever been identified as being part of a particular gang.⁷¹ CPS-based SROs possibly utilize what they see and hear in the hallways to log students’ gang affiliations into the gang database.⁷² There are no policies in place that prevent an SRO from wrongfully placing a student in the gang database.⁷³ Additionally, with the implementation of the Connect and Redirect pilot and school technology monitoring, data collected from this surveillance can be sent to the police, and depending on the nature of the information, could lead to a student being added to the gang database.⁷⁴

Chicago’s gang database has received considerable scrutiny for its lack of oversight and widespread inaccuracies.⁷⁵ And sadly, false designations can have serious implications that can prevent people from “finding work and getting licenses, immigration relief and housing, as well as lead to higher bonds and longer paroles if they are convicted of a crime.”⁷⁶ Suspiciously, CPS ran over 87,000 gang database inquiries from 2009 to 2018, accounting for roughly 2 percent of

⁶⁵ Beckett, *supra* note 10.

⁶⁶ *Id.* (quoting Elizabeth Laird, a senior fellow for student privacy at the Center for Democracy and Technology).

⁶⁷ Sawchuk, *supra* note 11.

⁶⁸ AMANDA PETTERUTI, JUST. POL’Y INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 1, 5 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

⁶⁹ *Id.*

⁷⁰ See MBEKEANI-WILEY, *supra* note 12, at 15-16.

⁷¹ Sarah Karp, *Chicago Mom Accuses School Police of Labeling Her Son a Gang Member*, WBEZ (Apr. 10, 2019), <https://www.wbez.org/stories/chicago-mom-accuses-school-police-of-labeling-her-son-a-gang-member/e18087b2-64a7-4783-b8a0-d28127de5e09>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Leibowitz & Karp, *supra* note 27.

⁷⁵ Heather Cherone, *95 Percent of Chicagoans Listed as Gang Members by Chicago Police are Black, Latino, Watchdog Audit Finds*, BLOCK CLUB CHI. (Apr. 11, 2019), <https://blockclubchicago.org/2019/04/11/95-percent-of-chicagoans-listed-as-gang-members-by-chicago-police-are-black-latino-watchdog-audit-finds/>.

⁷⁶ Leibowitz & Karp, *supra* note 27.

the total database inquiries in that time period.⁷⁷ Of all the external agencies with access to the gang database, CPS ranked third in the number of database inquiries conducted, behind the Cook County Sheriff and the Illinois Department of Corrections.⁷⁸

CPS and CPD have also come under fire recently in a report by the City of Chicago Office of Inspector General for not having any written agreement that lays out guidelines for police in Chicago schools.⁷⁹ The report noted that CPS and CPD could not even produce an accurate list of the police officers currently stationed in Chicago schools, “making it impossible to track what reports they were generating or whether they were accused of misconduct.”⁸⁰ However, even under the new MOU, many SROs can access certain databases through CPD computer terminals, a practice that likely predates the MOU.⁸¹ In particular, SROs likely have access to the Citizen Law Enforcement Analysis and Reporting (CLEAR) database, video surveillance located in CPS schools, and the Strategic Subject List (SSL).

The CLEAR database is an investigative tool used by CPD that allows SROs to file reports on students for simply violating a school policy.⁸² This information can be accessed by CPD and kept confidential from the public due to its categorization as “ongoing investigations.”⁸³

SRO and police access to extensive video surveillance of schools is also concerning. After the Parkland shooting, the Miami-Dade School District established a police command center that gives police officers the ability to monitor 18,000 live camera feeds throughout the schools in the district.⁸⁴ Similarly, in Chicago, CPD’s Crime Prevention and Information Center can view the 4,500 security cameras located in CPS schools, expanding CPD’s breadth of resources to surveil Chicago students and collect information.⁸⁵

CPD also engages in predictive analytics with the SSL.⁸⁶ The SSL uses a complex algorithm to “rank individuals with a criminal record according to their probability of being involved in a shooting or murder.”⁸⁷ This program could allow SROs to utilize what they see and hear in schools, their involvement in school discipline, and their interactions with students on a daily basis to create data for the SSL.⁸⁸

Similarly, in response to the Parkland shooting, schools in Florida are using a statewide predictive analytics database to “collect, sort, and analyze sensitive information about students to share with law enforcement.”⁸⁹ Alarming, yet not surprisingly, this technology disproportionately targets students of color.⁹⁰ The MIT Media Lab discovered “racial and gender bias embedded in the very code that runs predictive data systems.”⁹¹ As will be discussed below, students of color are more likely to be suspended or arrested at school than their white peers,

⁷⁷ CITY OF CHI. OFF. OF INSPECTOR GEN., REVIEW OF THE CHICAGO POLICE DEPARTMENT’S “GANG DATABASE” 26-27 (2019), <https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf>.

⁷⁸ *Id.*

⁷⁹ See CITY OF CHI. OFF. OF INSPECTOR GEN., *supra* note 11.

⁸⁰ *Id.*; Karp, *supra* note 71.

⁸¹ MBEKEANI-WILEY, *supra* note 12, at 15; Kunichoff, *supra* note 17.

⁸² MBEKEANI-WILEY, *supra* note 12, at 15.

⁸³ *Id.*

⁸⁴ Kamenetz & Bakeman, *supra* note 3.

⁸⁵ MBEKEANI-WILEY, *supra* note 12, at 16.

⁸⁶ *Id.* at 15.

⁸⁷ *Id.*

⁸⁸ *Id.* at 15-16.

⁸⁹ Bezahler, *supra* note 8.

⁹⁰ *Id.*

⁹¹ *Id.*

despite similar rates of misbehavior.⁹² This article and other scholars are concerned that predictive analytics systems will only make students of color more vulnerable to the school-to-prison pipeline.⁹³

III. THE SCHOOL-TO-PRISON PIPELINE

On January 29, 2019, at Marshall Metropolitan High School, a CPS school, a teacher notified two SROs to come and remove sixteen-year-old Dnigma Howard from the school for having a cell phone in class.⁹⁴ As part of Dnigma's individualized education program, she was allowed to ask for the school social worker whenever she had behavioral or emotional issues at school.⁹⁵ However, on this day, since Marshall's only school social worker was unavailable, Dnigma was instead escorted out of the school by two SROs.⁹⁶ In the process, school security cameras showed that the officers, unprovoked, tackled Dnigma down a flight of stairs, beat her, tased her, and ultimately arrested her as her classmates and teachers watched.⁹⁷ Prior to the release of video footage of the incident, the Cook County State's Attorney's Office charged Dnigma with two counts of felony aggravated battery, which could potentially have led to expulsion and jail time.⁹⁸

The video footage from this incident is shocking, leaving many people wondering why a school-based police officer would take such drastic actions toward a student who did not pose a threat. But in the context of a national school system embedded with the school-to-prison pipeline, these SROs' actions are not surprising. The school-to-prison pipeline, "a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems,"⁹⁹ is the result of discretionary school discipline policies that are disproportionately applied against children of color, zero-tolerance policies, and the overall criminalization of school discipline.¹⁰⁰

In 1994, Congress passed the Gun-Free Schools Act, which required a year-long suspension for any student that brought a weapon to school.¹⁰¹ As schools around the country began to implement zero-tolerance policies, the number of student suspensions and expulsions drastically increased, particularly for Black and Hispanic students.¹⁰² After the passage of the Gun-Free Schools Act, many schools expanded the scope of their zero-tolerance policies and began giving harsher consequences for minor school discipline offenses.¹⁰³ The overall trend: more

⁹² *Id.*

⁹³ *See id.*

⁹⁴ Curtis Black, *Police in Schools, Gang Database Scandals Offer Lightfoot First Test on Reform*, CHI. REP. (April 18, 2019), <https://www.chicagoreporter.com/police-in-schools-gang-database-scandals-offer-lightfoot-first-test-on-reform/>; Matthew Hendrickson, *Cops Removed from Chicago School After Stun Gun Used on Student*, CHI. SUN-TIMES (Feb. 2, 2019), <https://chicago.suntimes.com/news/video-cps-police-public-school-stun-gun-special-ed-resource-officer/>.

⁹⁵ Hendrickson, *supra* note 94.

⁹⁶ *Id.*

⁹⁷ *Id.*; Black, *supra* note 94.

⁹⁸ Hendrickson, *supra* note 94.

⁹⁹ *School-to-Prison Pipeline*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Feb. 16, 2020) [hereinafter *School-to-Prison Pipeline*].

¹⁰⁰ Libby Nelson & Dara Lind, *The School to Prison Pipeline, Explained*, JUST. POL'Y INST. (Feb. 24, 2015), <http://www.justicepolicy.org/news/8775>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

schools were pushing an increasing number of students out of their schools.¹⁰⁴ Still today, schools suspend and expel Black students and students with disabilities at a much higher rate.¹⁰⁵

In order to enforce their increasingly punitive school policies, many schools around the country have relied on SROs rather than teachers and administrators for discipline.¹⁰⁶ Although some schools have begun to rein in the role of SROs, many teachers still rely on them to handle routine school discipline issues.¹⁰⁷ Once an SRO has been notified, police actions, such as arrests and juvenile justice referrals, are determined by the officer that responds to the call.¹⁰⁸ Students that attend schools with SROs are significantly more likely to be arrested for discretionary criminal violations like disorderly conduct than those at schools without SROs.¹⁰⁹ In addition, data from the U.S. Department of Education shows that students of color and students with disabilities are disproportionately subjected to school-based arrests and referrals to law enforcement.¹¹⁰ Nationwide, students with disabilities comprise 12 percent of school populations but represent 25 percent of school-based arrests and referrals to law enforcement.¹¹¹ Similarly, Black students, who make up 16 percent of the school population, represent 31 percent of school-based arrests.¹¹² Every time an SRO is notified or responds to a school disciplinary matter, it puts students of color and students with disabilities at a greater risk of entering the juvenile justice system.

Police officers are also not equipped or trained to manage school behavior in a healthy or age-appropriate manner. As of the beginning of the 2019-2020 school year, 14.6 percent of CPS students had an individualized education plan (IEP), and nationwide, approximately three-quarters of children face at least one traumatic event in their lives before they turn eighteen.¹¹³ Yet alarmingly, many SROs have limited to no training on adolescent psychology or development, working with youth exposed to violence and trauma, and the behavioral safeguards that must be taken with students who have IEPs.¹¹⁴ An SRO best practice report published by the U.S. Department of Education and the U.S. Department of Justice recommends that school districts train SROs, among other areas, in childhood development and adolescent psychology, special

¹⁰⁴ *Id.*

¹⁰⁵ *School-to-Prison Pipeline*, *supra* note 99; *Executive Summary of DANIEL J. LOSEN & PAUL MARTINEZ, LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN THE OPPORTUNITY TO LEARN* (2020).

¹⁰⁶ Nelson & Lind, *supra* note 100.

¹⁰⁷ *School-to-Prison Pipeline*, *supra* note 99.

¹⁰⁸ See CHI. PUB. SCHS., UNDERSTANDING SCHOOL BEHAVIOR DATA 2,

<https://cps.edu/Performance/Documents/Datafiles/SuspensionExpulsionFactSheet.pdf> (last visited May 8, 2019).

¹⁰⁹ Bezahl, *supra* note 8.

¹¹⁰ U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Stats and Facts*, CHI. PUB. SCHS., https://cps.edu/About_CPS/At-a-glance/Pages/Stats_and_facts.aspx (last visited Nov. 1, 2020); *Cops and No Counselors*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/cops-and-no-counselors> (last visited Nov. 11, 2020) [hereinafter *Cops and No Counselors*].

¹¹⁴ Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 146, 163 (2015); see also HOLLY KURTH ET AL., SCHOOL POLICING: RESULTS OF A NATIONAL SURVEY OF SCHOOL RESOURCE OFFICERS 15 (2018), <https://www.edweek.org/media/school-resource-officer-survey-copyright-education-week.pdf>.

education and disability issues, trauma-informed responses, conflict resolution, and restorative justice.¹¹⁵

In Chicago, many of the schools targeted with social media surveillance are in communities that already face over-policing.¹¹⁶ Research has shown that a pervasive police presence in the school environment can have a damaging impact on student's physical and psychological well-being.¹¹⁷ Studies have shown that frequent interactions with police at school can act as a psychological trigger and over time can cause anxiety, lack of motivation, and aggressive behaviors.¹¹⁸ In particular, many students of color do not see police officers as a resource, but rather as people they cannot trust.¹¹⁹ Police officers and SROs are not equipped to support students emotionally and psychologically.¹²⁰ As a result of their lack of trauma-informed training, SROs may only serve to fuel student trauma.¹²¹

Additionally, SROs' involvement in routine school discipline and lack of training has led to a documented pattern of bad-policing, excessive use of force against minor students, and significant numbers of misconduct complaints filed.¹²² As of 2016, 67 percent of SROs in Chicago had complaints filed against them with the Independent Police Review Authority; 31 percent had three or more complaints and 11 percent had ten or more complaints.¹²³ Chicago has had to pay for this misconduct; Chicago schools amassed over \$2 million in SRO misconduct settlements from 2012 to 2016 alone.¹²⁴ About three-quarters of the settlement dollars were for the use of excessive force against a minor.¹²⁵

Although many schools are not purposely pushing kids into the juvenile justice system, disciplining students with suspensions "makes it more likely that they'll end up there."¹²⁶ A study conducted by the Council of State Governments Justice Center and Texas A&M University's Public Policy Research Institute examined millions of records for Texas seventh graders from 2001 to 2003 and then tracked the cohort for six years to study the relationship between school discipline, academic outcomes, and juvenile justice involvement.¹²⁷ The study discussed three notable findings regarding school discipline and suspensions.¹²⁸ First, school administrators have a lot of discretion in their discipline decisions.¹²⁹ Demographically similar schools suspended and

¹¹⁵ U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., SAFE SCHOOL-BASED ENFORCEMENT THROUGH COLLABORATION, UNDERSTANDING, AND RESPECT (SECURE): LOCAL IMPLEMENTATION RUBRIC 4-5 (2016) [hereinafter SECURE], <https://www2.ed.gov/documents/press-releases/secure-implementation.pdf>. This federal guidance was developed to support school districts, schools, and police departments in deciding what kind of school-police partnerships will help create safer schools and communities. *Id.* at 1.

¹¹⁶ Leibowitz & Karp, *supra* note 27.

¹¹⁷ MBEKEANI-WILEY, *supra* note 12, at 18.

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 9.

¹²⁰ *See* KURTHET AL., *supra* note 114.

¹²¹ *See Cops and No Counselors, supra* note 113.

¹²² The U.S. Dept. of Education SRO guidance also recommends that school districts prohibit SROs from engaging in routine school discipline and from enforcing school policies. SECURE, *supra* note 115, at 3.

¹²³ MBEKEANI-WILEY, *supra* note 12, at 11.

¹²⁴ *Id.* at 13.

¹²⁵ *Id.*

¹²⁶ Nelson & Lind, *supra* note 100.

¹²⁷ Donna St. George, *Study Shows Wide Varieties in Discipline Methods Among Very Similar Schools*, WASH. POST (July 19, 2011), https://www.washingtonpost.com/local/education/study-exposes-some-some-myths-about-school-discipline/2011/07/18/gIQAV0sZMI_story.html.

¹²⁸ *Id.*

¹²⁹ *Id.*

expelled students at very different rates.¹³⁰ Additionally, 97 percent of students were disciplined for discretionary offenses, compared to the less than 3 percent who were suspended or expelled for illegal behavior.¹³¹ Second, students that are suspended at least once are far more likely to repeat a grade than students who have never been suspended.¹³² Thirty-one percent of students who were expelled or suspended at least once repeated a grade, compared to only 5 percent of students who were never suspended or expelled.¹³³ Third, students who have been suspended or expelled are more likely to have some contact with the juvenile justice system than students who have not been disciplined in these ways.¹³⁴ The study discovered that students with at least one suspension in their disciplinary history were more than ten times as likely to become involved in the juvenile justice system than students who had not been suspended.¹³⁵ The conclusion from these findings: harsh, discretionary penalties for breaking school rules hold back students academically and push them into the juvenile justice system.¹³⁶

A 2015 research study on disparities in school discipline provides insight on the role implicit bias plays in the school-to-prison pipeline.¹³⁷ In the experiment, the researchers showed a racially diverse sample of female K-12 teachers the fictitious school records of a middle-school-aged student who had misbehaved twice in minor, unrelated ways.¹³⁸ The researchers requested that the teachers imagine they were working in the classroom with this fictitious student.¹³⁹ The researchers then asked the teachers a number of questions to identify and evaluate how the teachers would respond to both of the student's behavioral incidents.¹⁴⁰ All of the scenarios were identical; however, the researchers manipulated the perception of the students' races by giving some teachers a fictitious student with a stereotypical White name (Greg or Jake) and some teachers a student with a stereotypical Black name (Darnell or Deshawn).¹⁴¹ The results showed that teachers were more likely to escalate disciplinary consequences for the second incident when the student was thought to be Black as opposed to White.¹⁴² Additionally, the teacher group was more likely to believe the two infractions by the Black student were connected.¹⁴³ This research shows that bias plays a role in school disciplinary decisions and, at least in part, explains the large racial disparities in the school-to-prison pipeline.¹⁴⁴

The new technological surveillance methods discussed above are being implemented into the same discretionary and biased school discipline system that manifested the school-to-prison pipeline. The introduction of social media and school technology monitoring has experts concerned that students of color and students with disabilities may have adverse interactions with

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Nelson & Lind, *supra* note 100.

¹³⁴ *Id.*

¹³⁵ St. George, *supra* note 127.

¹³⁶ Nelson & Lind, *supra* note 100.

¹³⁷ Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 *PSYCH. SCI.* 617, 617-23 (2015).

¹³⁸ *Id.* at 618.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 620.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 623.

police and the justice system.¹⁴⁵ Increased surveillance in schools will inevitably intensify the existing disparities in school discipline. As discussed, students of color are much more likely to be punished for the same conduct as their White peers. Without addressing the systemic bias in school discipline, the unfairness embedded in that system will only increase with advanced technological surveillance because school officials will be able to discover more code of conduct violations.¹⁴⁶ Particularly with technology and social media surveillance, schools now have the ability to monitor and scrutinize areas of their students' lives that were previously private. Additionally, students from wealthy families can communicate on privately purchased devices without fear of school monitoring, unlike students from low-income families who may only have access to monitored school-issued devices—further contributing to the disparities in school discipline.¹⁴⁷ Put plainly, technologically enhanced school surveillance and monitoring will increase the number of school discipline infractions (and false positives) detected. Given what we know about the school-to-prison pipeline, these enhanced surveillance methods will increase the probability that a disproportionate number of students of color and students with disabilities will be pushed into the juvenile justice system.

With these monitoring technologies, there is a heightened understanding that students are constantly being watched. As more schools begin to implement these surveillance methods, students may be becoming increasingly desensitized to the idea that the private information they have on their devices is being monitored by school officials.¹⁴⁸ A 2016 report by the National Association of State Boards of Education found that “surveilled students may feel they are in a less nurturing, comfortable learning environment,” and that the increased use of surveillance methods “can interfere with the trust and cooperation learning requires by creating barriers among students, teachers, and [school] officials, and casting schools in a negative light in students’ eyes.”¹⁴⁹ In addition, students’ awareness that everything they are searching for and writing online might be monitored could hinder growth and self-discovery.¹⁵⁰ Rather than deter students from engaging in harmful conduct on their devices, this monitoring may only teach students not to share things, especially online.¹⁵¹ This could lead students who do not want to be questioned by school officials or be subject to school or criminal violations to “shut themselves off” and not come to adults for support—the opposite effect these schools likely intend to create.¹⁵²

IV. FOURTH AMENDMENT IMPLICATIONS

A. *School-Based Fourth Amendment Jurisprudence*

Over the past four decades, the United States Supreme Court has addressed how the Constitution applies to school-based searches. This school-specific Fourth Amendment

¹⁴⁵ Beckett, *supra* note 10.

¹⁴⁶ Richard W. Walker, *Schools Must Weigh the Benefits and Consequences of Surveillance Technologies*, EDSCOOP (Oct. 24, 2016), <https://edscoop.com/schools-must-weigh-the-benefits-and-consequences-of-surveillance-technologies/>.

¹⁴⁷ *Id.*

¹⁴⁸ Haskins, *supra* note 48.

¹⁴⁹ J. William Tucker & Amelia Vance, *School Surveillance: The Consequences for Equity and Privacy*, EDUC. LEADERS REP., Oct. 2016, at 1, 8.

¹⁵⁰ Beckett, *supra* note 10.

¹⁵¹ Haskins, *supra* note 48.

¹⁵² *Id.*

jurisprudence seeks to balance students' privacy interests with the governmental interest in student discipline and safety.¹⁵³

Beginning with *New Jersey v. T.L.O.* in 1985, the Court recognized that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the swift and informal disciplinary procedures needed in the schools."¹⁵⁴ The Court justified this holding by invoking the challenges of maintaining a safe school environment:

Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.¹⁵⁵

Thus, the Court found it necessary to create flexible standards for school officials to conduct searches of students at school.¹⁵⁶ It developed a two-step reasonableness standard for school-based searches: school officials must consider (1) whether the "action was justified at its inception," and (2) "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"¹⁵⁷

Through its holdings in *Board of Education v. Earls* and *Vernonia School District 47J v. Acton*, the Supreme Court further diminished the privacy and Fourth Amendment rights of students in public schools. In *Vernonia* and *Earls*, although the actions taken by these school districts did not meet the test established in *T.L.O.*, the Court lowered the standard by holding that suspicionless searches in the form of drug testing public school students who participate in competitive extracurricular activities or sports does not disturb the Fourth Amendment.¹⁵⁸ The Court found that when students sign up for extracurricular activities, they have reason to expect more intrusions on their privacy rights.¹⁵⁹ Additionally, the Court took into account the diminished expectation of privacy in the school setting, the lack of intrusiveness of the drug testing, and "the severity of the need met by the search."¹⁶⁰

Only once has the Supreme Court found a school-based search unreasonable. In *Safford Unified School District #1 v. Redding*, the Court held that the strip search of a thirteen-year-old female student was unreasonable, even though the school officials had reasonable suspicion to believe she possessed prescription strength ibuprofen.¹⁶¹ The Court found that the extent of the

¹⁵³ *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985); *Bd. Educ. v. Earls*, 536 U.S. 822, 828-29 (2002); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 370 (2009); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

¹⁵⁴ *T.L.O.*, 469 U.S. at 340.

¹⁵⁵ *Id.* at 339 (citation omitted).

¹⁵⁶ *Id.* at 340.

¹⁵⁷ *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)).

¹⁵⁸ *Vernonia*, 515 U.S. at 664-65; *Earls*, 536 U.S. at 838.

¹⁵⁹ *Vernonia*, 515 U.S. at 657; *Earls*, 536 U.S. at 831-32.

¹⁶⁰ *Vernonia*, 515 U.S. at 657, 664-65.

¹⁶¹ *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368 (2009).

search was unreasonable, but it did not hold that strip searches in schools by school officials were *per se* unreasonable.¹⁶² The Court left the door open by stating that other circumstances, such as “some greater level of particularized suspicion” of a more serious crime,¹⁶³ could permit a strip search.¹⁶⁴ In *Safford*, the Court relied on the second prong from the *T.L.O.* reasonableness test to declare that “a school search ‘will be permissible . . . when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.’”¹⁶⁵

School districts around the country have used these Supreme Court cases as guidelines when conducting searches and implementing new methods of student surveillance. However, these major holdings were decided prior to the technologically advanced and invasive surveillance methods used by school districts today. The privacy concerns raised by these expanding surveillance practices have yet to be addressed in any meaningful way.

The current state of the Supreme Court’s jurisprudence on school searches leaves many unanswered questions on whether school districts’ and police officers’ recent use of invasive surveillance complies with its rulings, particularly in terms of monitoring of school-issued technology. Although the surveillance and monitoring discussed in this article does not take the same form as a traditional school-based search, schools that implement these surveillance methods engage in a continuous search of students’ private data and information.

B. Riley: How Technology Can Affect Privacy Interests

Even though the Supreme Court has held that students have a diminished expectation of privacy while at school, school districts’ monitoring of students online, especially when not on school property, implicates the Fourth Amendment. In the landmark case, *New Jersey v. T.L.O.*, the Supreme Court established that while students do not give up their Fourth Amendment rights when they enter the school building, they do have a diminished expectation of privacy while in school.¹⁶⁶ More specifically, the Court found that the Fourth Amendment only requires school officials to have a reasonable suspicion of illicit activity to justify a search of a student or their personal effects.¹⁶⁷

When applying the Supreme Court’s school-based search jurisprudence to the surveillance methods discussed in this article, it is important also to look to the Supreme Court’s ruling in *Riley v. California*. In 2014, the Court held in *Riley* that under the Fourth Amendment, the government may not conduct a warrantless search of the contents of a cell phone seized incident to an arrest unless exigent circumstances exist.¹⁶⁸ The Court reasoned that a search of data on a cellphone is a massive invasion of privacy:

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person. The term “cell phone” is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to

¹⁶² *Id.* at 375-77.

¹⁶³ *Id.* at 388 (Stevens, J., dissenting).

¹⁶⁴ *Id.* at 377.

¹⁶⁵ *Id.* at 370 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

¹⁶⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 334, 341 (1985).

¹⁶⁷ *Id.* at 341-42.

¹⁶⁸ *Riley v. California*, 573 U.S. 373, 401-02 (2014).

be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.¹⁶⁹

Thus, due to the nature of cell phones and their ability to store an immense amount of private information, scholars have asserted that *Riley* established searching an individual's cell phone implicates a "higher order" of privacy right.¹⁷⁰

This higher order of privacy does not end when a school-age person enters a school building.¹⁷¹ However, most pre-*Riley* courts have considered cell phone searches by school officials to be reasonable as long as the search follows the reasonableness test in *T.L.O.*¹⁷² Yet, the surveillance and monitoring of students' devices taking place in American schools is often done separate from a school official having an individualized suspicion that a student has violated a school rule involving their cell phone.¹⁷³

C. *Earls and Vernonia: Suspicionless School Searches*

Due to the suspicionless nature of school technology surveillance, the Supreme Court's holdings in *Earls* and *Vernonia* provide the most direction in determining how future courts may address this issue. In both cases, the Court upheld suspicionless drug testing of student athletes; and in *Earls*, any student who participated in a competitive extracurricular could also be tested without reasonable suspicion.¹⁷⁴ However, the *Earls* decision made clear that the drug testing policy did not apply to the entire student body.¹⁷⁵ Separating out the students who participate in any competitive extracurricular, the Court "conducted a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests."¹⁷⁶ Regardless of the reasonableness inquiry mandated by *T.L.O.*, the Court, following *Vernonia*, determined that the "reasonableness inquiry cannot disregard the school's custodial and tutelary responsibility for children."¹⁷⁷ Thus, the Court found that subject to a balancing test, individualized suspicion may not be required to conduct certain school-based searches, including drug testing.¹⁷⁸

Again, the Court in *Earls* emphasized that the drug testing program only targeted extracurricular students and found that the very nature of participating in an extracurricular activity resulted in a more limited expectation of privacy than that of students who do not participate in these activities.¹⁷⁹ Against the students' privacy interests, the Court weighed the "nature and immediacy" of the government's interest in conducting suspicionless drug testing.¹⁸⁰ The Court cited *Vernonia* in finding that the government had a legitimate interest in protecting students from

¹⁶⁹ *Id.* at 393.

¹⁷⁰ Bernard James, *T.L.O. and Cell Phones: Student Privacy and Smart Devices After Riley v. California*, 101 IOWA L. REV. 343, 347-48, 352 (2016).

¹⁷¹ *Id.* at 351.

¹⁷² *Id.* at 352.

¹⁷³ See, e.g., *Gallimore v. Henrico Cty. Sch. Bd.*, 38 F.Supp.3d 721 (E.D. Va. 2014).

¹⁷⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822, 838 (2002).

¹⁷⁵ *Earls*, 536 U.S. at 832.

¹⁷⁶ *Id.* at 830.

¹⁷⁷ *Id.* (quoting *Vernonia*, 515 U.S. at 656).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 832.

¹⁸⁰ *Id.* at 834.

“the evil” of drug abuse problem that has plagued schools across the country.¹⁸¹ Therefore, as a result of the limited expectation of privacy of students involved in extracurricular activities and the immediate and legitimate government interest, the Court held that suspicionless drug testing did not violate students’ Fourth Amendment rights.¹⁸²

D. Application to School Surveillance Technology

It is unclear how far schools will be able to expand suspicionless searches under *Earls* and *Vernonia*. However, constant surveillance of school technology clearly falls outside the boundaries of these cases. Applying the balancing test from *Earls* to the enhanced methods of monitoring explored in this article, school districts could raise the argument that the emerging epidemic of school shootings justifies such surveillance and would cite the pressure they are under to take drastic measures to prevent the next shooting. Going further, schools could also claim that they have a legitimate and immediate interest to keep guns, violence, and drugs out of the school building.

But as tragic and shocking as school violence is, compared to other places, our school buildings are much safer.¹⁸³ Remarkably, homes are almost 200 times more dangerous for children than schools.¹⁸⁴ To put this into perspective, “any given school [in the United States] can expect to experience a student homicide about once every 6,000 years.”¹⁸⁵ Yet, the fear of school violence has driven schools to harden their school buildings and environments, and take drastic measures all in the name of school safety. Justice Stevens cautioned in his concurrence in *T.L.O.* that “[to] the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.”¹⁸⁶ Although school shootings are a real and present danger, the relatively low prevalence of school violence does not warrant the invasive and continuous monitoring that exists with school technology surveillance.

Next, the governmental interest must be weighed against the privacy interests of students. There are three primary considerations in determining students’ privacy interests against suspicionless school surveillance. First, in contrast to *Earls* and *Vernonia*, every student at a school that has implemented school technology monitoring is subjected to the suspicionless surveillance. Therefore, the classification used by the Court in *Earls* to determine a limited expectation of privacy for extracurricular students does not exist with this type of search. Without that classification, the student body as a whole will be assumed to have a greater expectation of privacy than the students in either *Earls* or *Vernonia*. Second, as mentioned above, the Court in *Riley* characterized a person’s privacy interest in their cell phone as a higher order of privacy.¹⁸⁷ Importantly, the reasons a cell phone demands a higher degree of privacy also apply to the surveilled school-supplied devices students use at school. Finally, school-age children in particular have an enhanced privacy interest in their electronic devices against invasive searches—monitoring a student’s messages, emails, social media, and internet searches unlocks a view into

¹⁸¹ *Id.* (quoting *Vernonia*, 515 U.S. at 662).

¹⁸² *Id.* at 838.

¹⁸³ Erin K. Nekvasil et al., *Prevalence and Offense Characteristics of Multiple Casualty Homicides: Are Schools at Higher Risk Than Other Locations?*, 5 PSYCH. OF VIOLENCE 236, 241 (2015).

¹⁸⁴ *Id.* at 238.

¹⁸⁵ Randy Borum et al., *What Can Be Done About School Shootings? A Review of the Evidence*, 39 EDUC. RSCHR. 27, 27 (2010).

¹⁸⁶ *New Jersey v. T.L.O.*, 469 U.S. 325, 382 n.25 (1985).

¹⁸⁷ James, *supra* note 170, at 347-48.

a student's entire private life.¹⁸⁸ This is a far greater scope of a search than has been discussed in any of the Supreme Court's school searches jurisprudence. Comparing these extremely intrusive suspicionless searches against the government's interest, the scales certainly appear to weigh in favor of a student's privacy interest.

The combination of these surveillance methods has the potential to put students in a school environment where their personal and digital lives are constantly being watched. A line must be drawn to preserve what is left of students' privacy interests while they are at school, a place where they spend most of their time. This line should be clearly drawn to prevent suspicionless surveillance of students' technology on and off school property. Following the Court's school searches jurisprudence: this surveillance is unreasonable and therefore unconstitutional.

V. THE WAY FORWARD: MENTAL HEALTH OVER SURVEILLANCE

In an age where it seems like hardening our schools is the only way forward in terms of protecting students, schools are generally not under a threat of violence. However, schools still have an obligation to keep their students safe, and decisions that harden school buildings and disciplinary systems are often the most popular, especially in the aftermath of tragic school violence. Currently, no independent evaluation has been conducted to show whether these methods of surveillance are effective in reducing violence or self-harm. Conversely, experts have found that this type of invasive surveillance may do more harm than good to children, especially students of color and students with disabilities.¹⁸⁹

There is not an easy answer on how to keep students safe, in school, and on the path to healthy and productive futures. Yet, there are numerous effective alternative programs available for schools to prevent violence and create healthier school environments in lieu of invasive surveillance. Some of these alternative programs include Cognitive Behavior Therapy (CBT), conflict resolution, family therapy, life skills training, Multisystemic Therapy (MST), Positive Behavior Interventions and Supports (PBIS), trauma-informed interventions, and restorative justice, just to name a few.¹⁹⁰ Although a detailed examination of the various programs and interventions is beyond the scope of this article, a brief discussion of the need and value of mental health workers and trauma-informed school staff will highlight a way forward from the invasive and punitive school surveillance systems that have hardened schools.

Schools that invest more money and resources into social workers and mental health resources experience better attendance rates, higher academic success, and have lower rates of expulsion and suspension.¹⁹¹ Almost three-quarters of children face one traumatic event or more in their lives before they turn eighteen.¹⁹² About one in three students who experience a traumatic event will show signs of post-traumatic stress disorder, and trauma will often affect a student's

¹⁸⁸ See *T.L.O.*, 469 U.S. at 342 ("Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.").

¹⁸⁹ Beckett, *supra* note 10.

¹⁹⁰ Jim Feger, Trainer, Sch. Threat Assessment Consultants, Presentation at the Comprehensive School Threat Assessment Guidelines Workshop (Feb. 11, 2020) (presentation slides on file with the author).

¹⁹¹ *Cops and No Counselors*, *supra* note 113.

¹⁹² *Id.*

performance and behavior in school.¹⁹³ Many students also do not have the necessary coping mechanisms to manage their traumatic and stressful life experiences.¹⁹⁴

Studies show that the presence of mental health workers in school settings creates safer and higher achieving schools.¹⁹⁵ Mental health workers could be especially helpful for students who have experienced trauma, which could have an even greater impact in low-income school districts where students are much more likely to use school-based mental health resources due to the scarcity of such resources in the community.¹⁹⁶ The National Association of Social Workers (NASW) recommends that every school should maintain a 250:1 student to social worker ratio.¹⁹⁷ As of 2018, CPS had a ratio of 1,200:1, meaning that CPS would need to add 1,000 social workers to meet the minimum standards recommended by NASW.¹⁹⁸ Chicago is not alone: forty-seven states and the District of Columbia do not meet the minimum standards for social worker ratios.¹⁹⁹ Marshall Metropolitan High School, the CPS school that Dnigma Howard attended, had more SROs than social workers at the time that she was arrested.²⁰⁰ This has been the trend across the country. Funding for school-based health professionals has decreased, while investment in student surveillance systems and SRO programs surged.²⁰¹ In light of the compelling studies that demonstrate the benefits to school health and safety, school districts would be prudent to invest more resources into their health professionals. Alternatively, schools can invest in their current staff and provide trauma-informed training to teachers, administrators, coaches, and faculty.

For the schools that insist on using invasive surveillance methods, they must use these systems for healthy interventions that put the focus on the safety and development of the student. Further, school mental health workers must staff and operate these systems and only involve law enforcement and heightened school discipline decisions when absolutely necessary. School districts everywhere must be hyperaware of the ways implicit bias and discretion have infiltrated every aspect of school discipline systems and create equitable systems that address these injustices.

Lastly, schools must understand that suspicionless monitoring and surveillance of students' technology and social media is a massive and alarming intrusion into their personal lives and will undoubtedly fuel the school-to-prison pipeline. And as a result of the Supreme Court's rulings in *T.L.O.*, *Earls*, *Vernonia*, *Safford*, and *Riley*, this level of intrusion must be deemed unreasonable and unconstitutional.

¹⁹³ *How Does Trauma Affect Children?*, TREATMENT & SERVS. ADAPTATION CTR., <https://traumaawareschools.org/impact> (last visited May 7, 2019).

¹⁹⁴ *Id.*

¹⁹⁵ *Cops and No Counselors*, *supra* note 113.

¹⁹⁶ *Id.*

¹⁹⁷ *NASW Highlights the Growing Need for School Social Workers to Prevent School Violence*, NAT'L ASS'N OF SOC. WORKERS (March 27, 2018), <https://www.socialworkers.org/News/News-Releases/ID/1633/NASW-Highlights-the-Growing-Need-for-School-Social-Workers-to-Prevent-School-Violence>.

¹⁹⁸ Lauren FitzPatrick & Yvonne Kim, *CPS to Add Social Workers, Case Managers, But Not Enough for CTU*, CHI. SUN-TIMES (July 16, 2018), <https://chicago.suntimes.com/news/cps-to-add-social-workers-case-managers-but-not-enough-for-ctu/>.

¹⁹⁹ *Cops and No Counselors*, *supra* note 113.

²⁰⁰ Hendrickson, *supra* note 94; Chicago Teacher Union, FACEBOOK (June 22, 2020), <https://www.facebook.com/ctulocal1/posts/marshall-high-school-has-a-police-officer-who-brutalized-a-student-but-no-librar/3508386705857935/>.

²⁰¹ *Cops and No Counselors*, *supra* note 113.