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Addressing Utah's School to Prison Pipeline

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ADDRESSING UTAH'S SCHOOL TO PRISON PIPELINE

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I. INTRODUCTION

On May 19, 2011, thirteen-year-old middle school student F.M. was removed from his physical education class for generating fake burps that "made the other students laugh and hampered class proceedings."[1] Ms. Mines-Hornbeck, the middle school physical education teacher, requested assistance from the School Resource Officer ("SRO"), Officer Arthur Acosta, who arrested F.M. "for interfering with the educational process."[2] For this offense, Officer Acosta searched, handcuffed, and drove F.M. in a patrol car to the juvenile detention center where F.M. was booked and detained.[3] The school suspended F.M. "for the remainder of the 2010–11 school year."[4]

This scenario is symptomatic of a nationwide trend, commonly referred to as the School to Prison Pipeline ("STPP"), in which "alarming numbers of young people are suspended, expelled, or even arrested for relatively minor transgressions."[5] Former Attorney General Eric Holder explained that the STPP produces "high out-of-school suspension rates" causing "lower-than-average graduation rates," making students "feel unwelcome in their own schools. . . . [D]isrupt[ing] the learning process," and having "lasting negative effects on the long-term well-being of our young people—increasing their likelihood of future contact with juvenile and criminal justice systems."[6] Alarmingly, Holder indicated that the STPP targets "students of color and those

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[1] A.M. v. Holmes, 830 F.3d 1123, 1129–30 (10th Cir. 2016).

[2] *Id.*; *see also* N.M. STAT ANN. § 30-20-13(D) (2011) (prohibiting interference "with the educational process of any public or private school").

[3] *Holmes*, 830 F.3d at 1130.

[4] *Id.*

[5] Eric Holder, Att'y Gen., U.S. Dep't of Justice, Speech at Frederick Douglass High School (Jan. 8, 2014), https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-department-justice-and-department-education [https://perma.cc/S7BN-NEZP].

[6] *Id.* For a groundbreaking and thorough discussion on how America's criminal justice system has perpetuated a racial caste system, see MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2–19 (2012).

with disabilities," giving them "different and more severe punishments than their peers."[7]

In 2016, the American Bar Association ("ABA") published its report, *School-to-Prison Pipeline: Preliminary Report*, documenting the nationwide presence of the STPP and its disproportionate effects on students of color, students with disabilities, and LGBTQ-identifying students.[8] Among many other contributors to the STPP, the report highlighted the negative role that SROs have played in criminalizing student behavior and funneling students from the classroom to the courtroom.[9] The ABA's *Preliminary Report* also points to implicit bias as a contributing factor, and highlights how the "limited constitutional rights" of students in school is a "law-related cause" of the STPP.[10]

Utah is not immune from these problems.[11] In 2014, the Public Policy Clinic at S.J. Quinney College of Law released its study, *From Fingerpaint to Fingerprints: The School to Prison Pipeline in Utah*, exposing the STPP in Utah's public schools.[12] The report warns that many of Utah's school districts have "overly subjective and harsh disciplinary policies that permit suspension . . . for vague offenses," and Utah's children of color are disproportionately disciplined and referred to law enforcement for these offenses.[13]

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[7] Holder, *supra* note 5.

[8] SARAH E. REDFIELD & JASON P. NANCE, AM. BAR ASS'N, SCHOOL-TO-PRISON PIPELINE: PRELIMINARY REPORT 10–11 (2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf [https://perma.cc/7MX8-23KU].

[9] *Id.* at 50–54.

[10] *Id.* at 50, 54–56 ("Other law-related causes discussed in somewhat less detail include the impact of zero tolerance policies, the limited constitutional rights of students in school, low academic achievement, and high stakes testing."); *see also* Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 936–40 (2016) (explaining how students' limited constitutional protections at school contribute to the school to prison pipeline).

[11] *See* JORDIN ALBERS ET AL., UNIV. OF UTAH, FROM FINGERPAINT TO FINGERPRINTS: THE SCHOOL-TO-PRISON PIPELINE IN UTAH 5–15 (2014), https://www.nawj.org/uploads/pdf/conferences/CLE/Fingerpaint%20to%20Fingerprint%20School%20to%20Prison_Pipeline%20in%20Utah.pdf [https://perma.cc/MG4L-2GEZ] (revealing how the STPP operates in Utah by analyzing suspension data); UTAH JUVENILE JUSTICE WORKING GRP., FINAL REPORT 1 (2016), http://uacnet.org/wp-content/uploads/2016/12/Utah-Juvenile-Justice-Working-Group-Final-Report.pdf [https://perma.cc/5GS8-W7AH] [hereinafter FINAL REPORT] (demonstrating how Utah's Juvenile Justice System suffers from bias, abuse of discretion, and disparate outcomes); VANESSA WALSH, UNIV. OF UTAH, DISPARITIES IN DISCIPLINE: A LOOK AT SCHOOL DISCIPLINARY ACTIONS FOR UTAH'S AMERICAN INDIAN STUDENTS 3–5 (2015) (showing that American Indian students, "the smallest student demographic in the state . . . was the most frequently expelled, referred to law enforcement, and arrested for school related incidents.").

[12] ALBERS ET AL., *supra* note 11, at 3.

[13] *Id.* at 3; *see also* FINAL REPORT, *supra* note 11, at 1–2, 6–7, 9–10.

In 2016, the Utah Juvenile Justice Working Group ("Working Group") published its findings from a yearlong "data-driven assessment of the Utah juvenile justice system," highlighting many harms of Utah's STPP.[14] The Working Group's *Final Report* revealed widespread problems with Utah's juvenile justice system, ranging from "[d]isparities based upon race and geography" to a lack of "[a]ffordable, accessible" evidence-based diversion programs to help rehabilitate youth offenders.[15]

To address the causes and the harmful effects of the STPP, analysts suggest: expanding the legal protections for juveniles;[16] refraining from using SROs for disciplinary issues;[17] clearly distinguishing educator and administrator disciplinary responsibilities from SRO responsibilities;[18] retraining SROs to better understand the effects of the STPP on youth and how to work with diverse youth populations;[19] adopting restorative justice practices and other evidence-based alternatives to the juvenile justice system;[20] and reforming the discretionary power of state actors to cite, refer, and sentence youth within the juvenile justice system.[21]

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[14] FINAL REPORT, *supra* note 11, at 1.

[15] *Id.* at 1–2.

[16] *See id.* at 15; REDFIELD & NANCE, *supra* note 8, at 12; *Developments in the Law–Policing*, 128 HARV. L. REV. 1706, 1763–69 (2015) (arguing that the Fourth Amendment protections afforded students should be modified); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1236 (1970) (arguing that there will be no revolution in juvenile justice until juveniles are granted the right to counsel); *cf. In re* Gault, 387 U.S. 1, 18 (1967) ("Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

[17] *See* ALBERS ET AL., *supra* note 11, at 4, 20; REDFIELD & NANCE, *supra* note 8, at 12–13; JUSTICE POLICY INSTITUTE, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 31 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf [https://perma.cc/37UQ-P589].

[18] *See* REDFIELD & NANCE, *supra* note 8, at 13; MOISES PROSPERO, DMC EVIDENCE-BASED, BEST PRACTICES INTERVENTION REPORT 6 (2014), https://www.nttac.org/views/docs/dmccasp/Utah_DMC_Best_Practices_Report.pdf [https://perma.cc/HBL6-7248].

[19] *See* ALBERS ET AL., *supra* note 11, at 20–21; FINAL REPORT, *supra* note 11, at 9; JUSTICE POLICY INSTITUTE, *supra* note 17, at 32; PROSPERO, *supra* note 18, at 6–7; REDFIELD & NANCE, *supra* note 8, at 12–13.

[20] *See* ALBERS ET AL., *supra* note 11, at 6, 22; FINAL REPORT, *supra* note 11, at 12–13; PROSPERO, *supra* note 18, at 6; REDFIELD & NANCE, *supra* note 8, at 13. For a discussion on restorative justice, see *infra* Part B.2.(a).

[21] *See* FINAL REPORT, *supra* note 11, at 12–21; REDFIELD & NANCE, *supra* note 8, at 13. *See generally* Sacha M. Coupet, *What To Do With the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1341–46 (2000) (arguing for guiding discretion towards the use of individualized, restorative justice based justice for youth offenders); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 436–61 (2013) (arguing that reforming prosecutorial decision-making in the juvenile justice system could reduce the racial disparities in the juvenile justice system).

In response to the alarming evidence of Utah's STPP, Utah passed a number of laws implementing some of these recommendations.[22] In 2016, Utah passed the "School Resource Officers" Bill ("SRO Law") that requires school districts and police departments to formally define the role of SROs in schools, and requires SROs to receive training specific to their job as school resource officers.[23] In 2017, Utah passed S.B. 134, "Indigent Defense Commission Amendments," suggesting that counsel must be provided "at all stages" for "[i]ndigent parties in juvenile delinquency and child welfare proceedings,"[24] and H.B. 239, "Juvenile Justice Amendments," guiding the exercise of discretion throughout the juvenile justice system with the use of standards and procedures, the limitation of punitive options, and the expansion of evidence-based rehabilitative services.[25]

This Note will evaluate how these reforms address Utah's STPP. Part A discusses how students' limited constitutional rights, school discipline policies, and untrained SROs with undefined roles contribute to the STPP in Utah. Part B outlines how these reforms address the causes and effects of Utah's STPP, and argues that while they are productive, they fail to address the bias and abuse of discretion that contribute to, as well as the disparate outcomes manifested in, Utah's STPP. This Note argues that Utah's existing network of restorative justice youth courts should be used to curtail the causes and effects of Utah's STPP. Part C proposes additional measures that Utah should take to address the STPP.

A. Student Rights, Policing Schools, and the School to Prison Pipeline

In an attempt to ensure our public schools are safe, school districts have implemented zero tolerance policies, courts have weakened students' constitutional rights, teachers have been given broad authority to discipline students, and SROs have been injected into our public schools without training or clearly defined responsibilities. The practical effect of these measures is the STPP—the over criminalization of problematic student behavior.

1. Student Rights Are Limited in Public Schools

Although the Supreme Court has maintained that students do not "shed their constitutional rights . . . at the schoolhouse gate,"[26] Supreme Court jurisprudence and case law from around the nation suggest that students in schools have limited

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[22] *See* UTAH CODE ANN. §§ 53A-11-1603, 1604 (2016); H.B. 239, 62d Leg., Gen. Sess. (Utah 2017); S.B. 134, 62d Leg., Gen. Sess. (Utah 2017).

[23] UTAH CODE ANN. §§ 53A-11-1603, 1604 (2016).

[24] *See* UTAH CODE ANN. § 77-32-804 (2016); S.B. 134, 62d Leg., Gen. Sess. (Utah 2017).

[25] H.B. 239, 62d Leg., Gen. Sess. (Utah 2017).

[26] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (holding that prohibiting students from wearing black armbands in protest of the Vietnam war violated their First Amendment rights).

constitutional rights.[27] Focused on efficiency in administrative decision-making aimed at preserving "a safe environment conducive to education in the public schools," courts have weakened students' privacy and due process rights while expanding the discretionary power of school officials.[28] The tension in America's juvenile justice system between the constitutional rights of juveniles and the parens patriae[29] power of the state to train juveniles is manifest in the STPP.[30]

(a) Zero Tolerance Policies

After the horrific shootings at Columbine High School in 1999, "moral panic" ensued, causing school districts from around the nation to implement zero tolerance policies in an effort to secure their schools.[31] Developed from the policies behind the Gun Free School Zone Act of 1994, aimed at keeping guns out of schools, zero tolerance policies called for "automatic discipline" every time a student committed a prohibited behavior, whether intentional or not.[32] Zero tolerance policies stripped school administrators of discretion in discipline

[27] Nance, *supra* note 10, at 936–40 (explaining that students have limited due process and privacy rights in schools).

[28] New Jersey v. T.L.O., 469 U.S. 325, 332–33 n.2, 341 (1985) ("We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law."); Goss v. Lopez, 419 U.S. 565, 582 (1975) (holding that while students have a property right in their education, school administrators considering suspending students for misbehavior meet due process requirements when they provide notice by telling the student what they did wrong and provide a hearing by giving the student a chance to explain her side of the story before suspending the student); *see also* Jensen v. Reeves, 45 F. Supp. 2d 1265, 1275 (D. Utah 1999), *aff'd*, 3 F. App'x 905 (10th Cir. 2001) (discussing what process is due to students who claim an injury to their reputation).

[29] The paternalistic parens patriae doctrine understands that the state as the sovereign should care for "persons under a legal disability . . . who cannot take care of themselves." Coupet, *supra* note 21, at 1308 (citations omitted).

[30] *See* Kent v. United States, 383 U.S. 541, 556 (1966); Illinois *ex rel.* O'Connell v. Turner, 55 Ill. 280, 286–87 (1870); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909). The paradox that "juveniles are different" informs this tension. *See* Coupet, *supra* note 21, at 1306. While our justice system has come to understand that juveniles are entitled to many of the same constitutional rights as adults, it has also come to understand that juveniles should not be treated the same as adults for purposes of sentencing. *See* Miller v. Alabama, 567 U.S. 460, 470 (2012); *In re* Gault, 387 U.S. 1, 39–58 (1967).

[31] Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 540–41 (2013).

[32] REDFIELD & NANCE, *supra* note 8, at 24.

practices.[33] In practice, these zero tolerance policies lead to a "one strike and you're out" discipline regime where students were automatically suspended or expelled for behaviors that "previously would have been dealt with through after-school detentions, withdrawal of privileges, counseling, mediation," or other methods that did not automatically remove a student from the classroom.[34]

Three common goals behind the implementation of zero tolerance policies are: deterring bad behavior, incapacitating dangerous students, and maintaining consistency in punishment between members of different racial groups.[35] Unfortunately, "[d]ata indicates that harsh discipline and zero tolerance have resulted in the exclusion of more students without actually deterring or improving student behavior."[36] Zero tolerance policies result in more discipline, causing more students to be excluded from school and raising the rate of re-offense for students punished under zero tolerance policies.[37] Additionally, the practical effect of zero tolerance policies is that minorities are disproportionately referred "for subjective misbehavior, like noise, disruption, and disrespect."[38] These zero tolerance policies contribute to the disproportionate effect of the STPP on students of color,[39] students with disabilities,[40] and, some argue, LGBTQ students.[41]

Zero tolerance policies have not worked as intended.[42] Instead, they fuel the STPP.[43] Critics of zero tolerance policies also argue that they violate students'

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[33] *Id.* ("A zero tolerance approach limited discretion, though research eventually revealed that discretion continued and the approach was not especially effective.").

[34] Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. REV. 65, 68–69 (2003).

[35] *Id.* at 75–87.

[36] Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 838 (2015).

[37] *Id.* at 838–39; *see also* A.M. v. Holmes, 830 F.3d 1123, 1138–41, 1152 (10th Cir. 2016) (holding that a SRO had probable cause to arrest, handcuff, and detain a student for burping in class, and the SRO was entitled to qualified immunity).

[38] Black, *supra* note 36, at 840.

[39] Nance, *supra* note 10, at 957 (discussing how the U.S. Department of Education's Office of Civil Rights Data Collection demonstrates the disproportionate impact that zero tolerance policies have had on African American students).

[40] ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARV. UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 9 (2000), https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf [https://perma.cc/WAN8-KDU7].

[41] Elizabethe C. Payne & Melissa J. Smith, *LGBTQ Bullying: Zero Tolerance Is Not the Answer*, HUFFINGTON POST: BLOG (Oct. 27, 2016), http://www.huffingtonpost.com/elizabethe-c-payne/lgbtq-bullying-zero-toler_b_8307222.html [https://perma.cc/VVT2-YWWA].

[42] Holder, *supra* note 5 (discussing how the zero tolerance policies have not served their purpose, but have contributed to juvenile incarceration); U.S. DEP'T. OF JUSTICE & U.S. DEPT. OF EDUC., JOINT "DEAR COLLEAGUE" LETTER (Jan. 8, 2014) [hereinafter DEAR

substantive and procedural due process rights, and should be invalidated because they automatically impose punishment without evaluating individualized concerns.[44] Few courts have invalidated zero tolerance policies on the constitutional grounds that mandatory suspension or expulsion provisions are not "rationally related to any legitimate state interest."[45] Instead, where a student's rights are unclear, discipline practices have been protected, and school administrators have been granted qualified immunity.[46]

Until advocates for students who suffer the consequences of zero tolerance policies can successfully invalidate those policies on constitutional grounds, students *will* shed their constitutional right at the schoolhouse gate, making them much more vulnerable to the STPP.[47]

(b) Students' Limited Due Process Rights at School

Courts have limited the procedural and substantive due process rights of students at school by "reducing disciplinary hearings to a sham" that are "hardly . . . sufficient to protect . . . against deprivation by pretext."[48]

In *Goss v. Lopez*,[49] the Supreme Court held that students have a legitimate property interest in their education.[50] The *Goss* court explained that this "property

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COLLEAGUE] (explaining that current discipline policies have been discriminatory in nature, federal law prohibits "discriminating in the administration of student discipline," and making recommendations for better school discipline practices).

[43] Holder, *supra* note 5; DEAR COLLEAGUE, *supra* note 42 ("Studies have suggested a correlation between exclusionary discipline policies and practices and an array of serious educational, economic, and social problems, including school avoidance and diminished educational engagement; decreased academic achievement; increased behavior problems; increased likelihood of dropping out; substance abuse; and involvement with juvenile justice systems."); REDFIELD & NANCE, *supra* note 8, at 24–40 (evaluating data to explain how zero tolerance policies have contributed to the school to prison pipeline).

[44] Black, *supra* note 36, at 900 (arguing that the mandatory imposition of penalties under zero tolerance regimes violates substantive and procedural due process rights because "due process prohibits decision-makers from deciding students' fates in advance, and requires that they listen to what the students say, deliberate the facts, and determine whether further information is necessary before making a decision.").

[45] Seal v. Morgan, 229 F.3d 567, 575–76 (6th Cir. 2000).

[46] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 378 (2009).

[47] *But see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (maintaining that students do not "shed their constitutional rights . . . at the schoolhouse gate.").

[48] Black, *supra* note 36, at 855 (quoting J. Harvie Wilkinson III, Goss v. Lopez*: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25, 30 (1975)); Nance, *supra* note 10, at 939–40.

[49] 419 U.S. 565 (1975).

[50] *Id.* at 574 (holding that students have a "legitimate entitlement to a public education as a property interest"); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (explaining that education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

interest" is protected by the "Due Process Clause and . . . may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[51] The *Goss* court explained that a student is deprived of his property interest in education when he is suspended without due process's "rudimentary precautions" of notice, a hearing, and an opportunity to present his side of the story.[52] These must be afforded the student to safeguard against "unfair or mistaken findings of misconduct and arbitrary exclusion from school."[53]

In applying this rule, the *Goss* court held that notice and the hearing can occur simultaneously; the hearing can be an informal discussion with the student and the student must "be told what he is accused of doing."[54] However, the court provided that there are some situations "in which prior notice and hearing cannot be insisted upon."[55] The *Goss* court explained that when schools believe a student's "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," that student may be removed immediately without notice or a hearing.[56]

This exception to the due process requirements imposed by the court effectively permits any school official to extrajudicially determine that a student is not due the "rudimentary precautions" of notice, hearing, and an opportunity to present his side of the story before suspension or expulsion. Even if the school officials grant students notice, a hearing, and an opportunity to be heard, these proceedings do not need to be "deliberative, collaborative, or aimed at accuracy, justice, or helping the student."[57] Instead, these proceedings become a sham, or a "routine hoop through which a school must jump to produce a favored result."[58] The minimal due process protections afforded students, the least powerful party in the student-administrator dynamic, are too weak to protect students from being funneled into the STPP.

(c) Students' Limited Privacy Rights at School

Students' privacy rights are weakened the moment they enter the schoolhouse.[59] In an effort to "promote safety and discipline within schools," courts have "weakened students' Fourth Amendment rights" in four main ways.[60]

First, the Supreme Court's ruling in *New Jersey v. T.L.O.*[61] weakened students' reasonable expectation of privacy when at the schoolhouse.[62] The *T.L.O.*

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[51] *Goss*, 419 U.S. at 574.
[52] *Id.* at 581.
[53] *Id.*
[54] *Id.* at 582.
[55] *Id.*
[56] *Id.* at 582–83.
[57] Nance, *supra* note 10, at 939–40.
[58] *Id.*; Black, *supra* note 36, at 855.
[59] *See Developments in the Law*, *supra* note 16, at 1748–54.
[60] Nance, *supra* note 10, at 937.
[61] 469 U.S. 325 (1985).

decision made it so that school officials do not have to obtain a warrant or probable cause before conducting a search.[63]

Second, in *Board of Education of Independent School District No. 92 of Pottowatomie County v. Earls*,[64] the Supreme Court held that schools do not need individualized suspicion to conduct invasive drug tests on students involved in the school's extracurricular activities.[65] The *Earls* court found the mandatory drug tests reasonable under the Fourth Amendment "special needs" analysis because the school district's interest in preventing and deterring drug use outweighed the invasiveness of the drug testing requirement.[66] The *Earls* court explained that it applied the "special needs" analysis where a search does not need to be supported by probable cause, because the "probable-cause requirement" is impracticable in public schools, where "Fourth Amendment rights . . . are different . . . than elsewhere."[67] Instead of requiring school administrators to proffer probable cause before searching a student, the Supreme Court lowered the standard to reasonable suspicion, explaining that the threshold inquiry for this standard is whether there is a "moderate chance of finding evidence of wrongdoing."[68]

Third, courts have permitted schools to "rely on intense surveillance methods to maintain order and control" at school.[69] Many schools are permitted "to use metal detectors, search through students' lockers, monitor students with surveillance cameras, and conduct random drug testing on students."[70]

Fourth, although they may be subject to criminal penalties, students are not guaranteed the same protections afforded in criminal procedure.[71] In *T.L.O*, the assistant vice principal conducted a search of a student's purse after someone reported that the student was smoking cigarettes in the bathroom.[72] During the search of the student's purse, the assistant vice principal found rolling papers and marijuana.[73] After conducting this warrantless search and discovering the

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[62] *See id.* at 333.
[63] *Id.* at 340–41.
[64] 536 U.S. 822 (2002).
[65] *Id.* at 838.
[66] *Id.* at 829, 836–38.
[67] *Id.* at 829–30 (internal citations omitted).
[68] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370–71 (2009).
[69] Nance, *supra* note 10, at 937.
[70] *Id.* at 937–38; *see also Earls*, 536 U.S. at 838 ("Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren."); United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991) ("Video surveillance does not itself violate a reasonable expectation of privacy."); Hough v. Shakopee Pub. Sch., 608 F. Supp. 2d 1087, 1104 (D. Minn. 2009) ("An otherwise valid administrative search—for instance, a search for weapons with a metal detector—will not necessarily become invalid just because the results of the search are turned over to the police."); State v. Jones, 666 N.W.2d 142, 150 (Iowa 2003) (upholding the search of a student's locker).
[71] Nance, *supra* note 10, at 937–38.
[72] New Jersey v. T.L.O., 469 U.S. 325, 328 (1985).
[73] *Id.*

marijuana, the assistant vice principal notified and turned the evidence over to the police.[74] The State brought criminal charges against the student, and while the student protested that the evidence was obtained through an unreasonable search, the Supreme Court ultimately upheld the search as reasonable.[75]

In addition to weakened Fourth Amendment rights, courts have also weakened students' Fifth Amendment protections. For example, courts "consistently hold that a school official may question a student without providing *Miranda* warnings, regardless of the possibility that the school official might later refer that student to law enforcement for wrongdoing."[76] The logical consequence of weakening students' Fourth and Fifth Amendment protections is that school officials will be more likely to discover incriminating evidence because students will be more likely to "fess up" without knowing that mandatory reporting requirements[77] will require school officials to report incriminating evidence to law enforcement. This evidence will be provided to prosecutors, even though it was "obtained under circumstances that would render such evidence inadmissible if seized from an adult or a juvenile outside of the school context."[78] Rather than protecting students, and setting them up to succeed, weakening their Fourth and Fifth Amendment rights pushes more students into the STPP, where they are set up to fail.[79]

(d) In Loco Parentis, Qualified Immunity, and Mandatory Reporting

While the rights of students in public schools have been restricted, teachers and administrators have been given broader in loco parentis roles,[80] and are often granted qualified immunity when sued by students for constitutional violations.[81]

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[74] *Id.* at 328–29.

[75] *Id.* at 329, 347.

[76] Nance, *supra* note 10, at 938.

[77] *See id.* at 934–36.

[78] *Id.* at 939.

[79] *Id.*

[80] *See* Bd. of Educ. v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring) (explaining that the common law doctrine of in loco parentis, which weakens a student's privacy rights, enables a public school to "adequately . . . carry out its responsibilities" of safety); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995) (explaining that the State's power over students in public schools was "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."); *see also* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *453 (1753) (explaining that a parent can "delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.").

[81] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377 (2009) ("A school official searching a student is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.") (internal quotations omitted).

These legal protections for teachers and administrators dealing with safety and discipline enable them to discover zero tolerance and criminal violations by students.[82] Once aware of criminal violations, some mandatory reporting statutes require teachers and administrators to turn the student in to the SRO stationed at the school, or to local police.[83] The cumulative effect of weakening students' rights, strengthening teachers' and administrators' disciplinary authority, and stripping teachers and administrators of discretion with zero tolerance policies and mandatory reporting statutes funnels more students into the STPP.[84]

Two Supreme Court cases held that teachers and administrators hold in loco parentis roles at school. In *Vernonia School District 47J v. Acton*,[85] the court held that schools' in loco parentis role expanded their powers to supervise and control students in a way that "could not be exercised over free adults."[86] Relying on their reasoning in *Vernonia*, the Supreme Court in *Earls* held that schools' in loco parentis powers gave them power "adequately to carry out [their] responsibilities" of safety, thereby diminishing student's privacy rights.[87] These cases contributed to a regime in schools that grants school officials in loco parentis rights that value safety and discipline over students' rights. Similar to the parens patriae power of state actors to care for "persons under a legal disability . . . who cannot take care of themselves,"[88] this broadly paternalistic in loco parentis power can produce bias and abuse when unchecked by rights.[89]

Additionally, the promise of qualified immunity for teachers and administrators minimizes whatever deterrent effect the threat of civil suits poses. In *Safford Unified School District No. 1 v. Redding*,[90] a school official conducted a strip search on a thirteen-year-old girl who was suspected of possessing pills that were prohibited under a zero tolerance policy.[91] Even though the court found the search unreasonable, the *Redding* court found the school official was entitled to qualified immunity because the thirteen-year-old student's right to be free from a

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[82] *See id.* at 371, 377–79 (holding that a school official was entitled to qualified immunity even though he conducted an unreasonable search on a student to discover whether she had violated one of the school's zero tolerance prohibitions); *Vernonia*, 515 U.S. at 650–51, 654–55 (explaining that the school's in loco parentis role contributed to the holding that the school's urinalysis test designed to test the presence of illegal drugs was reasonable).

[83] *See* Nance, *supra* note 10, at 934–36 (describing state mandatory reporting statutes that require school officials to report criminal acts).

[84] *See id.* at 929–45.

[85] 515 U.S. 646 (1995).

[86] *Id*. at 654–55.

[87] Bd. of Educ. v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring).

[88] Coupet, *supra* note 21, at 1308 (citations omitted).

[89] *See* Henning, *supra* note 21, at 426–30; *cf. In re* Gault, 387 U.S. 1, 18 (1967) ("[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

[90] 557 U.S. 364 (2009).

[91] *Id.* at 371, 374–75.

strip search was not "clearly established" at the time.[92] In addition to the protection of qualified immunity afforded school officials, many states have statues creating immunity for school officials who report "offenses to law enforcement in good faith."[93]

Federal and statewide mandatory reporting laws require teachers and administrators to report criminal activity observed within the school.[94] Under the Gun-Free Schools Act, "virtually every school district [in the nation] is required to have a policy in place that compels school officials to refer students who bring weapons to school to law enforcement."[95] On a statewide level, "twenty-six states require school officials to refer students to law enforcement for incidents relating to controlled substances, fifteen states require referral for offenses involving alcohol, eight states mandate referral for theft, nine states for vandalism of school property, and eleven states for robbery without using a weapon."[96] Depending on the violation, many states impose a criminal penalty on school officials for not reporting, and provide immunity for school officials when they do report.[97]

Coupled with the promise of qualified immunity, teachers' and administrators' in loco parentis rights empower them with broad disciplinary authority over students. With broader authority to investigate than prosecutors or police officers outside the academic environment, and with weaker due process and privacy protections for students, teachers and administrators are more likely to discover zero tolerance violations or criminal activity that they are likely to be statutorily required to report. This imbalance of power, unequal distribution of rights, and stripping of disciplinary discretion fuels the STPP.

2. Policing the Schools with School Resource Officers

Although very few studies demonstrate whether SROs make schools safer, the presence of law enforcement in schools has risen from a few hundred nationwide in the 1970s to over 19,000 in 2007.[98] SROs were placed in schools to make them safer, yet studies suggest that their presence in schools has contributed instead to

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[92] *Id.* at 377–79.

[93] Nance, *supra* note 10, at 936.

[94] *See id.* at 934–36.

[95] *Id.* at 934; *see* 20 U.S.C. § 7961(h)(1) (2015) ("No funds shall be made available under any subchapter of this chapter to any local educational agency unless such agency has a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency.").

[96] Nance, *supra* note 10, at 935.

[97] *Id.* at 935–36.

[98] *Id.* at 946–48; *see also* Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 157–59 (2015) (discussing the influx of School Resource Officers, the reasons for the trend, and the mixed results as to whether SROs increase school safety).

the overcriminalization of students' misbehavior, thereby fueling the STPP.[99] Three factors contribute to this phenomenon: the implicit bias of decisionmakers with discretionary powers,[100] insufficient training of SROs,[101] and the misuse of SROs for resolving noncriminal behavioral problems.[102]

(a) Implicit Bias in Discretionary Arrests

One of the most alarming characteristics of the STPP is the disproportionate rate at which students of color, students with disabilities, and LGBTQ students are disciplined or referred to law enforcement by school officials for discretionary violations.[103] Once referred to law enforcement, students from these groups are more likely to be criminalized.[104] Researchers point to implicit bias as one of the unintended but primary factors causing this disproportionality.[105] Studies demonstrate how "[r]ace plays a role in SROs' perceptions of situations involving youth and can influence split-second decisions related to culpability and whether an arrest is necessary."[106] In this sense, race likely plays a role in teachers', school administrators', and SROs' decisions to either penalize a student who "violated a discretionary law," or just "give a warning."[107] Since "[m]any—if not most—of the critical decisions impacting young people along the educational pipeline are discretionary individual decisions," implicit bias is one of the major contributing factors to the differential treatment of students.[108]

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[99] REDFIELD & NANCE, *supra* note 8, at 51–54; Nance, *supra* note 10, at 945–52; Merkwae, *supra* note 98, at 157–59.

[100] REDFIELD & NANCE, *supra* note 8, at 54; Nance, *supra* note 10, at 942–43; Merkwae, *supra* note 98, at 169.

[101] REDFIELD & NANCE, *supra* note 8, at 54; Nance, *supra* note 10, at 950–51; Merkwae, *supra* note 98, at 161–63.

[102] REDFIELD & NANCE, *supra* note 8, at 53–54; Nance, *supra* note 10, at 949–50; Merkwae, *supra* note 98, at 164, 168.

[103] REDFIELD & NANCE, *supra* note 8, at 54–55; *see also* Merkwae, *supra* note 98, at 168 (explaining that "SRO discretion in deciding whether to make an arrest" may be a cause of the trend that "students of color and students with disabilities bear a disproportionate risk for being criminalized at school"); FINAL REPORT, *supra* note 11, at 1–5 (finding that a lack of criteria for guiding discretionary decisions lead to disparate outcomes for youth along racial and geographical lines).

[104] *See* REDFIELD & NANCE, *supra* note 8, at 27, 30–31, 37, 39, 41–47; FINAL REPORT, *supra* note 11, at 1–5; Merkwae, *supra* note 98, at 168–72.

[105] REDFIELD & NANCE, *supra* note 8, at 54–55.

[106] Merkwae, *supra* note 98, at 169.

[107] *Id.*; *see also id.* at 54 (explaining that minority students are "disproportionately affected").

[108] REDFIELD & NANCE, *supra* note 8, at 55; s*ee also* Melinda D. Anderson, *When School Feels Like Prison*, THE ATLANTIC (Sept. 12, 2016), http://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/ [https://perma.cc/4DZN-GAQM] (explaining a study that demonstrates how "campuses with larger populations of

(b) Training School Resource Officers

While SROs are injected into schools with the hope that they will make the schools safer, few SROs are provided with training on how to work with youth.[109] Although the National Association of School Resource Officers ("NASRO"), a nonprofit founded in 1991, offers and encourages SRO-specific training,[110] very few jurisdictions require the SROs in their schools to attend such training.[111] In 2015, only twelve states had laws requiring SROs to have training; however, the training requirements are inconsistent across the twelve states.[112] Although "[s]ome states mandate training on how to respond to an active shooter," few focus on "dealing with children differently than adults."[113] Furthermore, in 2012, "most police academies d[id] not teach recruits about research on adolescent psychology and behavior."[114] According to the United States Department of Justice, the lack of substantive SRO training on child psychology, de-escalation, and children with disabilities contributes to the STPP and may give rise to valid civil rights claims.[115]

Proponents of SRO training suggest that the training should emphasize teaching SROs that their role is safety not discipline,[116] de-escalation techniques if they get involved in safety issues,[117] how to specifically work with children,[118] and how to work with students who have disabilities.[119] Without this training, SROs' decisions "to arrest a student" are more likely to be "based on criteria that are wholly distinct from and even anathema to the best interests of the student or the school as a whole."[120]

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students of color are more likely to use harsh surveillance techniques," sending a message to students that "white children have greater privacy rights than nonwhite children.").

[109] Merkwae, *supra* note 98, at 162–63.

[110] *About NASRO*, NASRO, https://nasro.org/about/ [https://perma.cc/LHF7-BB9A] (last visited July 26, 2017).

[111] Mark Keierleber, *Why So Few School Cops Are Trained to Work with Kids*, THE ATLANTIC (Nov. 5, 2015), http://www.theatlantic.com/education/archive/2015/11/why-do-most-school-cops-have-no-student-training-requirements/414286/ [https://perma.cc/LT2A-BLLR].

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Statement of Interest of the United States at 11–12, 14–15, S.R. v. Kenton Cty., (No. 2:15-CV-143), 2015 WL 10058699 (E.D. Ky. Oct. 2, 2015).

[116] Keierleber, *supra* note 111.

[117] *Id.*

[118] Nance, *supra* note 10, at 949–50.

[119] Keierleber, *supra* note 111.

[120] Nance, *supra* note 10, at 951.

(c) Blurred Lines: Using School Resource Officers for Discipline, Not Safety

SROs were injected into the nation's public schools in an effort to ensure that our schools remained safe.[121] Since most of these SROs were not provided with SRO-specific training and few had clearly defined roles within their schools,[122] SROs came to be used as disciplinarians by teachers and school administrators.[123] The lines between what was a disciplinary issue and what was a safety or a criminal issue became blurred.[124] The practical effect of flooding our schools with untrained and unhinged SROs was the over criminalization of student behavior, the STPP.[125]

The U.S. Department of Justice's *Investigation of the Ferguson Police Department* yields insight into this phenomenon:

> SROs told us that they viewed increased arrests in the schools as a positive result of their work. This perspective suggests a failure of training (including training in mental health, counseling, and the development of the teenage brain); a lack of priority given to de-escalation and conflict resolution; and insufficient appreciation for the negative educational and long-term outcomes that can result from treating disciplinary concerns as crimes and using force on students.[126]

Absent job descriptions that "clearly define the SROs' role or limit SRO involvement in cases of routine discipline or classroom management,"[127] SROs became more likely to intervene when they observed students "being disruptive and disorderly . . . because they view this as one of their duties, even when those duties overlap with the traditional duties of school officials."[128] When it is unclear

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[121] Merkwae, *supra* note 98, at 163.

[122] *See* Keierleber, *supra* note 111, at 3–5; Merkwae, *supra* note 98, at 162–64.

[123] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 37 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/F9WX-UEN9] (finding that the Ferguson Missouri Police treated "routine discipline issues as criminal matters") [hereinafter DOJ, FERGUSON].

[124] *See id.*; Merkwae, *supra* note 98, at 162–64 (explaining that "when sworn police officers are provided with unique access to students and are given disciplinary authority by school administrators, it is not always clear where administrators' disciplinary roles stop and police powers begin.") (internal quotation marks omitted).

[125] *See* DOJ, FERGUSON, *supra* note 123, at 38; REDFIELD & NANCE, *supra* note 8, at 51–54.

[126] DOJ, FERGUSON, *supra* note 123, at 38.

[127] *Id.* at 37.

[128] Nance, *supra* note 10, at 949–50.

"where administrators' disciplinary roles stop and police powers begin,"[129] benign student behavior is more likely to be criminalized.[130]

The broad power of SROs to criminalize behavior, the automatic suspension or expulsion with zero tolerance policies, the mandatory reporting statutes, and the protections afforded school administrators greatly overpower the weakened rights protecting students. This imbalance of power is at the root of the STPP. If schools must inject SROs into the academic setting, automatically suspend or expel students for zero tolerance violations, require school officials to discover and report criminal violations, and weaken students' constitutional rights, then they need to reconsider their methods of punishment and reeducate those in charge of punishment. These are two easy steps schools can take to minimize the effect the STPP has on our nation's children.

B. Utah's Attempt at Juvenile Justice Reform

The major contributing factors to the STPP outlined in this Note are zero tolerance policies,[131] the limited constitutional rights of students,[132] the police power of school administrators,[133] and the injection of SROs into the academic environment without clear job responsibilities and training.[134] To address the causes and effects of the STPP, researchers focusing on this problem have recommended: expanding the legal protections for juveniles;[135] refraining from using SROs for disciplinary issues;[136] clearly distinguishing educator and administrator disciplinary responsibilities from SRO responsibilities;[137] retraining SROs to better understand the effects of the STPP on youth and how to work with youth populations, minority populations, students with disabilities, and LGBTQ

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[129] Merkwae, *supra* note 98, at 162–64.

[130] *See* DOJ, FERGUSON, *supra* note 123, at 37; Statement of Interest of the United States at 11, S.R. v. Kenton Cty., (No. 2:15-CV-143), 2015 WL 10058699 (E.D. Ky. Oct. 2, 2015); *cf.* DEAR COLLEAGUE, *supra* note 42 (recommending training and professional development for all school personnel, the appropriate use of school resource officers, and the use of restorative justice practices).

[131] *See supra* Part A.1.(a).

[132] *See supra* Part A.1.(b)–(c).

[133] *See supra* Part A.1.(d).

[134] *See supra* Part A.2.

[135] *See* FINAL REPORT, *supra* note 11, at 15; Fox, *supra* note 16, at 1236 (arguing that there will be no revolution in juvenile justice until juveniles are granted the right to counsel); REDFIELD & NANCE, *supra* note 8, at 12; *Developments in the Law*, *supra* note 16, at 1763–69 (arguing that the Fourth Amendment protections afforded students should be modified); *cf. In re* Gault, 387 U.S. 1, 18–19 (1967) ("Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

[136] *See* ALBERS ET AL., *supra* note 11, at 4, 20; JUSTICE POLICY INSTITUTE, *supra* note 17, at 31; REDFIELD & NANCE, *supra* note 8, at 12–13.

[137] *See* REDFIELD & NANCE, *supra* note 8, at 13; PROSPERO, *supra* note 18, at 6.

students;[138] adopting restorative justice practices along with other evidence based alternatives to the juvenile justice system;[139] and reforming the discretionary power of state actors to cite, refer, and sentence youth within the juvenile justice system.[140]

Over the last two years, Utah has attempted to implement some of these recommendations by passing three new laws that regulate SROs, expand the legal protections afforded juveniles, and guide the exercise of discretion throughout the juvenile justice system. While these reforms make important steps in addressing Utah's STPP, they do not eliminate the potential for the bias and abuse of discretion that contribute to, and the disparate outcomes manifested in, Utah's STPP.

1. Utah's School Resource Officers Law

In June of 2014, Dr. Moises Prospero submitted the *DMC Evidence-Based, Best Practices Intervention Report* (*Intervention Report*) to the Utah Board of Juvenile Justice Disproportionate Minority Contact Subcommittee ("DMC subcommittee").[141] Utah's DMC subcommittee is "tasked with addressing the overrepresentation of minority youth in the juvenile justice system" and aims "to eliminate the disproportionate representation of minority youth at all points of contact in the juvenile justice system."[142] Prospero's *Intervention Report* recommended creating written agreements between SROs and school districts that outlined SRO responsibilities, the development of SRO-specific training programs, and the use of diversion programs; or alternatives to the juvenile justice system, like peer courts.[143] Two years later, Sandra Hollins, the first African American

[138] *See* ALBERS ET AL., *supra* note 11, at 20–21; FINAL REPORT, *supra* note 11, at 9; JUSTICE POLICY INSTITUTE, *supra* note 17, at 32; PROSPERO, *supra* note 18, at 6–7; REDFIELD & NANCE, *supra* note 8, at 12–13.

[139] *See* ALBERS ET AL., *supra* note 11, at 6, 22; FINAL REPORT, *supra* note 11, at 12–13; PROSPERO, *supra* note 18, at 6; REDFIELD & NANCE, *supra* note 8, at 13. For a discussion on restorative justice, see *infra* Part B.2.(a).

[140] *See* FINAL REPORT, *supra* note 11, at 12–21; REDFIELD & NANCE, *supra* note 8, at 13. *See generally* Coupet, *supra* note 21, at 1341–46 (arguing for guiding discretion towards the use of individualized, restorative justice based, justice for youth offenders); Henning, *supra* note 21, at 436–61 (arguing that reforming prosecutorial decision-making in the juvenile justice system could reduce the racial disparities in the juvenile justice system).

[141] PROSPERO, *supra* note 18, at 1.

[142] *What Is DMC Committee?*, UTAH BOARD JUVENILE JUST., https://justice.utah.gov/Juvenile/ubjj_dmc.html [https://perma.cc/U286-KXDS] (last visited July 26, 2017). The Utah Board of Juvenile Justice is a wing of the Utah Commission on Criminal and Juvenile Justice. *Id.*

[143] PROSPERO, *supra* note 18, at 6–7.

woman to be elected to the Utah State Legislature,[144] sponsored the "School Resource Officers" bill ("SRO Law") that included Prospero's recommendations when it was signed into law on March 22, 2016.[145]

(a) Training School Resource Officers

The "School Resource Officer" training section of the SRO Law requires the State Board of Education to create and "make available a training program for school principals and school resource officers."[146] In creating the training program, the State Board of Education is required to "work in conjunction with the State Commission on Criminal and Juvenile Justice . . . solicit input from local school boards . . . and consider the current United States Department of Education recommendations on school discipline and the role of a school resource officer."[147] The law also includes recommended topics for the training, but does not make any of the topics mandatory. Among the suggested topics are: training on childhood development; how to appropriately respond to students and disabled students; de-escalation and conflict resolution techniques; cultural awareness; restorative justice practices; identifying whether a student has been exposed to trauma and how to make appropriate referrals for that student; student privacy rights; the negative consequences associated with injecting youth into the juvenile and criminal justice system; strategies to reduce youth involvement in the justice system; and the distinctions between the roles and responsibilities of SROs and school administrators.[148]

(b) Defining School Resource Officers' Responsibilities

The section of the "School Resource Officers" law that discusses the contractual relationship between law enforcement agencies and local education agencies requires the contract to include provisions that will help minimize the misuse of SROs.[149] Under this law, contracts between law enforcement agencies and local education agencies must include language that requires SROs to "emphasize the use of restorative approaches to address negative behavior."[150] The contract must also describe the responsibilities of the SROs and the school administrators to "maintain safe schools . . . and support educational opportunities

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[144] Lee Davidson, *Black Politicians Beat Odds in Utah*, SALT LAKE TRIB. (Jan. 5, 2015), http://www.sltrib.com/news/2021834-155/black-politicians-beat-odds-in-utah [https://perma.cc/8YRD-4VH6].

[145] H.B. 460, 61st Leg., Gen. Sess. (Utah 2016); *see* UTAH CODE ANN. §§ 53A-11-1601, 1602, 1603, 1604 (2016).

[146] UTAH CODE ANN. § 53A-11-1603 (2016).

[147] *Id.*

[148] *Id.*

[149] *Id.* § 1604.

[150] *Id.*

for students."[151] The contract shall include detailed language designating the "student offenses that the SRO shall confer with" school administrators to resolve, including offenses that are "administrative issues that an SRO shall refer to a school administrator for resolution."[152] The law mandates that contracts must contain "a detailed description of the rights of a student under state and federal law," regarding searches, questioning, and privacy.[153] Finally, contracts must include "training requirements," and one of those requirements is that the SRO and the school principal "jointly complete the SRO training" designed by the State Board of Education.[154]

(c) Utah's SRO Law Addresses the Misuse of SROs and the Abuse of Student Rights

If implemented successfully, the SRO Law could address the causes of Utah's STPP in five ways. First, by requiring SROs *and* school principals to attend the SRO training together,[155] the SRO Law creates a critical dialogue between law enforcement agencies and local education agencies about how SROs should be used, how they can be used, and where the line is between an SRO's and a school administrator's responsibilities. Until the SRO Law was enacted, this was not done on a broad scale in Utah.[156] While this dialogue is an important first step towards reforming how students are disciplined at school—the entry point to the STPP—the effectiveness of this dialogue will depend on the trainer, the SROs, and the school administrators in attendance.

Second, although the SRO Law does not mandate any of the training topics it lists, it does limit the range of SRO training topics to the list it provides.[157] These topics could enable SROs to mitigate the effects of the STPP on students in their schools. For example, learning how the adolescent mind works, how to respond age appropriately to students, how to work with disabled students, or what is considered normal behavior in different cultural contexts would aid an SRO in differentiating between behavioral and criminal issues.[158] Learning de-escalation and conflict resolution techniques could help an SRO to prevent minor infractions from becoming major criminal violations. Learning about restorative justice practices could enable SROs to divert students from the juvenile justice system when they committed minor infractions at school.[159] Furthermore, learning about

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[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* § 1603.
[156] *See* PROSPERO, *supra* note 18, at 3.
[157] UTAH CODE ANN. § 53A-11-1603 (2016).
[158] *See supra* text accompanying notes 96–98.
[159] *See supra* text accompanying note 108; PROSPERO, *supra* note 18, at 6–7 (recommending peer courts, which are restorative in nature, as alternatives to the juvenile justice system).

the long-term negative consequences associated with youth involvement in the juvenile justice system could encourage an SRO to consider how best to serve youth before citing and referring a youth to the juvenile justice system.[160]

An SRO armed with the knowledge and insight from each of these topics could address the bias and abuse of discretion that often cause students to be funneled into the STPP. However, like the deferential "with all deliberate speed" language from *Brown II*, the fact that the SRO Law's training language is not mandatory could be a shortcoming that permits those with local control to undermine the purpose of the training program.[161]

Third, by requiring that law enforcement agencies and local education agencies enter into a contract defining the roles and responsibilities of SROs and school administrators, school administrators and SROs will be less likely to exercise unnecessary police power over students. Instead, when a school administrator or an SRO believes a student's behavior has risen to the level of criminal, the SRO and the school administrator can confer to determine who should take responsibility. If they disagree, or they do not know, they can reference their contract. If implemented properly, the practical effect of having a contract that clearly defines where SROs' responsibilities begin and end could be that fewer students are criminalized for benign behavioral missteps.[162]

Although this development is promising, any anticipated positive results could be undermined by ambiguous or unenforced contracts between law enforcement agencies and local education agencies. By granting local agencies the discretion to create their own contracts, the SRO Law risks the possibility that some communities may not work to combat the overcriminalization of adolescent behavior.

Fourth, the SRO Law requires all contracts to include affirmative requirements for SRO services.[163] Under this section of the SRO Law, SROs are required to collaborate with school administrators to solve problems and emphasize the use of restorative, not punitive, practices for resolving negative student behavior.[164] Under the SRO Law, when a student violates a rule or a law, SROs must try to resolve the problem with school administrators using restorative practices.[165] If implemented properly, problems would be dealt with in-house before the student is referred to the juvenile justice system. This will divert students from the juvenile justice system, causing fewer students to be funneled into the STPP.

While this affirmative requirement in the SRO Law has the potential to address abuse of discretion by way of resisting a change in SRO practices, it fails to use carrots or sticks to incentivize compliance. Absent statutory incentives, like

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[160] *See supra* text accompanying note 99.
[161] *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).
[162] *See supra* text accompanying notes 95, 102–108.
[163] UTAH CODE ANN. § 53A-11-1604 (2016).
[164] *Id.*
[165] *Id.*

making SROs responsible for educational outcomes, these affirmative requirements could go unenforced.

Finally, the SRO Law aims to protect students' constitutional rights by encouraging a student rights section in the SRO training, and requiring that the contract between the law enforcement agency and the local education agency include a detailed description of students' state and federal rights. With a detailed description of students' rights in the SRO employment contract, SROs and school administrators should no longer be unaware of what rights a student has. They should know what procedures violate the student's due process, privacy, and Fifth Amendment rights. If an established right is clearly defined in the contract, yet the SRO or the school administrator violates this right, it is possible that neither will have a valid claim for qualified immunity.[166]

This section of the SRO Law has the potential to deter honest state actors against grossly violating students' rights. However, the SRO Law creates no affirmative right for students to know what their rights are, or to enforce those rights. Absent these affirmative educational and process rights for students, this section of the bill fails to alter the balance of power between school officials (including SROs) and students. Instead, this section of the bill relies on the benevolence of school officials to act in students' best interests.

2. Utah's Juvenile Defense Law and Juvenile Justice Amendments

On June 16, 2016, Utah's Governor, Senate President, House Speaker, and Supreme Court Chief Justice "announced the formation of the interbranch Utah Juvenile Justice Working Group [to] conduct a data-driven examination of Utah's juvenile justice system and issue a comprehensive set of policy recommendations" with the goals of "protecting public safety, holding youth accountable, containing costs, and improving outcomes for youth, families, and communities."[167] After months of "exhaustive review of quantitative information from Utah's courts and juvenile corrections system" as well as "more than 30 roundtable discussions" with key stakeholders in the juvenile justice system, the Utah Juvenile Justice Working Group ("Working Group") published its report in November, 2016.[168]

The Working Group made four key findings relating directly to the STPP.[169] First, the Working Group found that a "lack of statewide standards leads to inconsistent responses and disparate outcomes throughout the juvenile justice system."[170] The "disparities based upon race and geography . . . for youth with

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[166] *See supra* text accompanying notes 66, 72–74, 94.

[167] *Utah Leaders Announce Formation of Juvenile Justice Working Group*, UTAH GOVERNOR GARY HERBERT (June 16, 2016), https://www.utah.gov/governor/news_media/article.html?article=20160616-1 [https://perma.cc/5WBU-VLPU].

[168] *See* FINAL REPORT, *supra* note 11, at 1.

[169] *Id.* at 1–2.

[170] *Id.* at 1.

similar offenses at every stage of the system" indicate that sentencing officers' discretion produced biased results.[171]

Second, "[a]ffordable, accessible services that effectively hold youth accountable and keep families intact are largely unavailable to the courts across the state."[172] While data shows that "early intervention, substance abuse treatment, and family services are in place and working effectively" in some districts, "the scarcity of services in the communit[ies] often leads to decisions that send lower-level youth deeper into the justice system."[173]

Third, while detaining juveniles "costs up to 17 times more than community supervision," it "results in similar rates of re-offending."[174] State actors frequently used their discretion to send juveniles to punitive detention programs that were more expensive and more likely to increase the risk of recidivism than alternatives to detention.[175] These findings demonstrate that the discretionary powers of state actors were not always used in the child's, the families', the community's, or the state's best interests. Absent clear guidelines to guide state actors' decisions and evidence-based diversion programs to serve juveniles, the power of discretion has been used to place juveniles in ineffective, expensive, and punitive programs.

Finally, the Working Group found that "[m]ost youth do not receive legal representation throughout the duration of the court process, even when their liberty is at stake."[176] Without a legal advocate to demand the "constitutional domestication"[177] of the juvenile courts, the parens patriae power of the state is left unchecked, and the fate of juveniles is in the hands of police officers, prosecutors, probation officers, and juvenile court judges.[178] The Working Group's findings indicate that Utah state actors have not always used their discretion in juveniles' best interests, and most juveniles have had no legal representation to protect their constitutional rights and advocate for their best interests.[179]

(a) Protecting the Constitutional Rights of Juveniles

In response to the Working Group's findings, the Utah State Legislature passed S.B. 134, Indigent Defense Commission Amendments,[180] during Utah's 2017 legislative session. The Indigent Defense Commission Amendments

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[171] *Id.*
[172] *Id.* at 2.
[173] *Id.* at 10.
[174] *Id.* at 1.
[175] *Id.*
[176] *Id.* at 2.
[177] *See In re* Gault, 387 U.S. 1, 22 (1967) (explaining that expansion of procedural rights for juveniles was a necessary "constitutional domestication" of the juvenile courts).
[178] *See* Fox, *supra* note 16, at 1236–38 (explaining that "[a] conscientious and experienced judge will sometimes raise questions concerning possible defenses when the child is not represented by counsel"); Henning, *supra* note 21, at 426.
[179] FINAL REPORT, *supra* note 11, at 1–2, 15.
[180] S.B. 134, 62d Leg., Gen. Sess. (Utah 2017).

("Juvenile Defense Law"), hints at expanding the constitutional protections afforded juveniles in Utah by suggesting that counsel should be provided "at all stages" for "[i]ndigent parties in juvenile delinquency and child welfare proceedings."[181] While the Juvenile Defense Law does not directly provide for Parcounsel at all stages for indigent youth, or address how to keep students outside of the STPP, the law takes a baby step towards protecting the constitutional rights of students once they have been funneled into the STPP by recognizing the importance of counsel. However, as some have argued, "[t]he granting of procedural rights can hardly become a reality for children without lawyers to assert them on their behalf."[182] Without advocates to protect the rights of indigent youth, those youth will be more vulnerable to the bias and abuse of discretion that contribute to the disparate outcomes in Utah's STPP.[183]

(b) Reforming the Discretionary Powers of State Actors

Responding to the Working Group's findings, the Utah State Legislature also passed H.B. 239, Juvenile Justice Amendments (the "Amendments") during the 2017 legislative session.[184] In large part, the Amendments address the misuse of parens patriae power in Utah by guiding discretion using standards and procedures, the limitation of punitive options, and the expansion of evidence-based rehabilitative services.[185]

First, the Amendments reformed how certain conduct was reported by narrowing what conduct could be reported to law enforcement, by expanding what offenses qualified for school-based interventions, and by requiring that minor school-based offenses were reported only to school-based diversion programs.[186] Second, the Amendments changed public school discipline policies by declaring when schools must refer minor school-based offenses to diversion programs.[187]

These two changes should address the overcriminalization of adolescent behavior, and thereby diminish the flow of students into the STPP. Taking law enforcement officers out of the equation for school-based offenses makes sense from a rehabilitative standpoint. Law enforcement officers have training in identifying criminal behavior and addressing that behavior with punitive models. Despite the SRO Law, SROs throughout the state do not yet have training in child developmental psychology and addressing adolescent behavior with rehabilitative

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[181] *Id.*; *see also* UTAH CODE ANN. § 77-32-804(1)(iv)(B) (2017).
[182] Fox, *supra* note 16, at 1236.
[183] *See* FINAL REPORT, *supra* note 11, at 2, 11–12.
[184] H.B. 239, 62d Leg., Gen. Sess. (Utah 2017).
[185] *Id.*
[186] *Id.*; UTAH CODE ANN. § 78A-6-603 (2008); UTAH CODE ANN. § 53A-11-101.7 (2014); UTAH CODE ANN. § 53A-11-911 (2017).
[187] *See* H.B. 239, 62d Leg., Gen. Sess. (Utah 2017); UTAH CODE ANN. § 53A-11-910 (2008); UTAH CODE ANN. § 76-10-105 (2010); UTAH CODE ANN. § 53A-11-908 (2010); UTAH CODE ANN. § 53A-11-901 (2015); UTAH CODE ANN. § 53A-11-911 (2017).

techniques.[188] Public school employees and school-based diversion programs do have this training. Placing a stronger burden on school officials and school-based diversion programs to use rehabilitative approaches in response to disruptive behavior addresses one of the primary causes of the STPP, the overcriminalization of adolescent behavior.

Third, the Amendments limit the power of schools and juvenile courts to punish juveniles for "disruptive student behavior," modifies the notice provisions for disruptive student behavior, and requires schools to use school-based problem solving interventions for disruptive behavior.[189] This change limits the power of schools and juvenile courts to punish students for the vague offense of "disruptive student behavior." By forcing schools to refer these offenses to problem solving diversion programs, this change addresses another cause of the STPP—zero-tolerance-like catchall offenses—thereby increasing the likelihood that students will receive affordable rehabilitative treatment.

Fourth, the Amendments removed the limitation that minors can only receive rehabilitative dispositions if it is their first violation of alcohol, drug paraphernalia, controlled substances, or prohibited acts charges.[190] At most, this is a change in judicial discretion. While this change does not significantly narrow the state's discretionary powers to punish youth for drug-related offenses, it does expand the state's discretionary powers to give juveniles rehabilitative dispositions for those offenses.

Fifth, the Amendments require Utah's Commission on Criminal and Juvenile Justice ("CCJJ") to study evidence-based community and diversion programs, develop training and guidelines for those programs, and, along with the Division of Juvenile Justice Services ("JJS"), expand their availability throughout the state.[191] Although this reform will take time to implement, it has the potential to be a crucial element of the Amendments. If the CCJJ can find evidence-based programs that will effectively rehabilitate, rather than punish, juveniles, JJS could offer these programs throughout the state. These programs would cost less, serve youth more effectively, and divert many youths from the STPP.[192] However, this reform will be ineffective if the CCJJ does not find programs that work (i.e. programs that rehabilitate juveniles without disparate outcomes), if local communities reject the programs (i.e. abuse of discretion), or if JJS is not given the funding to implement these programs (resulting in disparate outcomes based on geography).

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[188] *See* discussion *infra* Parts A.2.(b), B.1.(a).

[189] Utah H.B. 239, 62d Leg., Gen. Sess. (Utah 2017); UTAH CODE ANN. § 53A-11-910 (2008); UTAH CODE ANN. § 53A-11-911 (2017).

[190] Utah H.B. 239, 62d Leg., Gen. Sess. (Utah 2017); UTAH CODE ANN. § 32B-4-409 (2015); UTAH CODE ANN. § 32B-4-411 (2015); UTAH CODE ANN. § 58-37b-9 (2015); UTAH CODE ANN. § 58-37-8 (2016); UTAH CODE ANN. § 32B-4-410 (2017).

[191] H.B. 239, 62d Leg., Gen. Sess. (Utah 2017); UTAH CODE ANN. § 62A-7-101 (2008); UTAH CODE ANN. § 62A-7-601 (2008); UTAH CODE ANN. § 63M-7-404 (2015); UTAH CODE ANN. § 63M-7-204 (2017); UTAH CODE ANN. § 63M-7-208 (2017).

[192] *See* discussion *infra* Part B.3.

Sixth, the Amendments expand the criteria for when youth must be offered nonjudicial adjustments (i.e. diversion programs), strips the requirement that juveniles must admit guilt and waive their privilege against self-incrimination to obtain a nonjudicial adjustment, prohibits denial of nonjudicial adjustments if the juvenile cannot pay for the service, requires that fees adhere to a statewide sliding scale, and permits prosecutors to dismiss cases where juveniles fail to meet the conditions of their nonjudicial closure.[193]

By expanding the requirements for offering nonjudicial adjustments with statutory criteria and a sliding scale for fees, the Amendments increase the likelihood that youth will receive rehabilitative dispositions. Additionally, eliminating the requirement that youth admit guilt and waive their privilege against self-incrimination before participating in a diversion program is one of the few ways the Amendments protect the constitutional rights of juveniles.

Finally, the Amendments enable school boards to create and partner with certified youth court programs, permit referrals to youth courts for minor school-based offenses, permit youth courts to take on juveniles referred for multiple minor offenses, and eliminate the requirement that juveniles waive their right to a speedy trial and their right against self-incrimination to participate in the program.[194]

Protecting juveniles' constitutional right to a speedy trial and privilege against self-incrimination in youth courts is a positive step that limits the parens patriae power of state actors in these diversion programs. Additionally, by enabling partnerships between schools and youth courts, these reforms make way for the proliferation of school-based restorative justice diversion programs throughout the state. Coupled with the requirement that school-based offenses are referred to diversion programs as well as the CCJJ's mandate to study and expand the use of evidence-based diversion programs, this reform paves the way for an institutional shift in how Utah's parens patriae power is administered in response to first time, low-risk juvenile offenders. However, this reform is limited because it is permissive rather than mandatory. If school boards and communities throughout Utah decide not to create youth court diversion programs, this reform will have no positive effect for the juveniles in those communities, resulting in no diversion-program check on the bias and abuse of discretion associated with the STPP at the school level, and causing disparate outcomes based on geography.

Utah's Juvenile Justice Amendments, H.B. 239, made significant improvements to the juvenile justice system by limiting and guiding state actors' powers of discretion throughout the system. However, in large part, the reforms either passed these powers of discretion to state actors with less punitive power (i.e. public school officials or diversion programs), or permitted juvenile court judges to exercise more discretion in deciding whether to send juveniles through

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[193] Utah H.B. 239, 62d Leg., Gen. Sess. (Utah 2017); UTAH CODE ANN. § 78A-6-602 (2017).

[194] Utah H.B. 239, 62d Leg., Gen. Sess. (Utah 2017); UTAH CODE ANN. § 78A-6-1203 (2013); UTAH CODE ANN. § 53A-3-402 (2017); UTAH CODE ANN. § 53A -11-911 (2017); UTAH CODE ANN. § 78A-6-117 (2017) (effective July 1, 2018).

diversion programs. These reforms do little to address the bias and abuse of discretion that contribute to, and the disparate outcomes manifested in, Utah's STPP. However, Utah can address these problems by using its existing network of youth courts to divert students from the STPP.

3. Utah's Network of Restorative Justice Youth Courts

Originally passed in 1999, the Utah Youth Court Diversion Act ("Youth Court Act") defines the types of offenses that youth courts are permitted to hear, outlines the referral process for youth court juvenile offenders, lays out parameters for disposition options, creates a board responsible for certifying and evaluating youth courts, and permits local public school boards to provide school credit to students who volunteer in youth courts.[195]

The Youth Court Act permits youth courts to take the cases of youth offenders who have committed "minor offenses,"[196] which are defined as "any unlawful act that is a status offense or would be a class B or C misdemeanor, infraction, or violation."[197] Law enforcement personnel, school officials, prosecuting attorneys, juvenile court officers, and parents can refer juveniles to youth courts as an intervention aimed at preventing further juvenile delinquency.[198] A youth court cannot accept referrals if it is not certified by the Utah Youth Court Board.[199] Once a referral is made, the youth court coordinator must screen the case to determine if it qualifies.[200] Youth courts can exercise authority over youths who do have a pending law violation with the juvenile courts if the juvenile courts and the prosecuting attorney agree, or if the youth court offense is not a law violation.[201] Youth courts can decline to accept a youth or terminate a youth for any reason, and a youth or a youth's parent or guardian can withdraw from youth court at any time.[202]

Youth volunteers determine the youth court dispositions (i.e. "sentences") for each youth court. Acceptable dispositions include community service, educational classes, counseling, treatment, reporting to the youth court, participating in mentoring programs, participating as a volunteer with the youth court, letters of apology, essays, and "any other dispositions considered appropriate by the youth court and adult coordinator."[203]

Supporting the Youth Court Act, The Utah Youth Court Association ("UYCA") is a collection of youth courts throughout the state of Utah. The UYCA aims to train and educate youth court workers and volunteers, help establish

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[195] UTAH CODE ANN. § 78A-6-1201 (2016).
[196] *Id.* § 78A-6-1203 (2013).
[197] *Id.* § 78A-6-1202 (2017).
[198] *Id*. § 78A-6-1203 (2013).
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] UTAH CODE ANN. § 78A-6-1205 (2017).

restorative justice youth courts, collect statewide data, and promote the work of youth courts throughout the state.[204] In 2015, Utah had twenty-three certified youth courts.[205] Operating under the Youth Court Act, the UYCA's youth courts can be used as restorative justice alternatives to the juvenile justice system. In this sense, Utah's restorative justice youth courts can combat Utah's STPP.

(a) Restorative Justice Youth Courts

Restorative justice aims to prevent future criminal activity through a process that focuses on three stakeholders and three goals.[206] The stakeholders are victims, communities, and offenders; the goals are community protection, skill development, and accountability.[207] Restorative justice focuses on a process of "repairing harm and rebuilding relationships . . . that involves stakeholders in an active and respective way, while emphasizing the community's role in problem solving."[208] Many youth courts have adopted restorative justice models. The National Association for Youth Courts reports "[t]he primary function of most youth court programs is to determine a fair and restorative sentence or disposition for the youth respondent."[209]

Additionally, in *The Impact of Teen Court on Young Offenders*, the researchers found that all the youth courts they evaluated had significantly lower rates of recidivism (less than 9%) than juvenile courts.[210] The authors of the study concluded that effective youth courts could significantly lower the rate of recidivism, or the "rate at which youth commit new offenses after teen court."[211] While practices varied significantly between the youth courts studied, the researchers noted that "many [youth volunteers] are former defendants" and positive peer pressure was "the one guiding idea behind all teen courts."[212]

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[204] BYLAWS OF THE UTAH STATE YOUTH COURT ASSOCIATION 2 (2015), http://www.utahyouthcourts.com/uploads/8/6/4/8/86488034/utah_youth_court_executive_board_bylaws.pdf [https://perma.cc/6V5K-5HJU] [hereinafter BYLAWS].

[205] UTAH YOUTH COURT ASSOCIATION, UTAH'S CERTIFIED YOUTH COURTS 2–4 (2015), http://utahstudentsuccess.weebly.com/uploads/8/6/8/0/8680113/usoe_conf_handout.pdf [https://perma.cc/S8EV-9WUH].

[206] Tracy Godwin, *The Role of Restorative Justice in Teen Courts: A Preliminary Look*, NAT'L YOUTH COURT CTR. 1 (2001), http://www.globalyouthjustice.org/uploads/The_Role_of_Restorative_Justice.PDF [https://perma.cc/H7HC-LJ83].

[207] *Id.*

[208] *Id.*

[209] *Facts and Stats*, NAT'L ASS'N YOUTH COURTS, http://www.youthcourt.net/?page_id=24 [https://perma.cc/5LMM-RP9K] (last visited July 26, 2017).

[210] JEFFREY A. BUTTS ET AL., THE IMPACT OF TEEN COURTS ON YOUNG OFFENDERS 27 (2002).

[211] *Id.* at 10.

[212] *Id.* at 1; *see also* Rebecca Owen, Univ. of Utah, Speech at the Meeting Discussing Restorative Justice: Salt Lake Peer Court Recidivism to Juvenile Court at the American Society of Criminology Conference (Nov. 18, 2016) (analyzing a data set from Salt Lake

(b) Weakening Utah's School to Prison Pipeline with Restorative Justice Youth Courts

Utah's Youth Court Act sets up a framework for certified youth courts to legally operate as restorative justice diversion programs for first time juvenile offenders. With twenty-three certified youth courts throughout Utah enabled by the Youth Court Act, and the UYCA, youth courts can and should be used to combat Utah's STPP. Utah's youth courts can mitigate the effects of Utah's racially biased STPP by: (i) serving as a quality control check on biased schoolhouse discipline, (ii) diverting students from juvenile court, and (iii) giving students a stake in the process of dismantling Utah's STPP.

(i) Youth Courts as Quality-Control Checks on Biased Schoolhouse Discipline

Under the Utah Youth Court Act, any person can refer a youth to a youth court for a minor first-time offense. This includes teachers, principals, and SROs. When a referral is sent to a local youth court, the adult coordinator at the youth court is required to screen all referrals to determine whether the youth qualifies for their restorative justice program. Since these are restorative justice youth courts, part of this screening process includes contacting the key stakeholders: the referring officer at the school (community member), the parent or legal guardian of the referred youth (offender's family), the referred youth herself (offender), and any victims.[213] If the screening process reveals that there was no real offense, an adult coordinator could declare the case unfit for youth court. The Youth Court Act also states that "[y]outh courts may decline to accept a youth" for any reason.[214] Since youth courts are required to screen referred youth and can reject referred youth for any reason, youth courts have a unique power to act as a check on the bias and abuse of discretion that contribute to the funneling of students into the STPP.[215]

The UYCA collects statewide data on youth courts.[216] Included in this data set is demographic information of the referred youth as well as the identity of the referring officer.[217] If the UYCA and their member courts notice that certain referring officers disproportionately refer students of color, students with

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Peer Court's 2010–2014 years and finding that the research suggested that students who graduated from Salt Lake Peer Court were unlikely to recidivate to Utah's juvenile court).

[213] *See* Godwin, *supra* note 206, at 1 (explaining that restorative justice focuses on victims, offenders, and community members).

[214] UTAH CODE ANN. § 78A-6-1203(8) (2017).

[215] *See supra* text accompanying notes 80, 83–86.

[216] *See* BYLAWS, *supra* note 204, at 2 (noting one of the objectives of the UYCA is "[c]ollecting and compiling statewide statistics and survey data.").

[217] *Data Collection Requirements Years 2015–2017*, UTAH YOUTH COURT ASS'N, http://www.utahyouthcourts.com/certification.html [https://perma.cc/Z72J-6GPD] (last visited May 13, 2016).

disabilities, or LGBTQ students, the youth courts could scrutinize the statistics in the presence of the referring officer, decline further referrals from the referring officer, or do their best to fully support and nurture students referred to them from referring officers who disproportionately refer students from certain groups. In these ways, youth courts can use the data they collect to address some causes of Utah's STPP.

(ii) Youth Courts as Effective Alternatives to Juvenile Court

The Utah Youth Court Act sets up youth courts as early intervention diversion programs that serve as alternatives to juvenile court. When a first-time offender commits a class B or C misdemeanor, she can ask to be referred to a youth court program instead of juvenile court. Furthermore, under the Act, juvenile court officers and prosecuting attorneys have the power to give a youth court authority over a referred youth who is in juvenile court. Youth courts can address the funneling of students from school directly to juvenile court by serving as a legal alternative to juvenile court.

The *Fingerpaint to Fingerprints* study revealed that a disproportionate amount of Pacific Islander and Black students were referred directly to law enforcement in Utah.[218] By using youth courts as a precursor to juvenile courts, school officials and SROs can divert students from the STPP. The findings of *The Impact of Teen Court on Youth Offenders* study demonstrate that well-run youth courts have the potential to serve referred youth offenders better than juvenile courts, thereby addressing the disparate outcomes manifested in the STPP.[219] Youth courts can develop, rather than merely punish, referred youth by employing positive peer pressure to encourage referred youth to take accountability for their actions, develop new skills, and connect with the community.

With low rates of recidivism, youth courts likely serve youth who are accused of violating certain low-level misdemeanors better than juvenile courts.[220] Furthermore, youth courts cost much less than juvenile courts.[221] Even if Utah's youth courts do not have significantly lower recidivism rates than Utah's juvenile courts, the youth courts can still mitigate the criminalization effect of the STPP because they do not create criminal records for referred youth.[222] As an alternative

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[218] ALBERS ET AL., *supra* note 11, at 10.

[219] BUTTS ET AL., *supra* note 210, at 4.

[220] *Id.*; Owen, *supra* note 212.

[221] *See* FINAL REPORT, *supra* note 11, at 1 (explaining that Utah's state actors frequently used their discretion to send juveniles to punitive detention programs that were more expensive and more likely to increase the risk of recidivism than alternatives to detention).

[222] Diverting a student through a youth court means that the student will not have a criminal record. However, if the student fails the youth court program and is referred to juvenile court, the youth court must share the student's case file with the juvenile court. UTAH CODE ANN. § 78A-6-1203(13) (2017). Since youth must admit guilt to participate in the youth court, UTAH CODE ANN. § 78A-6-1203(4)(c) (2017), the mandated sharing of

to juvenile courts, youth courts can ease the effects of the STPP by diverting students from juvenile court, serving them better than juvenile court, and insulating them from a criminal record.

(iii) Youth Courts Give Students Powerful Roles

By giving youth, the people targeted by the STPP, the power to actively engage with the penal system, youth courts give students the power to challenge the STPP.[223] First, contrary to juvenile courts, youth courts give youth volunteers the responsibility of creating restorative dispositions for their peers. When youth volunteers believe that the "offense" committed by the referred youth is no offense at all, or is simply excusable by circumstance, the youth volunteers could suggest dismissal of the case or give the referred youth minimal disposition requirements. When youth volunteers believe that the offense committed requires attention, they have the unique power to support the referred youth with peer pressure and restorative dispositions that focus on accountability, skill development, and helping the referred youth connect with positive networks within the community.

Second, many youth courts are made up of youth volunteers who previously appeared before the youth court as referred youth offenders.[224] Former defendants understand how to successfully navigate and use the restorative justice youth court process. As youth who have made mistakes, former defendants have great potential to connect with referred youth by telling their story and explaining how they successfully completed youth court. Furthermore, if former defendants feel like they were racially profiled or unfairly disciplined, they have the power to advocate for their peers when they believe referred youth are unfairly before the court, thereby addressing the disparate impacts of the STPP.

C. Expanding Juveniles' Rights and Improving Parens Patriae Discretion

While discretion is often necessary and should not be wholly eliminated from the juvenile justice system, Utah should adopt the following measures to strengthen juveniles' rights and guide the discretionary powers of state actors. These changes should improve the balance of power between juveniles and state actors, and mitigate the effects of the STPP on juveniles throughout the state.

First, Utah should guarantee counsel at all stages for indigent parties in juvenile delinquency and child welfare proceedings. If Utah takes the constitutional rights of its juveniles seriously, this is a necessary step. Utah cannot overlook the results of its Working Group's report, which exposes how bias and abuse of discretion contribute to the funneling of students into the juvenile justice

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that youth's case file with juvenile court, after the youth has shared information in confidence with the youth court may violate due process protections. Utah should consider eliminating or changing this section of the Utah Youth Court Diversion Act.

[223] *See supra* text accompanying notes 80, 83–86.

[224] BUTTS ET AL., *supra* note 210, at 37.

system, and demonstrates that youth are subject to disparate outcomes once they are in the juvenile justice system.[225] Furthermore, the lasting negative effects of the STPP on juveniles supports protecting their constitutional right to counsel; once a youth has been funneled into the STPP, the cards are stacked against her for the rest of her life.[226] While appointing counsel to indigent youth defendants does not directly prevent students from being funneled into the STPP, it does address what happens to students once they are in the pipeline.

Second, Utah should grant juveniles a statutory right to evidence-based rehabilitative treatment. If our juvenile justice system is based on the premise that "juveniles are different" than adults because they are more amenable to rehabilitation,[227] then granting juveniles this right is the next logical step. The evolution of America's juvenile justice system, and the Working Group's report, has shown that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[228] Rather than relying on the benevolence of its public school officials, its SROs, its probation officers, and its juvenile court judges, Utah should empower juveniles with the right to hold the state accountable to the principle of rehabilitation. Utah could do this by giving juveniles a right to evidence-based rehabilitative treatment that is only lost if the juvenile commits a heinous crime *and* has failed a graduated list of evidence-based rehabilitative treatments.

Third, Utah should expand the *Miranda* rights of juveniles by creating a statutory right to *Miranda* warnings in all school-based interrogations.[229] To further safeguard juveniles' Fifth Amendment privilege against self-incrimination, Utah should require all public school personnel (including SROs) to consult with a youth's parent, legal guardian, or custodian before asking the youth about any criminal violation above a class B misdemeanor (whether the youth is a suspect or a witness). If *Miranda* rights are not read to the youth's parent, legal guardian, or custodian before any questioning begins, Utah courts should be instructed to suppress all evidence obtained from the questioning.[230] This broadened constitutional protection would intentionally make criminal investigations against juveniles in the school setting burdensome. Instead of pursuing criminal charges against juveniles, it would be easier for school officials to pursue the rehabilitative and restorative justice processes, or diversion programs already in place.[231]

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[225] FINAL REPORT, *supra* note 11, at 1–11.

[226] REDFIELD & NANCE, *supra* note 8, at 22–23.

[227] Coupet, *supra* note 21, at 1306 (citation omitted).

[228] *In re* Gault, 387 U.S. 1, 18 (1967).

[229] *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (holding "that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized" and "[p]rocedural safeguards must be employed to protect the privilege.").

[230] *See id.* at 479 ("But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.").

[231] *See* discussion *supra* Part B.2.(b).

Fourth, Utah should pass legislation mandating that school boards throughout the state offer a minimum of three evidence-based, CCJJ certified diversion programs. For each program to be certified, it must meet standards adopted by the CCJJ regarding the rehabilitative or restorative justice qualities of the program. To assist the annual certification process, each program must submit annual reports to the CCJJ that include referral data (i.e. who gets referred to the programs, who does not, and for what offenses), and outcomes for each referred youth (i.e. required dispositions, graduation data, behavioral changes). This reform would hold diversion programs accountable to evidence-based standards and avoid the drawbacks usually associated with granting broad discretion: bias, abuse of discretion, and disparate outcomes.

Fifth, Utah's State Office of Education and the CCJJ should partner in researching and proposing a mandatory maximum class size throughout the state's public schools. Utah's parens patriae and in loco parentis powers are most potent in the public schools, where teachers oversee the education, socialization, and development of our children. If large class sizes dilute the influence of our teachers so they cannot fully support each student's positive development, there should be cause for concern. While it is important for Utah to invest in expanding its rehabilitative processes on the back end—after juveniles have gone astray—it is equally important to invest in preventative influence on the front end, before juveniles go astray. This is especially true when the infrastructure to support preventative counseling, K–12 public schools, is already in place.

II. CONCLUSION

Utah's STTP problem needs to be resolved. Zero tolerance policies, the limited constitutional rights of students, the police power of school administrators, the injection of SROs into our schools without clear job responsibilities and training, and the imbalance of power between students and state actors all contribute to Utah's biased STPP. To address the STPP, researchers encourage: the expansion of legal protections for juveniles; the re-training of SROs and employment contracts that clearly define SROs' responsibilities; the use of restorative justice practices and other evidence-based alternatives to the juvenile justice system; and reforming the discretionary power of state actors to cite, refer, and sentence youth within the juvenile justice system.

Utah's new SRO Law, the Juvenile Defense Law, and the Amendments to the discretionary power of state actors take important steps in addressing the causes and the effects of the STPP. These reforms, however, are not enough. Utah should expand the protections for juveniles by providing counsel at all stages for indigent youth in juvenile delinquency and child welfare proceedings, by granting juveniles the statutory right to evidence-based rehabilitative treatment, and by significantly expanding their *Miranda* rights at school. Utah should improve how its actors exercise discretion in shaping juveniles by enforcing evidence-driven standards for the administration of its diversion programs, and by adopting a mandatory maximum on class sizes in public schools throughout the state. Without these

additional reforms, the discretionary authority of state actors will continue to overpower juveniles' weakened constitutional rights, leading to the bias and abuse of discretion that cause, as well as the disparate outcomes that are manifested in, Utah's STPP.