

Fall 2013

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Recommended Citation

Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 Nw. J. L. & Soc. Pol'y. 58 (2013).
<http://scholarlycommons.law.northwestern.edu/njlsp/vol9/iss1/3>

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Booking Students: An Analysis of School Arrests and Court Outcomes*

Kerrin C. Wolf[·]

ABSTRACT

The fate of school discipline and security in America is at a crucial turning point. While the “school-to-prison pipeline” has recently received an increased amount of attention from policy makers interested in improving public education, the recent shooting at Sandy Hook Elementary School in Connecticut led to renewed calls for the heightened security measures that helped give rise to the pipeline. This article provides clear evidence that heightened disciplinary and security measures in schools are faulty policy responses, as they have adverse impacts on the students they intend to protect and siphon resources away from policies that more effectively ensure student safety and success. More specifically, the article analyzes a unique statewide database that contains all school arrests that occurred during a recent school year in Delaware, including individual-level variables such as age, race, gender, offense, adjudication result, and disposition result. The analysis reveals three troubling trends that have important policy implications. First, the use of arrests in response to student misbehavior has resulted in a great number of students being arrested for minor misbehaviors. Second, a highly disproportionate rate of black students faced arrests for their behavior in school, and female students seemed to experience differential treatment. Third, the juvenile justice system is forced to devote its scarce resources to processing a high volume of minor school arrests, a plurality of which lead to diversionary services that could have been offered directly through schools in a much more efficient manner.

I. INTRODUCTION

In 2012, the “school-to-prison pipeline”¹ emerged as an issue ripe for policy action after more than a decade of research and advocacy efforts. In March 2012,

[·] Some preliminary findings of the research that forms the basis of this article were presented at the National Leadership Summit on School-Justice Partnerships in New York, New York, on March 13, 2012.

[·] Abraham L. Freedman Fellow, Temple University Beasley School of Law. I am eternally grateful to many of the wonderful people at the Family Court of Delaware. In particular, I would like to thank Chief Judge Chandlee Kuhn for providing incredible support as I conducted the research that formed the basis of this article and for her insightful comments on the many drafts that I prepared. I would like to thank Tom Mraz for facilitating my research at the various courthouses in Delaware. I would also like to thank Danilo Yanich, Ph.D., Aaron Kupchik, Ph.D., Ed Raffel, Ph.D., and Leland Ware, J.D., for their guidance and support as I conducted the research that formed the basis of this article. I would like to thank Muriel Morrissey, J.D., and Theresa Glennon, J.D., for their comments on previous drafts of this article. Lastly, I would like to thank Daniel Hess for his assistance in preparing this article for publication.

prominent education and judicial leaders from almost every state in the country met at a conference focused on ending the pipeline.² Papers and presentations by leading researchers, advocates, and policy makers discussed plans for replacing punitive school discipline measures with therapeutic, developmentally appropriate, and evidence-based responses to student misbehavior.³ The conference coincided with the release of the United States Department of Education's Civil Rights Data Collection.⁴ This immense and groundbreaking data set consists of national school discipline data and promises a better understanding of the school-to-prison pipeline.⁵ In 2012, states such as Delaware⁶, California⁷, and Colorado⁸ also considered legislation reversing zero tolerance policies⁹ in their schools, which are an essential feature of the school-to-prison pipeline. In December 2012, the Senate held its first hearing on the school-to-prison pipeline, hearing testimony from students, teachers, judges, and others directly involved in and affected by this issue.¹⁰ Significant policy changes aimed at dismantling the school-to-prison pipeline seemed to be underway.

However, in December 2012, America was stunned by the horrific mass shooting at Sandy Hook Elementary School in Newtown, Connecticut that left twenty children and seven adults dead.¹¹ Like the mass shootings at Columbine High School in Colorado and at Virginia Tech, this event shocked the nation and led many to call for a wide array of

¹ The "school-to-prison pipeline" describes the phenomenon in which students are pushed out of the public education system and toward the juvenile criminal justice systems by a variety of policies including punitive and exclusionary school discipline practices.

² NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS: KEEPING KIDS IN SCHOOL AND OUT OF COURT, <http://www.school-justicesummit.org/home.cfm> (last visited July 23, 2013) [hereinafter "National Leadership Summit"].

³ *Id.*

⁴ U.S. DEPT. OF EDUCATION, CIVIL RIGHTS DATA COLLECTION (2012), <http://ocrdata.ed.gov/>.

⁵ *Id.* See also Joy Resmotives, *Minority Students Face Harsher Discipline, Fewer Options, New Federal Data Shows*, HUFFINGTON POST (Mar. 5, 2013, 11:16AM), http://www.huffingtonpost.com/2012/03/06/minority-students-education-study_n_1322594.html.

⁶ See discussion *infra* part II.B.

⁷ Jenny Deam & Howard Blume, *Colorado is Latest to Reconsider Zero-Tolerance School Policies*, L.A. TIMES (May 23, 2012), <http://articles.latimes.com/2012/may/23/nation/la-na-zero-tolerance-20120523> (noting that California and Colorado were considering such legislation).

⁸ *Id.*

⁹ As used here, zero tolerance policies refer to strict, mandatory, and inflexible disciplinary responses to designated student misbehavior. See CATHERINE Y. YIM, DANIEL J. LOSEN & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 80 (2010) ("One of the hallmarks of zero tolerance policies is the automatic imposition of a predetermined penalty for a given form of misconduct, without consideration of the individual circumstances surrounding the conduct or extenuating circumstances such as the student's age, cognitive capacity, or even the existence of intent."). For a discussion of the origins of the term "zero tolerance" as it relates to school discipline, see Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 373 (1999).

¹⁰ Maggie Clark, *U.S. Senate Committee Probes "School-to-Prison Pipeline,"* STATELINE (Dec. 14, 2012), <http://www.pewstates.org/projects/stateline/headlines/us-senate-committee-probes-school-to-prison-pipeline-85899436560>.

¹¹ See, e.g., *The Shootings at Sandy Hook Elementary School*, N.Y. TIMES, Dec. 14, 2012, <http://www.nytimes.com/interactive/2012/12/14/nyregion/The-shooting-at-the-Sandy-Hook-Elementary.html>.

policy changes, including gun control measures and mental health reform.¹² In response to the proposals for gun control, the National Rifle Association (“NRA”) countered with calls for changes to security at schools,¹³ specifically calling for armed guards at every school in the country.¹⁴ The National Association of School Resource Officers (“NASRO”) echoed the NRA’s position but predictably noted that the armed personnel should be school resource officers specifically trained to operate in the school environment.¹⁵ Ahead of federal action, school districts responded to the shooting in Newtown by reassessing their existing security policies and by adopting new policies, such as increasing police presence and making school entrances more secure.¹⁶ Finally, President Obama unveiled his proposed policy responses to the Newtown shooting, which included increased funding and support for school districts that wish to bring school resource officers into their schools, along with other school safety and security, gun control, and mental health initiatives.¹⁷ Just as momentum was building to make significant policy changes to the current school security and discipline policies that gave rise to the school-to-prison pipeline,¹⁸ the mass shooting in Newtown revived the desire for increased police presence and other security measures in schools.

¹² See, e.g., Carl Hulse, *After Newtown, Pelosi Pushes Obama on Guns*, N.Y. TIMES, Jan. 8, 2013, <http://www.nytimes.com/2013/01/09/us/politics/after-newtown-congress-must-act-pelosi-says.html?hp>; Peter Baker, *Biden to Lead White House Effort on Gun Control*, BOSTON GLOBE, Dec. 30, 2012, <http://www.bostonglobe.com/news/nation/2012/12/29/biden-lead-white-house-effort-gun-control/bNuDnsGKG65CO79NjByp5M/story.html>; Liz Zabo, *Newtown Shooting Prompts Calls for Mental Health Reform*, DETROIT FREE PRESS, Jan. 8, 2013, <http://www.freep.com/article/20130108/FEATURES08/130108025/Newtown-shooting-prompts-calls-for-mental-health-reform>.

¹³ Press Release, National Rifle Association (Dec. 21, 2012), (on file with author). If anyone questions the policy-making influence of the NRA, note that Vice President Biden met with the NRA to specifically discuss gun control and other policy responses in the wake of the Newtown shooting. Arlette Saenz, *Gun Violence: Biden Meets NRA, Will Send Ideas to Obama by Tuesday*, ABC NEWS, Jan. 10, 2013, <http://abcnews.go.com/Politics/OTUS/sandy-hook-elementary-biden-includes-nra-wal-mart-background-checks/story?id=18174779>.

¹⁴ *Id.* The NRA offered a more detailed plan through its National School Shield Task Force, which included calls for armed police officers and arming other school personnel. ASA HUTCHINSON, NATIONAL RIFLE ASSOCIATION, REPORT OF THE NATIONAL SCHOOL SHIELD TASK FORCE, 15 (2013), http://www.nrschoolshield.com/NSS_Final.pdf.

¹⁵ Press Release, National Association of School Resource Officers, NASRO: Police Should be First Choice to Carry Guns in Schools (Apr. 4, 2013), <http://www.nasro.org/content/press-release> (last visited July 25, 2013).

¹⁶ See, e.g., Donna St. George & Ovetta Wiggins, *Schools Taking Serious Look at Putting Armed Police in Schools After Massacre*, WASHINGTON POST (Feb. 8, 2013), http://www.washingtonpost.com/local/education/schools-taking-serious-look-at-putting-armed-police-in-schools-after-massacre/2013/02/07/f2fcc9ec-6e11-11e2-ac36-3d8d9dcaa2e2_story.html?hpid=z2; Jessica Parks, *How Philly Area Schools are Reassessing Safety and Preparedness*, PHILADELPHIA INQUIRER, Jan. 9, 2013, http://www.philly.com/philly/news/20130109_How_Philly-area_schools_are_reassessing_safety_and_preparedness.html.

¹⁷ THE WHITE HOUSE, OFFICE OF THE PRESS SEC’Y, NOW IS THE TIME: THE PRESIDENT’S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE (Jan. 16, 2013), available at <http://www.nytimes.com/interactive/2013/01/16/us/politics/16white-house-gun-proposals-documents.html>.

¹⁸ School security policies, as used in this article, include the use of school resource officers and security guards, systematic monitoring of entrances and hallways, identification requirements, security cameras, metal detectors, random locker and backpack searches, among other policies. School discipline policies refer to schools’ systems of responding to misbehavior, which often include strict codes of student conduct, and the use of suspensions, arrests, and expulsions. For a full discussion of the current state of school security and discipline in American schools, see *infra* Part II.A.

When faced with horrifying events such as the Newtown shooting that spur visceral policy reactions,¹⁹ it is imperative that policy makers test these reactions against more rational measures of whether the contemplated policy changes are appropriate. A growing, but still developing,²⁰ body of academic research is beginning to demonstrate that heightened security and disciplinary policies intended to make schools safer actually have adverse impacts on students. In particular, these policies result in higher rates of suspensions, expulsions, and arrests in schools, thereby feeding more and more students into the pipeline.²¹

This article adds compelling evidence to this conversation by analyzing school arrests to obtain a better understanding of what occurs when school discipline and criminal justice become too closely intertwined. To date, research has not sufficiently examined the characteristics of students who are arrested or the nature of the misconduct that leads to these arrests.²² This article fills this void by conducting an analysis of a database of school arrests during the 2010-2011 school year in Delaware. This database contains an array of variables relating to both student demographics and court outcomes that has not previously been assembled in a single database. While Delaware serves as the site of this investigation, the findings have implications that stretch far beyond the state's borders, as Delaware's school discipline²³ regime reflects what is occurring throughout the country.²⁴

This analysis yields a profile of school arrests that aims to improve our understanding of the students who are arrested, the charges they face, and the outcomes of their delinquency proceedings. Most notably, it will demonstrate that police most often arrest students for relatively minor misbehaviors, with misdemeanors comprising more than 90% of lead charges against arrested students.²⁵ It will also show that black students are three times more likely to be arrested than their white peers, a remarkably

¹⁹ As evidence of Americans' visceral responses, one week after the Newtown shooting, a six-year-old student was suspended from his elementary school for pointing his fingers like a gun at a fellow student and saying "pow." Donna St. George, *Boy, 6, Suspended from Silver Spring School for Pointing Finger Like Gun*, WASHINGTON POST, Jan. 2, 2013, http://www.washingtonpost.com/local/education/boy-6-suspended-from-silver-spring-school-for-pointing-finger-like-a-gun/2013/01/02/21acc8d4-54fc-11e2-8b9e-dd8773594efc_story.html (notably, the suspension was eventually rescinded by the school); Donna St. George, *School Officials Rescind Suspension of 6-year-old Silver Spring Student*, WASHINGTON POST, Jan. 4, 2013, http://www.washingtonpost.com/local/education/in-silver-spring-suspension-of-6-year-old-student-is-reversed-by-school-officials/2013/01/04/4dcbb0d8-561e-11e2-bf3e-76c0a789346f_story.html. Similarly, after the Columbine shooting, schools across the country placed police officers in their hallways on a permanent basis and adopted a number of other heightened security measures. See Lynn A. Addington, *Cops and Cameras: Public School Security as a Policy Response to Columbine*, 52 AM. BEHAV. SCIENTIST 1426, 1429 (2009).

²⁰ See Sean Nicholson-Crotty, Zachary Birchmeier, & David Valentine, *Exploring the Impact of School Discipline on Racial Disproportion in the Juvenile Justice System*, 90 SOCIAL SCI. Q. 1003, 1004 (2009) (noting the lack of research providing demonstrable proof of the school-to-prison pipeline).

²¹ See *infra* notes 50-52 and accompanying text.

²² See Michael P. Krezmien, et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. OF CONTEMP. CRIM. JUST. 273, 289 (2010) (calling for research into the types of offenses that lead to school arrests and the characteristics of the arrested students).

²³ School discipline, as used here, refers to both traditional school discipline, such as detention, suspensions, and expulsions, and the use of justice system responses to student misbehavior.

²⁴ See *infra* Part II.

²⁵ See *infra* Part III.B.i.

disproportionate rate.²⁶ Additionally, police tend to employ arrests differently to control the behavior of female students. For example, the data indicates that the police are more apt to use arrests as a response when females fight or otherwise act disorderly.²⁷ In particular, the data demonstrates that black females were approximately twice as likely to be arrested for fighting as white males even though they comprised a smaller percentage of the student population and were not more likely to be in a fight.²⁸ Finally, a large percentage of arrests are dismissed in lieu of delinquency adjudications, with the majority of dismissals stemming from diversion programs, which suggests that the large numbers of arrests for minor student misbehavior improperly involve the justice system in school discipline matters.²⁹

This study comes at a time when many states and school districts are actively considering reforms to their school discipline policies, with one eye focusing on ending the school-to-prison pipeline and the other determining how student safety can be better protected.³⁰ Its findings provide clear evidence that reforms are drastically needed and that such reforms should not include the placement of additional police and other security measures in schools as some might desire following the events in Newtown. Rather, therapeutic, developmentally appropriate, and evidence-based responses to student misbehavior are needed.³¹

This article will begin by providing relevant background information regarding the current state of school discipline nationally and then specifically discuss school discipline and juvenile justice in Delaware. Next, this article will focus on the school arrest database by describing its scope and creation, revealing key findings from the data, and analyzing the findings. In conclusion, this article will offer policy recommendations that follow from these findings and analysis.

II. BACKGROUND

A. *The Criminalization of School Discipline*

Over the past twenty years, American youth have experienced a remarkable increase in the number of disciplinary and security measures in their schools.³² These include the adoption of zero tolerance policies and other punitive student codes of conduct and the installation of security measures such as metal detectors,³³ surveillance cameras,³⁴ and school resource officers (SROs).³⁵ Scholars have labeled this trend the

²⁶ See *infra* Part III.B.ii.

²⁷ See *infra* Part III.B.ii.

²⁸ See *infra* Part IV.B.

²⁹ See *infra* Parts II.B.iii., IV.C.

³⁰ See *supra* notes 2-10 and accompanying text.

³¹ See *infra* Part V.

³² SIMON ROBERS, ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS & BUREAU OF JUSTICE STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2010, 78 (2010), <http://nces.ed.gov/pubs2011/2011002.pdf>; Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79 (2008).

³³ ROBERS, ET AL., *supra* note 32, at 81 (reporting that, in 2007, 10% of schools had metal detectors).

³⁴ *Id.* (reporting that the percentage of schools with security cameras increased from 39% to 66% from 1999 to 2007). See also Addington, *supra* note 19, at 1429.

“criminalization” of school discipline³⁶ as these measures approach student misbehavior much like society approaches adult criminal conduct.

In the 1980s, the primary purpose of school security was to prevent and respond to property crimes such as graffiti and other vandalism.³⁷ Based on reports of increasing juvenile crime rates, schools across the country began to repurpose school security measures to address violence and drugs.³⁸ In the mid-1990s and continuing into the 2000s, schools adopted a wide array of security measures and policies in response to growing concerns over safety.³⁹ During these two decades, the use of various security measures in schools rapidly increased,⁴⁰ encouraged by federal legislation such as the Gun Free Schools Act of 1994⁴¹ and the Violent Crime Control and Law Enforcement Act of 1994,⁴² which provided funding for these policies. The criminalization of school discipline was a prominent aspect of this “get tough” era of criminal justice policy.⁴³

The criminalization trend is not confined to urban schools. As of 2010, every public school in America has implemented school security measures, in one form or another.⁴⁴ While many of the security and disciplinary measures first appeared in urban schools,⁴⁵ these measures spread to the suburbs and beyond in response to the Columbine mass shooting and unsubstantiated concerns over increased drug use by students.⁴⁶ However, schools serving urban, poor, and minority students have often adopted the most punitive regimes.⁴⁷

³⁵ SROs are trained police officers who are stationed in schools, most commonly through agreements between school districts and local police departments. For further discussions of school resource officers, see AARON KUPCHIK & NICOLE L BRACY, *To Protect, Serve, and Mentor? Police Officers in Public Schools*, in *SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION* (Torin Monahan & Rodolfo D. Torres, eds., 2009); Matthew T. Theriot, *School Resource Officers and the Criminalization of School Behavior*, 37 J. OF CRIM. JUST. 280 (2009); Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, *YOUTH VIOLENCE & JUV. JUST.* (2013).

³⁶ See, e.g., Hirschfield, *supra* note 32; Krezmien, et al., *supra* note 22, at 273; ELORA MUKHERJEE, NYCLU, *CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS* (Phyllis Eckaus et al. eds., 2007), http://www.nyclu.org/files/publications/nyclu_pub_criminalizing_the_classroom.pdf.

³⁷ Addington, *supra* note 19, at 1429.

³⁸ *Id.*

³⁹ Theriot, *supra* note 35, at 280.

⁴⁰ ROBERS, ET AL., *supra* note 32, at 78.

⁴¹ 20 U.S.C. §§ 8921-23 (1994). The Gun Free Schools Act was an amendment to the Elementary and Secondary Education Act of 1965 that, most notably, required schools to adopt exclusionary school discipline policies targeting students who bring weapons to school.

⁴² 18 U.S.C. §§ 1033-1034 (1994).

⁴³ JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 207-231 (2010).

⁴⁴ ROBERS, ET AL., *supra* note 32, at 80-81.

⁴⁵ See, e.g., JOHN DEVINE, *MAXIMUM SECURITY: THE CULTURE OF VIOLENCE IN INNER CITY SCHOOLS* (1996) (chronicling the use of heightened security and disciplinary measures in inner-city schools). See also Addington, *supra* note 19, at 1429.

⁴⁶ See Addington, *supra* note 19, at 16-17; Aaron Kupchik, *Things Are Tough All Over: Race, Ethnicity, Class and School Discipline*, 11 PUNISHMENT & SOCIETY 291, 299 (2009); William Lyons & Julie Drew, *Punishing Schools: Fear and Citizenship in American Public Schools* 44-46 (2006).

⁴⁷ KATHLEEN NOLAN, *POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL* (2012) (detailing the punitive school discipline regime in an urban high school); Kupchik, *supra* note 46, at 310.

The adoption of these various disciplinary and security policies led to an increased reliance on harsh punishments as sanctions for student misbehavior transformed from admonitions by teachers and trips to the principal's office to suspensions, expulsions, and arrests.⁴⁸ Civil rights groups such as the ACLU have published a series of reports that chronicle the new role of juvenile justice in school discipline and raise important questions about the efficacy and appropriateness of the commingling of these formerly distinct punishment systems.⁴⁹

Numerous studies have demonstrated the link between school disciplinary practices, school failure, and future criminal involvement, providing clear evidence of the phenomenon known as the "school-to-prison pipeline."⁵⁰ Although advocates and scholars have examined the criminalization of school discipline from a wide array of perspectives, a comprehensive understanding of its effects on schools and on students is still under development. Perhaps the clearest evidence of the pipeline emerged from a study by the Council of State Governments Justice Center and the Public Policy Research Institute. Their report, *Breaking School Rules*, revealed the results of a massive multi-year examination of school discipline and juvenile justice system data from Texas.⁵¹ The report revealed that students who were suspended or expelled were more likely to experience educational struggles and nearly three times more likely to have juvenile

⁴⁸ See, e.g., Hirschfield, *supra* note 32, at 80 ("[T]he problems that once invoked the idea and apparatus of student discipline have increasingly become criminalized."); NAACP LEGAL DEFENSE & EDUCATION FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (noting that, between 1974 and 1997, the number of suspensions nationwide climbed from approximately 1.7 million to 3.1 million); Krezmien, et al., *supra* note 22, at 286 (reporting an increase in the proportion of school-based referrals to the juvenile justice system in four out of five states studied); Anna M. Phillips, *City Reports More Suspensions, but Serious Crime Declined*, N.Y. TIMES, Nov. 1, 2011, <http://www.nytimes.com/schoolbook/2011/11/01/city-reports-more-suspensions-but-serious-crimes-declined> (reporting that suspensions increased in New York City schools during 2010-2011 school year despite a drop in suspension for serious incidents); NOLAN, *supra* note 47, at 26-30.

⁴⁹ See AMERICAN CIVIL LIBERTIES UNION & AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT, HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS (2008), <http://www.aclu.org/racial-justice/hard-lessons-school-resource-officer-programs-and-school-based-arrests-three-connecti>; MUKHERJEE, *supra* note 36.

⁵⁰ See, e.g., Ron Casella, *Punishing Dangerousness through Preventive Detention: Illustrating the Institutional Link Between School and Prison*, in DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE: NEW DIRECTIONS FOR YOUTH DEVELOPMENT 55-70 (Johanna Wald & Daniel J. Losen eds., 2003) (reporting results from interviews of students and inmates that reveal their perspectives on how school disciplinary practices contributed to criminal involvement); TONY FABELO, ET AL., THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER & PUBLIC POLICY RESEARCH INSTITUTE, BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT (2011); Paul J. Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 SOCIOLOGY OF EDUC. 368 (2009) (demonstrating the correlation between being arrested as a juvenile and dropping out of school); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155 (2004) (demonstrating that the more education a person attains, the less likely they are to be involved in crime as an adult through the analysis of three databases that each provided differing measures of this phenomenon); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462 (2006) (demonstrating the link between involvement in justice system and educational struggles).

⁵¹ TONY FABELO, ET AL., *supra* note 50, at 25-26.

justice system involvement the following year even after controlling for a variety of variables.⁵²

While concerns over arrests for misbehavior in school are widespread, few efforts have been made to document the characteristics of the students who are arrested in school, the offenses for which they are arrested, and their resulting experiences in the juvenile justice system. Michael Krezmien, Peter Leone, Mark Zablocki, and Craig Wells recently published a study of school referrals in five Midwestern states.⁵³ They found that between 1994 and 2005 four of the states⁵⁴ experienced increases in the proportion of juvenile referrals that originated from behavior in schools but also noted variation between the states' school referral trends.⁵⁵ The authors reasoned that state and local laws and policies vary such that it may be valuable to examine school arrests on a state-wide, as opposed to a national level.⁵⁶ They also suggested several lines of future inquiry, including an "examination of the types of offenses resulting in referrals from schools and from other sources [and] . . . of individual characteristics of referred youth in the context of all youth in the jurisdiction with particular attention to understanding the patterns of referrals by gender and by race."⁵⁷ This article answers this call for research by providing a detailed school profile for the state of Delaware that considers the charges for which students were arrested, the demographic characteristics of the students arrested, and their adjudication and disposition outcomes in Family Court.

B. *Education and School Discipline in Delaware*

Delaware, one of the smaller states in the Union by both geographic and demographic measures, contains 19 school districts, including vocational/technical schools and charters. These school districts are responsible for educating approximately 130,000 students from grades K-12.⁵⁸ As in most states, the local school districts have a fair degree of autonomy. For example, each district creates and implements its own student codes of conduct subject to state and federal law and Delaware Department of Education regulations.⁵⁹ If a district elects to have SROs placed in any of its schools, it may independently contract with the Delaware State Police or local police departments.⁶⁰ This autonomy, however, may be in decline since the state legislature passed a law in 2013 which requires all school districts to adopt uniform definitions in their codes of conduct for offenses that can lead to transfer, alternative school placement, or expulsion.⁶¹

⁵² *Id.* at 32 (explaining the study controlled for variable such as race, age, disciplinary history, disability status, immigration status, and socioeconomic status, among other student characteristics and school characteristics).

⁵³ Krezmien, et al., *supra* note 22, at 276.

⁵⁴ Those four states were Arizona, Hawaii, Missouri, and West Virginia. *Id.* at 268.

⁵⁵ *Id.* at 286-88.

⁵⁶ *Id.* at 287.

⁵⁷ *Id.* at 289.

⁵⁸ STATE OF DELAWARE, SCH. PROFILES, <http://profiles.doe.k12.de.us/SchoolProfiles/State/Default.aspx>.

⁵⁹ 14 DEL. ADMIN. CODE § 605 (2008).

⁶⁰ 14 DEL. ADMIN. CODE § 601 (2007) (providing model memorandum of agreement for school districts to use with police departments).

⁶¹ DEL. CODE ANN. tit. 14, § 112(b)(26) (2011).

Delaware schools followed the national criminalization trend during the 1990s and 2000s. Zero tolerance policies can be found in all of Delaware's school districts,⁶² and an elementary school in the state received national attention in 2009 when it suspended a young student for bringing a Boy Scout camping utensil to school.⁶³ Security cameras can be found on school grounds and in school buses throughout the state.⁶⁴ SROs are stationed permanently in approximately 30 of Delaware's middle, high, and alternative schools, and another 19 SROs are specifically assigned to two or more schools in the state, including high schools, middle schools, elementary schools, alternative schools, and charter schools.⁶⁵

Furthermore, Delaware features a "School Crimes Law" which prescribes how public schools in the state must respond to certain student misbehavior.⁶⁶ This law provides a list of differing procedures that each school and the police must follow when there is reason to believe that certain crimes have been committed on school property. Until amendments passed in 2012,⁶⁷ the law required student suspensions, police investigations, and the reporting of a wide variety of offenses to the Delaware Department of Education.⁶⁸ The Department of Education prescribes additional reporting requirements on a wider array of offenses through the state's administrative code.⁶⁹ The new version of the School Crimes Law limits the offenses that schools must report to the Department of Education. Additionally, it no longer requires criminal complaints and suspensions for any offenses, which returns discretion back to the school districts and

⁶² See 14 DEL. ADMIN. CODE § 603 (2008) (requiring expulsion of students in possession of firearms); 14 DEL. ADMIN. CODE § 612 (2008) (requiring suspension of students in possession of drugs or alcohol). See, e.g. Christina School District Christina School District, Student Code of Conduct: Rights and Responsibilities for Students in Kindergarten - Grade 12 (2011-2012), available at http://www.christinak12.org/apps/pages/index.jsp?uREC_ID=179029&type=d&termREC_ID=&pREC_ID=366113/; Indian River School District, Guide to Student Conduct and Policies (2011-2012), available at http://www.irsd.net/files/_RVB3n/_e08ab1949a6988cd3745a49013852ec4/Student_Code_of_Conduct_2011-12.pdf.

⁶³ Ian Urbina, *It's a Fork, It's a Spoon, It's a . . . Weapon?*, N.Y. TIMES, Oct. 11, 2009, <http://www.nytimes.com/2009/10/12/education/12discipline.html>.

⁶⁴ DEL. CODE ANN. tit. 14, §4121 (2011) (granting school districts authority to use video surveillance). See also Milford School District (2012), ADVANTECH SECURITY, INC., <http://www.advantechsecurity.net/index.cfm?fuseaction=portfolio.details&portfolioItemID=342> (describing the design and installation of security camera in Milford schools); Red Clay Community Financial Review Committee, Meeting Minutes (Mar. 14, 2011) <http://www.redclay.k12.de.us/boardcfrc1011/meetings/minutes/CFRCMinutes031411.pdf> (discussing the presence of security cameras in busses).

⁶⁵ Kerrin C. Wolf, *An Exploration of School Resource Officer Arrests in Delaware* (May 9, 2012) (unpublished Ph.D. dissertation, University of Delaware) (on file with author).

⁶⁶ DEL. CODE ANN., tit. 14, § 4112 (2008).

⁶⁷ See H.B. No. 243, 146th Gen. Assemb. (Del. 2012).

⁶⁸ For example all violent felonies, assaults in the third degree, unlawful sexual contacts in the third degree, and weapons and drug possession led to mandatory suspensions, police investigations and written reports to the Department of Education under the former version of the law. 14 DEL. CODE § 4112 (2011) (amended 2012).

⁶⁹ 14 DEL. ADMIN. CODE § 601 (2008) (mandating that offenses such as fighting, vandalism, and alcohol possession be reported to the Department of Education).

school administrators.⁷⁰ The School Crimes Law serves as a clear example of the intermingling of education and justice systems.

Delaware appears to be in a state of transition for its school disciplinary practices. As is the case in other states throughout the country,⁷¹ Delaware policy makers are currently considering how to reform school discipline to make it less punitive and more rehabilitative.⁷² Previously, the state legislature created a School Discipline Task Force, composed of stakeholders from all facets of this issue, including teachers, school administrators, the police, the Family Court, and advocacy groups, among others.⁷³ The work of the School Discipline Task Force eventually led to the aforementioned changes to the School Crimes Law.⁷⁴ A second task force will take a broader look at this issue and make further recommendations “for improving Delaware’s laws, regulations and school district policies relating to truancy, school suspensions and expulsions, arrests, and alternative placements for the purpose of promoting a positive school climate and improving student success.”⁷⁵

C. *Juvenile Justice in Delaware*

The Family Court hears juvenile delinquency proceedings in Delaware. Because the overwhelming majority of school arrests involve juveniles, all school arrests are referred to the Family Court for intake. Arrested students who are no longer minors are later transferred to the adult criminal court. The Family Court devotes certain court sessions to cases arising out of school arrests. Cases involving more serious charges or juveniles that face additional charges from incidents arising outside of school, may be heard outside of these sessions. Those students the Court adjudicates delinquent are assigned to a prescribed disposition level, which ranges from community-based treatment to detention. Some arrested students, however, avoid delinquency adjudications by successfully completing diversionary programs.

New Castle County, the largest county in the state, developed a special school diversion program tailored to students arrested in school.⁷⁶ Kent and Sussex Counties rely

⁷⁰ H.B. No. 243, 146th Gen. Assemb. (Del. 2012) (limiting offenses that require police investigations and reports to the Department of Education to violent felonies, assaults in the third degree, weapons and drug possession, and certain sexual offenses).

⁷¹ The National Leadership Summit on School-Justice Partnerships serves as the clearest indicator of this potential policy shift away from punitive school disciplinary practices. The summit brought education and justice system leaders from almost every state in the country to discuss school disciplinary practices and provide states with motivation and resources to help them pursue policy change. National Leadership Summit, *supra* note 2. Colorado stands as one example of a state that took clear and affirmative steps to reform its approach to school discipline by passing legislation that affirmative recognized the ill effects of zero tolerance policies. *See* COLO. REV. STAT. § 22-54-104 (WEST 2012).

⁷² H.R. 10, 147th Gen. Assemb. (Del. 2013) (creating a task force “for the purpose of studying and making recommendations for improving Delaware’s laws, regulations and school district policies relating to truancy, school suspensions and expulsions, arrests, and alternative placements for the purpose of promoting a positive school climate and improving student success”).

⁷³ Delaware School Discipline Task Force, Del. H.R. 22, 145th Gen. Assemb. (2009) (establishing the Task Force) (hereinafter “School Discipline Task Force”). The Task Force met on several occasions and made several policy recommendations in its Final Report. SCH. DISCIPLINE TASK FORCE. FINAL REPORT 4 (2010).

⁷⁴ *See supra* note 67.

⁷⁵ H.R. 10, 147th Gen. Assemb. (Del. 2013).

⁷⁶ CINDY MCDANIEL, DEL. CTR. FOR JUSTICE, INC. *School Diversion Program* (2011).

on arbitration and mediation programs to divert arrested students from delinquency adjudications. In general, the diversion programs require students to perform certain tasks such as writing reflective essays and performing community service and require students to avoid subsequent misbehavior and regularly attend school. If students fulfill the requirements, their charges are dismissed.

Delaware is currently reforming its juvenile justice system in addition to its school discipline system. The state worked with the Annie E. Casey Foundations Juvenile Detention Alternative Initiative to reduce the number of juveniles placed in secure detention facilities and reduce the number of juveniles transferred to adult criminal court.⁷⁷ Delaware also formed the Juvenile Justice Collaborative with representatives of all of the government agencies involved in juvenile justice.⁷⁸ The Collaborative is working to improve cooperation between these agencies, make case processing more efficient, improve specialty courts focused on mental health, drug abuse, and gun violence, and improve services offered to youths in the system.⁷⁹

This study examined school arrests at a time when school discipline and the juvenile justice system were in a state of flux in Delaware. At the same time that the state and its school districts continued to implement policies that tend to criminalize students, policy makers in the state sought to change many of these practices because of the negative impacts the policies were having on students, schools, and the state.⁸⁰

III. SCHOOL ARREST PROFILE IN DELAWARE

A. *Methodology*⁸¹

The school arrests profile was created using Family Court of Delaware case files for all juveniles arrested in school in Delaware during the 2010-2011 school year.⁸² The

⁷⁷ JOHN WILSON ET AL., JUVENILE JUSTICE SYSTEM IN DEL. 2012: THE LITTLE ENGINE THAT COULD 6 (2012).

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 7-14.

⁸⁰ See SCH. DISCIPLINE TASK FORCE, FINAL REPORT, *supra* note 73, at 4.

⁸¹ This database comes with certain limitations. First, the school arrest data does not capture the instances in which arrests were not made. Therefore, important information such as the extent to which black students misbehaved at different rates than white students and the extent to which female students misbehaved in differing ways in school than they did on the streets remains unknown. However, the Youth Risk Behavior Study data discussed *infra* at Part IV.A. suggests that the arrests are not proportional representations of actual student behavior. The extent to which charges against students matched their actual misbehavior is also unknown. It is possible that the state charged students with lesser offenses or more serious offenses than their misbehavior dictated. Lastly, while this article uses Delaware's experience to advance the national discussion of reforming student punishment practices, the state's unique population, policies, and practices dictate that what occurred in Delaware cannot be assumed to have occurred in other states – their student arrest profiles might look very different. That being said, Delaware's population, policies, and practices are not particularly unique, so its experience with school arrests can serve as a reasonable case study of what is occurring throughout the country.

⁸² This includes any arrests that occurred during and after school during the school week on school property and on school buses taking students to and from school.

Family Court maintains an electronic database (FAMIS)⁸³ that contains information about each juvenile arrest that falls under its jurisdiction. Court personnel mark every arrest that occurs in a school as such when the case is entered into FAMIS at intake. Using this marker, school arrests were easily isolated from juvenile arrests that occurred in other settings. In order to ensure that all arrests that occurred during the 2010-2011 school year were captured, the database was limited to arrests that occurred between September 1, 2010 and June 30, 2011.

Case records in FAMIS contain the following information: case number, county, juvenile age, number of prior arrests, date of arrest, offense types, and adjudication. Using the case number, additional information was extracted from each case's paper file. The paper files associated with a particular arrestee are housed and maintained in the Family Court courthouse of the county in which the arrest occurred. A researcher traveled to each county's courthouse and pulled the file for each school arrest case in order to extract the identity of the school in which each arrest occurred, the identity of the arresting officer, and, depending on the adjudication, information about the reason for dismissal, diversionary services, or disposition level. Once the database was created, a statistical software package was used to conduct descriptive data analysis, the results of which are reported below.

Access to student-level school arrest data is rare. This study was made possible because of the Family Court's support and interest in this issue. Furthermore, juvenile delinquency case records are a matter of public record in Delaware—with certain restrictions—alleviating certain privacy concerns that often accompany data pertaining to minors.⁸⁴ Every effort was made to protect the privacy of the students whose information became part of the database.⁸⁵

B. School Arrests Profile

Approximately 739 student arrests occurred in Delaware schools during the 2010-2011 school year. Forty-six percent of the arrests occurred in high schools, 37% in middle schools, 2% in elementary schools, and the remainder occurred on busses and in nontraditional schools, such as charter and alternative schools.⁸⁶ In traditional middle schools and high schools, approximately 1 in 100 students were arrested during the school year. Between September 2010 and June 2011, arrests of students in schools made up 16% of all juvenile arrests in the state of Delaware.

1. Offenses

A relatively small number of the students arrested in Delaware were charged with felony offenses (approximately 9%), while the overwhelming majority of students were

⁸³ FAMIS is an acronym for "Family Court's automated information system." See Delaware State Courts Family Court Glossary of Legal Terms, *available at* <http://courts.delaware.gov/help/proceedings/FCglossary.stm>.

⁸⁴ Family Court of the State of Delaware, Public Access Policy (May 8, 2007), *available at* <http://courts.delaware.gov/Help/docs/FCPublicAccessPolicy.pdf>.

⁸⁵ The research was approved by the University of Delaware's Institutional Review Board pursuant to its Human Subjects Protocol.

⁸⁶ The locations of 20 of the arrests were unknown due to unavailable files, and these were excluded from the calculations.

charged with misdemeanors and violations (approximately 91%).⁸⁷ Moreover, students rarely faced high-level felony charges. Delaware categorizes its felonies by severity from A to G, with A-level felonies being the most serious.⁸⁸ No students were arrested and charged with A-level felonies, and less than one percent of those arrested faced Felony B- or C-level charges. The majority of felony charges were related to weapons possession. Similarly, Delaware categorizes its misdemeanors as level A, B, or unclassified.⁸⁹ Delaware also categorizes certain low-level offenses as violations.⁹⁰ Sixty-three percent of all arrested students faced Misdemeanor-A charges, 24% faced Unclassified Misdemeanor charges, and 3% faced charges for Misdemeanor-B offenses or Violations. The overwhelming majority of students were arrested for offenses Delaware deems as relatively minor.

An examination of the specific charges levied against students reveals much more about the nature of the student misbehavior that leads to arrests. Table 1 details the percentage of student arrests that arose out of various types of behavior. Fighting and disorderly behavior led to more than three-quarters of student arrests. The most common charges were offensive touching⁹¹ (30% of charges), disorderly conduct⁹² (23% of charges), and assault in the third degree⁹³ (14% of charges). Common charges for offenses that were not related to fighting or disorderly behavior included weapons possession, drug and alcohol related offenses, robbery and theft charges, and sexual offenses. Thus, the specific charges filed against students further demonstrate that most student arrests arise out of relatively minor misbehavior.

⁸⁷ This is based on the lead charge facing the students, which was determined by the most serious and specific charge filed against the student, excluding conspiracy counts. For example, the lead charge for a student charged with assault in the third degree and disorderly conduct would be assault in the third degree because it is the more specific charge and is deemed more serious because of its status as a “misdemeanor A” offense. If that student was also charged with conspiracy because he allegedly had accomplices, the lead charge was still determined to be assault in the third degree.

⁸⁸ DEL. CODE ANN. tit. 11, § 4201 (2011) (delineating the levels of felonies); DEL. CODE ANN., tit. 11, § 4205 (2008) (prescribing sentence parameters for each level of felony).

⁸⁹ DEL. CODE ANN., tit. 11, § 4202 (2011) (delineating the levels of misdemeanors); DEL. CODE ANN., tit. 11 § 4206 (2011) (prescribing sentence parameters for each level of misdemeanor).

⁹⁰ DEL. CODE ANN. tit. 11, § 4202 (West 2013) (identifying “violation” as a class of offense); DEL. CODE ANN. tit. 11, § 4207 (prescribing sentence parameters for violations).

⁹¹ DEL. CODE ANN. tit. 11, § 601 (West 2013).

⁹² DEL. CODE ANN. tit. 11 § 1301 (West 2013).

⁹³ DEL. CODE ANN. tit. 11 § 611 (West 2013).

<i>Table 1 Lead Charges for School Arrests in Delaware, 2010-2011 School Year</i>			
Lead Charge	% of Arrests	Offense Category	Offense Description Summary
Offensive Touching	29.8%	Class A Misdemeanor	Intentionally striking another person with body part, instrument, or bodily fluid with intent to cause offense or alarm
Assault in the 3 rd Degree	14.3%	Class A Misdemeanor	Intentionally striking another person with body part, instrument, or bodily fluid with intent to cause bodily harm
Terroristic Threatening	5.4%	Class A Misdemeanor	Threatening to commit any crime likely to result in death or in serious injury to person or property
Assault in the 2 nd Degree	1.9%	Class D Felony	Intentionally striking another person with body part, instrument, or bodily fluid with intent to cause serious bodily harm
Aggravated Menacing	.3%	Class E Felony	Displaying what appears to be a deadly weapon to intentionally place another person in fear of imminent physical injury
Fighting Behavior	51.7%	Various Categories	Offensive touching, assault in the 3 rd degree, terroristic threatening, assault in the 2 nd degree, aggravated menacing
Disorderly Conduct	22.7%	Unclassified Misdemeanor	Committing tumultuous or threatening behavior
Resisting Arrest	1.4%	Class A Misdemeanor	Intentionally preventing or attempting to prevent a peace officer from effecting an arrest
Riot	1.1%	Class F Felony	Participation with 2 or more persons in a course of disorderly conduct with intent to commit or facilitate the commission of a felony or misdemeanor
Disorderly Behavior	25.1%	Various Categories	Disorderly conduct, resisting arrest, riot
Weapons Possession	6.5%	Various Categories	Includes possession of a weapon in a school zone and carrying a concealed deadly weapon or instrument
Drugs and Alcohol	5.4%	Various Categories	Includes delivery of controlled narcotics and possession/use of prescription and controlled narcotics, drug paraphernalia, and alcohol
Robbery and Theft	4.5%	Various Categories	Includes robbery, attempted robbery, receiving stolen property, shoplifting, and theft
Sexual Offenses	1.9%	Various Categories	Includes rape, unlawful sexual contact, sexual harassment, lewdness, and harassment
Other	4.9%	Various Categories	Includes all other offenses not included above
Total	100%		

2. Student Characteristics

Because the school arrest database contained student-level data, it enables an examination of characteristics of the demographics who were arrested in Delaware during the 2010-2011 school year. Data relating to age, arrest histories, gender, and race provide some compelling insights into the students who are arrested. Further, the data allows

comparisons between demographic groups, which highlight differences in the offenses that lead to arrests for students in these groups.

In Delaware, the youngest student placed under arrest during the 2010-2011 school year was nine years old, while the oldest was nineteen. Most students placed under arrest were fourteen to sixteen years of age, with the average age of arrested student falling at 14.7 years old. Half of the arrested students had no prior juvenile justice contact, 20% had only one prior arrest, 11% had two prior arrests, 13% had between three and five prior arrests, 4% had between six and nine prior arrests, and 2% had 10 or more prior arrests. The student with the most expansive arrest history had 22 prior arrests. While most of the arrested students had little-to-no personal experience with the juvenile justice system, some students' school arrests represented one of many contacts with the juvenile justice system.

Although the Delaware student population is evenly split between genders, 65% of the arrested students were male, and 35% were female. Black students comprised 67% of the arrested students while only accounting for 32% of the student body.⁹⁴ Meanwhile, white students accounted for 31% of those arrested in school, but half of the student body. Black students, therefore, were approximately three-and-a-half times more likely to be arrested than white students.⁹⁵ Further disaggregating the arrested student population by race and gender reveals that black males were 39% of those arrested, and black females were 24% of those arrested, compared to white males, who were 21% of those arrested and white females, who were 8% of those arrested. Even though white males and white females were much larger demographic groups amongst Delaware's student body, their membership amongst the population of arrested students was significantly smaller than black males and black females.

An examination of the offenses that led to female arrests shows that offenses relating to fighting and disorderly behavior dominated—90% of female arrests resulted from such behavior.⁹⁶ Female arrests for crimes involving weapons possession, drug and alcohol possession, theft, and property damage were quite rare, constituting only 6% of all female arrests.

Similarly, black students' arrests more commonly arose out of fighting and disorderly behavior, with 82% of charges against black student falling under this category. Disorderly conduct arrests occurred at a particularly disproportionate rate for black students as they made up 77% of students facing disorderly conduct charges. Disorderly conduct charges made up 26% of all lead charges against black students, compared to 17% of charges against white students—a significant difference.⁹⁷

⁹⁴ A notable limitation of this data set is that the FAMIS database does not effectively delineate Latino/Hispanic from non-Latino/non-Hispanic. Therefore, while Latino/Hispanic students made up 12% of the student population in Delaware during the 2010-2011 school year, statistics measuring the percentage of arrested students who were Latino/Hispanic are not available. *See* STATE OF DELAWARE, *supra* note 58.

⁹⁵ This odds ratio was determined by comparing the number of black and white students arrested to the number of black and white students enrolled in grades 6-12 ($P < .0001$). Elementary school student arrests were excluded from the calculations.

⁹⁶ A chi-square test demonstrated a statistically significant difference between the proportion of female students arrested for fighting and disorderly conduct and the proportion of male students arrested for the same behavior ($p < .001$).

⁹⁷ Statistical significance was established through a chi-square test ($P = .01$).

Meanwhile, weapons and drug charges were a significantly larger proportion of lead charges against white students (20%) than against black students (8%).⁹⁸

3. Family Court Outcomes

The school arrest database includes information on court outcomes for arrested students, including adjudication, disposition if adjudicated delinquent, and reason for dismissal if not adjudicated delinquent. An initial analysis of the arrested students' adjudications revealed that 37% of the student arrests led to delinquency adjudications and the remaining 63% resulted in dismissals of charges.⁹⁹ The dispositions for those adjudicated delinquent and the reasons for dismissing charges provide a more holistic picture of what occurs when students are sent to Family Court for alleged crimes in school.

a. Dismissals

Dismissals occurred in two distinct circumstances: 1) cases were dismissed outright because they lacked sufficient evidence or the attorney general's office deemed it not worth pursuing; or 2) the student agreed to and successfully completed a diversionary program.

One-quarter of the cases that ended in dismissal were dismissed outright. The most common reason for dismissal was insufficient evidence, including the failure of witnesses and victims to appear at trial. The attorney general's office cited a lack of "prosecutorial merit" as the reason for approximately one-third of the outright dismissals.¹⁰⁰ Another 13% of these dismissals occurred because the arrested students were adjudicated delinquent for charges other than their school arrests.

Almost three-quarters of the students whose charges were dismissed accepted and completed diversionary programs in lieu of facing delinquency determinations. Each of the three counties in Delaware used different diversion options. New Castle County, the most populous county in the state, developed a school diversion program where 63% of its diverted students were sent. The school diversion program involves one-on-one meetings with the program coordinator and a set of behavior and service requirements such as attending school, performing community service, and participating in social services when applicable.¹⁰¹ New Castle also commonly used probation as a diversionary program (called "probation before adjudication") and sometimes referred students to specialized diversionary mental health or drug courts. The other two counties in Delaware, Kent and Sussex, used mediation and arbitration programs to divert students (and juveniles arrested outside of school) from official entry into the juvenile justice system. Arrested students participating in these diversionary programs often must complete community service, meet educational requirements, and perform tasks such as

⁹⁸ Statistical significance was established through a chi-square test ($P=.03$).

⁹⁹ Dismissals came in three forms including dismissal with prejudice, dismissal without prejudice, and *nolo pros*. Although each form represents a legally distinct outcome, they are uniformly referred to as dismissals in this article.

¹⁰⁰ A determination that a case "lacks prosecutorial merit" can stem from a wide array factors, such as a lack of evidence, unreliable or absent witnesses, or lack of severity of the behavior that led to the arrest.

¹⁰¹ McDaniel, *supra* note 76, at 2.

writing apology letters for their behavior. All told, dismissal via diversion was the most common outcome for arrested students (48% of all cases).

b. Delinquency Adjudications

Thirty-seven percent of arrested students were adjudicated delinquent. The Family Court assigns adjudicated delinquents a disposition according to a prescribed system that delineates six tiers of disposition services (Levels 1, 2, 3, 3A, 4, and 5). Levels 4 and 5 involve out-of-home detention, while the other levels involve at-home services and behavior restrictions that become increasingly comprehensive as the level increases. Family Court assigned approximately half of delinquent students to Level 2, by far the most common disposition. Nineteen percent of delinquent students received a Level 3 disposition and Levels 1 and 3A each were assigned 13% of the delinquent students. Only 5% of the arrested students who were adjudicated delinquent were assigned a Level 4 or 5 disposition. Thus, it was quite rare for a school arrest to result in detention.¹⁰² Even for the relatively small number of arrested students that the Family Court deemed delinquent, their involvement in the juvenile justice system most commonly consisted of low-level services and behavioral restrictions.

Almost three-quarters of the students who were adjudicated delinquent had previous contact with the juvenile justice system. Meanwhile, 78% of the students who received diversion had no prior arrest history. The array and proportions of charges facing students adjudicated delinquent did not vary from those who were diverted. Therefore a history of being arrested appears to be a significant factor in determining court outcomes. This makes sense, as diversionary programs were designed to provide services to first-time, low-level offenders without having to convict them or adjudicate them delinquent.¹⁰³

IV. DISCUSSION

The school arrests discussed above did not occur in a vacuum but rather were part of a larger school discipline and security regime. When the 739 arrests are considered in this broader context, school arrests do not seem to be the most troubling disciplinary practice in the state. During the same 2010-2011 school year, Delaware schools utilized out-of-school suspensions as a punishment 29,645 times and applied these punishments to more than 13,000 students.¹⁰⁴ One in ten public school students faced an out-of-school suspension at least once during the school year.¹⁰⁵

The School Crimes Law in Delaware requires schools to report when certain criminal incidents occur, and Delaware's Department of Education also adds a list of

¹⁰² As discussed above at *supra* Part II.C., Delaware is systematically attempting to minimize its use of juvenile detention, so these findings are in line with this effort.

¹⁰³ See, e.g., Victoria Simpson Beck et al., *Juvenile Diversion: An Outcome Study of the Hamilton County, Ohio, Unofficial Juvenile Community Courts*, 57 JUV. & FAMILY CT. J. 1, 1 (2006) ("Juvenile diversion strategies tend to target minor, usually first-time, delinquency offenses (e.g., petty theft, property damage) or status offenses (e.g., truancy, curfew violations)").

¹⁰⁴ STATE OF DELAWARE, *supra* note 58.

¹⁰⁵ *Id.*

other forms of misbehavior that must be reported.¹⁰⁶ During the 2010-2011 school year, the law required schools to report all violent felonies,¹⁰⁷ possession of weapons on school grounds, drug offenses, assault in the third degree, unlawful sexual contact, offensive touching of a school employee or volunteer, and terroristic threatening of a school employee or volunteer.¹⁰⁸ The Department of Education requires a much broader set of offenses to be reported including vandalism, offensive touching of a student, terroristic threatening of student, and fighting/disorderly behavior.¹⁰⁹ All of the behaviors that are required to be reported qualify as specific criminal conduct.¹¹⁰ During the 2010-2011 school year, Delaware schools reported more than 1,000 school crimes and 9,000 Department of Education offenses, a number that greatly exceeded the number of school arrests that occurred.¹¹¹ As a single incident can compel a school to report multiple school crimes or Department of Education offenses, the number of reported offenses is therefore higher than the number of incidents that occurred. In other words, an incident could result in a single arrest, but several reported offenses. Even though the comparison of arrests to reported offenses is not pure, the great disparity between the two demonstrates that many arrestable offenses occurred in Delaware schools that did not result in arrest. One only needs to look at the more than 4,500 fighting/disorderly conduct offenses reported by Delaware schools to confirm this.¹¹² Indeed, it appears that the police utilized great discretion when determining whether to make an arrest, deciding against it more often than not.

These school arrests also occurred in the larger context of the juvenile justice system. It is worth comparing the school arrests profile with all juvenile arrests in the state.¹¹³ Between September 1, 2010 and June 30, 2011, school arrests accounted for 16% of all juvenile arrests in the state of Delaware, showing that juveniles were more likely to be arrested when they were not in school. A greater percentage of non-school arrests led to felony charges (18%) than school arrests (9%). It follows that arrests that occurred when students were not in schools generally arose out of more serious misconduct. Importantly, certain types of conduct were also more prominent among arrests in schools. For example, school arrests accounted for 34% of all offensive touching charges and 49% of all disorderly conduct charges during this time period. These findings suggest that acts

¹⁰⁶ See *supra* notes 67, 70 and accompanying text for a discussion to how the law has changed since the collection of the data.

¹⁰⁷ For a complete list of violent felonies under Delaware law, see DEL. CODE ANN. tit. 11 §4201(c) (West 2013).

¹⁰⁸ DEL. CODE ANN. tit. 14 § 4112 (2011) (West 2013).

¹⁰⁹ 14 DEL. ADMIN. CODE § 601 (West 2013).

¹¹⁰ Incidents of bullying were required to be reported, and while bullying is not an enumerated crime under the Delaware Code, an act of bullying might easily fall under a variety of crimes, including offensive touching, terroristic threatening, or assault. Following a national trend, Delaware passed bullying legislation in 2007 and 2012. The laws did not make bullying a crime and instead focused on developing bullying prevention practices in schools, implementing cyberbullying policies, and reporting requirements for schools. DEL. CODE ANN. tit. 14 § 4112D (West 2013).

¹¹¹ STATE OF DELAWARE, *supra* note 58.

¹¹² *Id.*

¹¹³ Just like the school arrest data, the data relating to all juvenile arrests was obtained from FAMIS, the Family Court electronic database.

of minor misbehavior may be less tolerated in schools because of the heavy focus on maintaining a safe and secure learning environment.¹¹⁴

The findings further demonstrate that normal, adolescent behavior is being criminalized. For example, fighting is a common adolescent experience.¹¹⁵ Since our schools are concentrated pockets of adolescents during the school day, it should come as no surprise that fights are similarly commonplace within schools (although significantly less common than outside of school).¹¹⁶ Just as was found in Delaware, previous studies have identified fighting and disorderly conduct as prominent offenses that lead to arrests in schools. For example, Kathleen Dolan examined a Bronx high school's records and found that during its 2004-2005 school year, 52% of the delinquency summonses and referrals issued to students charged the students with no more than disorderly conduct.¹¹⁷ The NAACP and the Advancement Project found that the overwhelming majority (76%) of school referrals to the juvenile justice system in Florida during the 2004-2005 school year related to "misdemeanor offenses such as disorderly conduct, trespassing, or assault and/or battery."¹¹⁸ All of these studies reveal the commonality of delinquency charges for very common student behavior, such as schoolyard fights, verbal threats, and otherwise acting out. Moreover, the common charges of disorderly conduct and offensive touching empower police and prosecutors with significant discretion regarding whether to charge students when they act in such ways.¹¹⁹

Certainly, these common occurrences of fights in schools are not to be taken lightly—they endanger students and staff, and disrupt schools' efforts to provide an

¹¹⁴ First Amendment jurisprudence supports the notion that minor misbehavior is less tolerated in school permitting greater restrictions on student speech in order to preserve the educational environment. *See Morse v. Frederick*, 551 U.S. 393, 393 (2007) (holding that school administrator did not violate student's free speech rights by ordering that a "Bong Hits 4 Jesus" sign be taken down at a school-sponsored event); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (holding that school administrator's decision to remove two stories from an issue of the school-sponsored newspaper was not a violation of First Amendment rights); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 676 (1986) (holding that suspension of a student for delivering a student government campaign speech containing sexual innuendo was constitutional because speech was not political and school has legitimate interest in quelling lewd speech). Of course, the data do not allow a definitive conclusion about the reason for these findings. It could be that minor misbehavior is more frequently noticed in schools due to constant surveillance of students by school staff or it could be that students proportionately commit more acts of minor misbehavior in school. While the latter seems unlikely, we cannot dismiss it outright.

¹¹⁵ For example in a recent national survey, 31% of high school students admitted to having been in a physical fight in the preceding twelve-month period. ROBERS, ET AL., *supra* note 32, at 152. We need look no further than Vice President Joe Biden for anecdotal evidence of this reality. Getting in fights was an aspect of his childhood that he could not escape, as his mother encouraged him to find and fight a boy who had previously beaten him up. David Von Drehle, *Let There be Joe*, TIME, Sept. 2012, at 40.

¹¹⁶ ROBERS, ET AL., *supra* note 32, at 50.

¹¹⁷ Nolan, *supra* note 47, at 54.

¹¹⁸ FLORIDA STATE CONFERENCE NAACP, ADVANCEMENT PROJECT, & NAACP LEGAL DEFENSE AND EDUCATION FUND, *ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA* 6 (2006).

¹¹⁹ Offenses such as disorderly conduct (DEL. CODE ANN. tit. 11 § 1301 (1995)) and offensive touching (DEL. CODE ANN. tit. 11 § 601 (2001)) provide the police and prosecutors with a great degree of discretion because they encompass a wide array of behavior, the perception of which can determine whether it is deemed criminal or not. For example, loud shouting or cursing may be considered disorderly conduct in certain circumstances but not in others. Likewise, pushing may be seen as playful in certain situations or aggressive in others.

education. However, responding to these instances with arrests and/or other exclusionary sanctions are not the only options available to school administrators. As is discussed later in more detail, a variety of evidence-based alternative responses exist that reduce problem behavior in schools without resorting to punitive sanctions.¹²⁰

A. Race

The disproportionate arrest rate for black students in Delaware is consistent with the proportion of black-student involvement in suspensions and expulsions: black students in Delaware composed 52% of those suspended and 51% of those expelled during the 2009-2010 school year.¹²¹ This finding is also consistent with the proportion of black youth in the juvenile justice system generally. Black youth accounted for 58% of juveniles arrested in Delaware between September 2010 and June 2011, while only making up 25% of the juvenile population.¹²² Just as in schools, black juveniles across the state were three-and-a-half times more likely to be arrested than white juveniles.

The findings in Delaware are consistent with national statistics relating to both school discipline and juvenile justice.¹²³ In 2006, 15% of black students were suspended nationally, compared to 5% of white students.¹²⁴ Similarly, in 2008, the violent crime arrest rate for black juveniles was five times that of white juveniles.¹²⁵ The overrepresentation of blacks in school discipline and in the juvenile justice system is well recognized and seemingly ubiquitous.

The charges levied against black students tell a compelling story. During the 2010-2011 school year, Delaware charged black students with charges relating to fighting and disorderly behavior at a significantly higher rate than their white counterparts. Most of these charges are discretionary in nature, which raises specters of discrimination in the system. While some might argue that this difference could be the result of differential involvement (i.e., black students simply fight and act disorderly much more often than white students), the Youth Risk Behavior Survey (the Survey) undermines this claim.¹²⁶

¹²⁰ See *infra* Part V.

¹²¹ These data were provided by the ACLU of Delaware, which they obtained from the Delaware Department of Education.

¹²² Rates were determined using juvenile arrest data provided by the Family Court of Delaware and juvenile population data found at KIDS COUNT IN DELAWARE, KIDS COUNT IN DELAWARE, FAMILIES COUNT IN DELAWARE: FACT BOOK 2011, 127. Notably, this report provides 2008 population data and delineates between Hispanic and black, making the comparison imperfect, since the Family Court data does not make this delineation.

¹²³ See, e.g., RUSSELL J. SKIBA, ROBERT S. MICHAEL, ABRA CARROLL NARDO, & REECE PETERSON. THE COLOR OF DISCIPLINE: SOURCES OF RACE AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 2 (2001); Charles Puzzanchera & Benjamin Adams, *Juvenile Arrests 2009*. JUVENILE OFFENDERS AND VICTIMS, NATIONAL REPORT SERIES BULLETIN 6-7 (Dec. 2011), <http://www.ncjj.org/pdf/236477.pdf>; U.S. DEPARTMENT OF EDUCATION, 2006 CIVIL RIGHTS DATA COLLECTION: PROJECTED VALUES FOR THE NATION, http://ocrdata.ed.gov/StateNationalEstimations/projections_2006 (providing national and state data demonstrating disproportionate involvement of minority students in school discipline).

¹²⁴ DANIEL J. LOSEN & RUSSELL J. SKIBA. SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 3 (2010).

¹²⁵ Charles Puzzanchera. *Juvenile Arrests 2008*. JUVENILE JUSTICE BULLETIN 9 (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/ojdp/228479.pdf>.

¹²⁶ Data from the Survey was made available to the author by the Center for Disease Control and the analysis.

The data from the Survey, which was last administered to public high school students in 2011 in states throughout the country, including Delaware,¹²⁷ closely coincides with the 2010-2011 student arrest data that is being analyzed here. The Survey asked students a series of questions about their involvement in a variety of behavior.¹²⁸ One of the questions specifically asked the student respondents if they have been in a fight in the last twelve months *in school*. Twelve percent of black students responded affirmatively to this question, compared to 5.4% of white students. In other words, black students were almost two-and-a-half times more likely to get into a fight than white students.¹²⁹ However, black students were more than four times more likely to be arrested for fighting offenses.¹³⁰ Differential involvement can only explain a portion of the disproportionate arrests of black students.

A disproportionate number of minority youth have been involved at every stage in the school-to-prison pipeline, culminating with a national incarceration rate for blacks that dwarfs the rate for whites.¹³¹ School arrests, an increasingly utilized punishment in the past two decades, appears to exacerbate this significant issue by providing a direct link between school and the juvenile justice system. The analysis of school arrest rates in Delaware only serves to heighten concerns that school arrests are pushing black students away from school and toward justice system involvement.

B. Gender

The proportion of females among arrested students (35% of student arrestees) and the types of charges that female students faced (overwhelmingly related to fighting and disorderly behavior) raise important questions about how gender and school discipline interact. The proportion of female arrests for fighting and disorderly behavior in school is consistent with prior research on the possible causes of the increasing rates of female arrests over the past three decades. For example, Professor Darrell Steffensmeier from Pennsylvania State University and his colleagues conducted a longitudinal study that

¹²⁷ CENTER FOR DISEASE CONTROL, YOUTH RISK BEHAVIOR SURVEILLANCE SYSTEM: SYSTEM OVERVIEW (2012), http://www.cdc.gov/healthyyouth/yrbs/pdf/system_overview_yrbs.pdf; CENTER FOR DISEASE CONTROL, PARTICIPATION HISTORY & DATA QUALITY, 1991–2011 — HIGH SCHOOL (2012), <http://www.cdc.gov/healthyyouth/yrbs/history-states.htm>; CENTER FOR DISEASE CONTROL, PARTICIPATION HISTORY & DATA QUALITY, 1991–2011 — HIGH SCHOOL (2012), <http://www.cdc.gov/healthyyouth/yrbs/history-states.htm>.

¹²⁸ CENTER FOR DISEASE CONTROL, QUESTIONNAIRES AND ITEMS RATIONALES (2011), http://www.cdc.gov/healthyyouth/yrbs/questionnaire_rationale.htm.

¹²⁹ This result is based on an odds ratio calculation. A chi-square test confirmed statistical significance ($P < .001$).

¹³⁰ Again, this result is based on an odds ratio calculation. A chi-square test confirmed statistical significance ($P < .001$). Fighting offenses include all grades of assault and offensive touching. When the list of fighting offenses is expanded to offenses that are often levied against students for fighting, but may also apply to other behavior, the disparity becomes even starker. These offenses include disorderly conduct, terroristic threatening, and riot. The odds ratio shifts from 4.18 to 4.24 when these offenses are added to the calculations.

¹³¹ See, e.g., CATHERINE Y. KIM, DANIEL J. LOSEN, & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM (2011) (documented discrimination against students of color in suspensions, expulsions and law enforcement referrals); PRISON POLICY INITIATIVE, INCARCERATION RATES BY RACE AND ETHNICITY, 2010, *available at* <http://www.prisonpolicy.org/graphs/raceinc.html> (showing that the black incarceration rate in 2010 was 2,207 per 100,000, while the rate for whites was 308 per 100,000).

pitted Uniform Crime Report statistics against self-reported behavior data from the Monitoring the Future and National Youth Risk Behavior Survey data sets.¹³² The authors found that the increasing rate of female arrests for violent behavior did not correspond to actual increases in violent behavior.¹³³ Rather, the arrest rates reflect several phenomena that make it more likely for females to be arrested for such behavior. These include less tolerant attitudes toward female misbehavior and, most notably, increased policing in intimate settings, such as schools, where female violence is more likely to occur.¹³⁴

Criminologists Meda Chesney-Lind and Katherine Irwin took this analysis a step further in their book *Beyond Bad Girls*.¹³⁵ They concluded that the increased involvement of females in the juvenile justice system results from a change in the way females are monitored and controlled.¹³⁶ They also found formal controls such as juvenile justice involvement replaced traditional informal control of females that occurred in homes and schools.¹³⁷ Moreover, because of media attention to violence among females, adults are increasingly monitoring females, leading to a greater awareness of misbehavior.¹³⁸ Certainly, the hyper-secure nature of present-day school settings coupled with heightened disciplinary responses lend themselves to closer monitoring of female behavior and a shorter path between misbehavior and juvenile justice involvement.

The school arrest data relating specifically to black female students in Delaware provides a unique picture into how gender and race interact with school discipline. Black females made up a larger proportion of arrested students than white males, and the charges they faced arose almost exclusively out of fighting and other disorderly behavior. During the 2010-2011 school year, black female students faced more arrests for fighting than white male students despite the fact black females made up approximately 16% of the student population, while white males comprised approximately 26% of the student population. Black females were more than twice as likely to face arrest for fighting in school than their white male counterparts.¹³⁹ This was the case even though black females and white males reported fighting in school at similar rates¹⁴⁰ according to the Youth Risk Behavior Survey.¹⁴¹ This data undermines any claim that black females were arrested for fighting more often simply because they fought more often. Rather, it lends

¹³² Darrell Steffensmeier, Jennifer Schwartz, Hua Zhong, & Jeff Ackerman, *An Assessment of Recent Trends in Girls' Violence Using Diverse Longitudinal Sources: Is the Gender Gap Closing?* 43 CRIMINOLOGY 355, 358 (2005).

¹³³ *Id.* at 387.

¹³⁴ *Id.* at 387-392.

¹³⁵ See generally MEDA CHESNEY-LIND & KATHERINE IRWIN, *BEYOND BAD GIRLS: GENDER, VIOLENCE AND HYPE* 143-155 (2008).

¹³⁶ *Id.*

¹³⁷ *Id.* (noting that in the past, schools relied on classroom condition, extracurricular activities and social norms to suppress female expression and achievement).

¹³⁸ *Id.*

¹³⁹ This result is based on an odds ratio calculation. A chi-square test confirmed statistical significance ($P < .001$). Fighting offenses include all grades of assault and offensive touching. When the list of fighting offenses is expanded to offenses that are often levied against students for fighting but that may also apply to other behavior, the disparity again becomes starker, with the odds ratio shifting from 2.2 to 3.0. These offenses include disorderly conduct, terroristic threatening, and riot.

¹⁴⁰ A chi-square test revealed no significant difference in the rates of black female and white male respondents who indicated that they had been in a fight in school in the past twelve months ($P = .8$).

¹⁴¹ See *supra* Part IV.A. for a discussion of the Youth Risk Behavioral Survey.

strong support to the notion that black females receive disparate treatment when they fight in school, at least compared with white males. Thus, the school arrests data from Delaware not only confirms concerns that harsh disciplinary practices disproportionately affect minority youth, it indicates that female students (and black female students in particular) receive differential treatment under strict disciplinary regimes.

C. *Court Administration*

The outcomes in Family Court for the arrested students lend credence to the findings of policy makers in the state who are currently working to reform school discipline laws. One of the major issues raised by the School Discipline Task Force was a concern that the Family Court and the Attorney General's Office were devoting scarce resources to school arrests for minor offenses when those resources could be better used to address more serious crimes.¹⁴² Certainly, the high proportion of school arrests for misdemeanor offenses confirms this claim. Moreover, the number of arrested students that avoid delinquency adjudications by successfully completing diversionary programs further demonstrates that the Family Court is utilizing time and resources handling school arrests that should not be in the justice system. If such diversionary programs were offered by schools or in other settings outside the justice system, the services provided by these programs could address student misbehavior without the need for arrests, Attorney General review, court appearances, or the case processing associated with juvenile justice cases.

V. FIXING SCHOOL DISCIPLINE

The data reveals three troubling trends that have important policy implications. First, the application of arrests in Delaware's schools resulted in a great number of students being arrested for minor misbehavior. Second, a disproportionate number of black and female students received differential treatment. Third, the Family Court is forced to devote scarce time and resources to processing a high volume of minor schools arrests, a plurality of which lead to diversionary services that could have been offered directly through schools (in a much more efficient manner).

It would be unfair and inaccurate to suggest that punitive disciplinary practices, including heavy reliance on suspensions and arrests for minor misbehavior, represent the totality of Delaware school districts' efforts to promote safe and secure school climates. Schools throughout the state have implemented a variety of initiatives aimed at producing positive and productive outcomes for misbehaving students. This includes the adoption of Positive Behavioral Intervention Supports in some schools,¹⁴³ and a peer court program in others.¹⁴⁴ Teachers, administrators, SROs, and other school personnel throughout the

¹⁴² SCH. DISCIPLINE TASK FORCE. FINAL REPORT, *supra* note 73, at 8.

¹⁴³ See DEL. POSITIVE BEHAV. SUPPORT PROJECT, <http://www.delawarepbs.org> (last visited July 24, 2013).

¹⁴⁴ Brandywine School District Secondary School Code of Conduct (2012-2013), *available at* <http://brandywineschools.org/cms/lib04/DE01000691/Centricity/Domain/1452/Secondary%20code%202012%202013%20%2009%20%2024%202012.pdf> ("In order to minimize the number of students being suspended out of school for violations of a school handbook or the Code of Conduct for certain offenses at the Secondary School Level, the District, has established a Peer Court Diversion Program to allow a jury made up of students to determine consequences for certain violations of the Code within each of the District's Secondary School.").

state are working hard in their own capacities to improve their schools and classrooms in a variety of ways that may not fit neatly into pre-ordained models and methods. Perhaps most importantly, they give individual attention to students in need and strive to provide them the support they need to succeed in school. Yet, these individual efforts are not consistent across the state. Moreover, when they are in place, their positive effects are tempered by existing codes of student conduct that drive Delaware's high rate of suspensions¹⁴⁵ and the arrest practices outlined above. Therefore, Delaware needs to continue to pursue unified, statewide initiatives to improve schools' disciplinary responses such as the recent changes made to its School Crime Law.¹⁴⁶ The two policy changes below would do just that by minimizing the use of arrests in schools and installing more productive responses to student misbehavior in all schools.

A. The First Step is Simple: Reserve Suspensions, Expulsions, and Arrests for only the Most Serious Misbehaviors

The most obvious way to reduce the number of students who are suspended, expelled, or arrested for relatively minor misbehavior is to stop suspending, expelling, and arresting students for relatively minor misbehavior. This straightforward solution seems to be hiding in plain sight, but it requires political will and stakeholder collaboration to accomplish.

To change suspension and expulsion practices, leadership at the school, school district, and state levels must agree to alter established practices by changing student codes of conduct, department of education regulations, and state laws where necessary. Suspensions, expulsions, and arrests must be reserved for the most serious acts of misbehavior. In some states, changing disciplinary practices may require legislative action, but in many places it only requires changes to administrative regulations or local school district rules. State legislatures can take the lead by passing laws that severely restrict the use of suspensions. Short of that, state legislatures must at least pursue legislation that turns back mandatory suspension policies, as was done recently in Colorado.¹⁴⁷

Changes to the application of arrests in school are unlikely to come from the legislature, as it would require complex or nuanced changes to certain criminal codes. However, the police, prosecutors, delinquency court officials, education leaders, and other leaders can come to an agreement that reserves arrests as a response of last resort to student misbehavior. This may seem like a far-flung notion, but such agreements exist in several localities throughout the United States.¹⁴⁸ The efforts of Judge Teske and others in Clayton County, Georgia stands as the most prominent example. Judge Teske convened school leaders, school resource officers, police leadership, and the district

¹⁴⁵ See *supra* notes 104-105 and accompanying text.

¹⁴⁶ See *supra* notes 67, 70 and accompanying text.

¹⁴⁷ Deam & Blume, *supra* note 7.

¹⁴⁸ Steven C. Teske, Brian Huff, & Cora Graves, *Collaborative Role of Courts in Promoting Outcomes for Students: The Relationship between Arrests, Graduation Rates and School Safety*, in NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN, KEEPING KIDS IN SCHOOL AND OUT OF COURTS: A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS 138 (2012) (indicating successful implementation of such agreements in Birmingham, Alabama, Wichita, Kansas, and Clayton County, Georgia).

attorney's office, and they came to a simple yet effective agreement.¹⁴⁹ Briefly, the agreement stated that students would no longer be arrested for fights and disorderly behavior unless they repeat such behavior several times and attempts at counseling and other services appear ineffective.¹⁵⁰ Before this agreement, fighting and disorderly behavior offenses were the overwhelming majority of school arrests in the county, and its creation has led to three positive outcomes.¹⁵¹ First, the number of school arrests shrank dramatically.¹⁵² Second, the SROs noticed improved relationships with students in their school because their adversarial confrontations with students became rare.¹⁵³ Finally, the number of serious crimes in schools diminished.¹⁵⁴ Similar programs have been implemented in different counties and districts with similarly positive results.¹⁵⁵

In Delaware, the successes achieved by the School Discipline Task Force demonstrate that the necessary stakeholders are already in place and ready to change arrest and suspension practices. The changes to the School Crimes Law mentioned above represent an incremental step toward this policy shift.¹⁵⁶ Yet, the example set by Clayton County demonstrates that a more dramatic and impactful policy change can occur if school leaders, SROs, the courts, and state policy makers commit to making a bold change.

Notably, this approach would not only reduce the number of arrested students but would also diminish the disparate involvement of minority students in school arrests. As demonstrated above, the overwhelming majority of charges faced by black students in Delaware during the 2010-2011 school year related to minor fighting and disorderly behavior. If Delaware had not arrested any students for misdemeanor fighting or disorderly conduct charges,¹⁵⁷ the number of black students arrested would have dropped from 465 to 101, while the number of white students arrested would have dropped from 213 to 71. Disproportionate black involvement would still be an issue, as black students comprised approximately 57% of all students arrested; nevertheless, the disproportionality would have been less severe than what actually occurred during the 2010-2011 school year where blacks comprised approximately 65% of all students arrested. More importantly, the sheer number of black students involved in school arrests would have been much lower, not to mention the added benefit of significantly decreasing student involvement in the justice system.¹⁵⁸

¹⁴⁹ *Id.* at 135-146; BLUE RIBBON COMM'N ON SCH. DISCIPLINE, EXECUTIVE REPORT, 50 (2007); Clayton County Cooperative Agreement, (n.d.), <http://www.jdaihelpdesk.org/collmodagree/Clayton%20County%20GA%20School%20Referral%20Cooperative%20Agreement.pdf>, (last visited July 24, 2013).

¹⁵⁰ Teske, et al., *supra* note 148, at 136.

¹⁵¹ *Id.*

¹⁵² *Id.* at 137 (reporting a 67.4% decrease in court referrals from schools).

¹⁵³ *Id.* at 138.

¹⁵⁴ *Id.* at 137 (reporting a 30.8% drop in felony referrals and a 73% decrease in the number of serious weapons found on school campuses).

¹⁵⁵ *Id.* at 138-139.

¹⁵⁶ See *supra* notes 67, 70 and accompanying text.

¹⁵⁷ These charges included assault in the third degree, disorderly conduct, offensive touching, resisting arrest, and terroristic threatening.

¹⁵⁸ Some of these students might have been repeat offenders and subject to arrest and some of them may have committed a felony-level offense that was undercharged, but even if this occurred in a few instances, the number of arrests would still have dropped dramatically.

In his book *American Juvenile Justice*, Professor Franklin E. Zimring argues that a “harm reduction” approach to reforming juvenile justice is more pragmatic than a “proportionality” approach to addressing overrepresentation.¹⁵⁹ According to Zimring, a “harm reduction” approach seeks to minimize the harm done to juveniles involved in the juvenile justice system by removing harmful policies.¹⁶⁰ The “proportionality” approach seeks to make the application of those harmful policies more proportionate between minority and non-minority juveniles, regardless of the overall number of juveniles who are subject to the harm.¹⁶¹ Zimring argues that a harm reduction approach is preferable because it can both decrease the number of minority and non-minority juveniles experiencing the harm, and have the side-benefit of reducing disproportionality.¹⁶² He highlights two policy shifts: ending the detention of status offenders and increasing the use of diversion.¹⁶³ These policies did not specifically target minority overrepresentation but had the effect of reducing the number of minority youths who were either detained or adjudicated delinquent.¹⁶⁴ While these reforms did not have a significant impact on disproportionality, they diverted a substantial number of juveniles away from detention, including a large number of minority juveniles.¹⁶⁵ Thus, Zimring argues, these policy changes reduced the net harm felt by minority students more effectively than reforms that targeted disproportionality would have.¹⁶⁶

Such is the case with school arrests in Delaware. If policy makers in the state would agree that students cannot be arrested for misdemeanor fighting and disorderly behavior, the number of students arrested, across races, would dramatically drop. Additionally, because black students are more likely to be arrested for such offenses, their disproportionate representation among arrested students would improve. Thus, if Delaware embraced a harm reduction approach by limiting the use of school arrests, it would have the effect of both limiting the number of students exposed to the juvenile justice system and improve black students’ disproportionate representation among arrested students. Such a policy change may seem far-fetched because it would take political will and collaboration among a diverse group of stakeholders. The example set by Clayton County, however, demonstrates that it *is* possible. In places such as Delaware, where stakeholders have already begun the conversation about how to improve school discipline practices, this change is certainly within the realm of possibility.

B. The Second Step is Complex: Adopt a Comprehensive System to Create Positive Learning Environments in Delaware Schools

In lieu of suspensions, arrests, and expulsions, schools can turn to more effective responses to student misbehavior. For quite some time, researchers have been pointing to two distinct yet complimentary approaches to student misbehavior that create safer and

¹⁵⁹ FRANK E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 159-174 (2005).

¹⁶⁰ *Id.* at 164.

¹⁶¹ *Id.*

¹⁶² *Id.* at 165.

¹⁶³ *Id.* at 170-72.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 174.

more positive learning environments for students: Positive Behavioral Interventions and Supports (PBIS)¹⁶⁷ and restorative justice.

1. Promising Approaches Are Available

PBIS is an evidence-based practice that relies on a three-tier system for promoting positive student behavior and preventing misbehavior.¹⁶⁸ The first tier of the system provides supports for the entire student body. Such supports include clearly defining and teaching expected behaviors, rewarding positive behavior, and applying a continuum of consequences for problem behavior. The second tier targets at-risk students—students who exhibit behavior problems despite the supports provided in the first tier—with enhanced interventions and supports, often in group settings. These may include sessions that teach social skills and informal meetings during which the students “check in” to discuss how they have been behaving. The third tier provided individualized and specialized interventions and supports for high-risk students—students who do not respond to the first and second tier supports and interventions. The interventions and supports are based on a functional behavior assessment and involve a community of teachers and other school staff working with the student to change his or her behavior patterns.

Restorative justice is a practice that has emerged as a viable approach in a variety of contexts,¹⁶⁹ but its use in schools is particularly apt. Restorative justice focuses on the individuals affected by misbehavior: both the offenders and the victims. Restorative justice seeks to repair the harm done to the victims and to restore the offenders’ positive membership status in their communities through collaborative problem solving.¹⁷⁰ In other words, when misbehavior occurs, restorative justice seeks to find a mutually agreeable way to address the impact on victims and provide support for offending students that help them learn to behave more appropriately in the future. Evidence demonstrates that restorative justice practices effectively address student misbehavior,

¹⁶⁷ PBIS is also referred to as Positive Behavioral Supports (PBS) and School-Wide Positive Behavioral Interventions and Supports (SWPBIS). See, e.g., Andrea M. Cohn, *Positive Behavioral Supports: Information for Educators* NASP RESOURCES (2001), http://www.nasponline.org/resources/factsheets/pbs_fs.aspx (explaining PBS); Jeffrey Sprague & Vicky Nishioka, *Skills for Success: A Systems Approach to Delinquency Prevention and School Success*, in NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN, KEEPING KIDS IN SCHOOL AND OUT OF COURTS: A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS 55 (2012) (same).

¹⁶⁸ For a thorough summary of empirical tests of the efficacy of PBIS, see *Is School-Wide Positive Behavioral Supports an Evidence-Based Practice?*, OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS EFFECTIVE SCHOOLWIDE INTERVENTIONS (Mar. 2009), <http://www.pbis.org/research/default.aspx>.

¹⁶⁹ See, e.g., Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 288-89 (2012) (examining whether restorative justice might be employed in attorney disciplinary matters and noting the application of restorative justice in schools, regulatory enforcement, and white collar crime).

¹⁷⁰ Mara Schiff & Gordon Bazemore, “Whose Kids Are These?” *Juvenile Justice and Education Partnerships Using Restorative Justice to End the “School-to-Prison Pipeline”*, in NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN, KEEPING KIDS IN SCHOOL AND OUT OF COURTS: A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS 68 (2012).

enhance relationships between students and school personnel, and improve school climates continues to mount.¹⁷¹

Several localities have successfully instituted restorative justice practices in their schools. Mara Schiff and Gordon Bazemore, two leading restorative justice scholars, cite restorative justice successes in Minnesota, Denver, Philadelphia, Oakland, Chicago, and Palm Beach County, Florida.¹⁷² They note that many of these locales experienced drops in both harsh disciplinary practices *and* incidents of misbehavior.¹⁷³ The New York Civil Liberties Union found similarly successful restorative justice practices in several New York City schools.¹⁷⁴ Importantly, the report highlighted that these schools served minority and low-income student population, and that these schools experienced not only safer environments but also greater educational attainment than peer New York City schools that adopted criminalized school security and discipline measures.¹⁷⁵

If schools adopt and properly implement PBIS or restorative justice programs,¹⁷⁶ they would essentially replace exclusionary school discipline practices, including suspensions and arrests. Implementing these programs in schools is a more efficient use of resources. With regard to arrests, these programs would eliminate several stages of court involvement: consideration and pursuit of a case by the attorney general's office; defense of the case by the public defender's office; court appearances and related court administration; and involvement of social service agencies and others. Furthermore, because schools are generally more familiar with their students than courts are with the juveniles that appear in delinquency court, schools are better able to respond to student misbehavior in an individualized manner.

2. SROs Can be Part of the Solution

SROs and other modes of police involvement in schools appear to be fixtures in modern school regimes. Their presence in schools seems likely to expand in the wake of the Newtown shooting.¹⁷⁷ Fortunately, school shootings are relatively rare occurrences.¹⁷⁸

¹⁷¹ *Id.*

¹⁷² Schiff & Bazemore, *supra* note 170, at 74-75 (noting restorative justice successes outside the United States).

¹⁷³ *Id.*

¹⁷⁴ NEW YORK CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 22-42 (2009).

¹⁷⁵ *Id.*

¹⁷⁶ PBIS and restorative justice are the most prominent amongst among a variety of alternatives to exclusionary school discipline practices. *See, e.g.*, MARIA O'CONNELL, CONNECTICUT'S SCHOOL BASED DIVERSION INITIATIVE: EVALUATION REPORT (2011), (finding that in-school diversion program effectively linked misbehaving students with mental health and other service and seemed to divert them from future contact with the juvenile justice system); Jennifer Wynn-Whaley & Arianna Gard, *The Neuroscience Behind Misbehavior: Reimagining How Schools Discipline Youth*, in NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN, KEEPING KIDS IN SCHOOL AND OUT OF COURTS: A COLLECTION OF REPORTS TO INFORM THE NATIONAL LEADERSHIP SUMMIT ON SCHOOL-JUSTICE PARTNERSHIPS 26 (2012) (highlighting Cognitive Behavioral Therapy as a promising school-based program for misbehaving students).

¹⁷⁷ *See supra* note 17 and accompanying text.

¹⁷⁸ *See, e.g.*, Chris Kirk, *Since 1980, 297 People Have Been Killed in School Shootings*, SLATE (Dec. 19, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/12/sandy_hook_a_chart_of_all_196_fatal_school_shootings_since_1980_map.html (noting that there have been 137 fatal school shootings resulting in 297 deaths since 1980).

Only a very small number of SROs will ever experience an active shooter event in their schools, and even for those SROs, the event will most likely be a one-time occurrence. The majority of the time that SROs spend in schools is devoted to policing students and responding to incidents of misbehavior.

While their presence in schools can escalate disciplinary responses, this does not have to be the case. Obviously, if arrests are limited as proposed here, SROs' roles in criminalizing school discipline will also be limited. SROs can be incorporated into PBIS and restorative justice practices, so they become partners in an effort to create positive learning environments. They can play a role in explaining to students the possible criminal consequences of their behavior or contemplated behavior, and they can serve as facilitators of restorative justice programs. Pursuant to the "Triad Model," SROs are already expected to play the roles of counselors and teachers as well as law enforcers.¹⁷⁹ Formally incorporating and training SROs in PBIS and restorative justice programs would allow them to fulfill these roles to a much greater extent. Meanwhile, limiting their use of arrests would diminish the contradictions that inherently exist between their law enforcement role and their counseling and teaching roles.¹⁸⁰

VI. CONCLUSION

Ensuring the safety and security of America's school children is a critical part of creating a nurturing learning environment. While American schools' adoption of harsh disciplinary policies and security measures may have been an effort toward achieving safe and secure schools, such initiatives nevertheless threaten the nurturing ideal. For example, the use of arrests to control minor misbehavior, as is demonstrated by the data examined above, impedes schools' abilities to address students' behavioral problems in a productive way and instead removes students from the very environment where their needs could best be met. As such, school arrests provide a direct conduit for students to the school-to-prison pipeline by making it more likely that even minor acts of misbehavior in school will lead to justice system contact. Moreover, as the data discussed above confirms, these harsh disciplinary responses disproportionately affect certain at-risk student populations, including minority and female students. As a result, those students who could benefit most from a school's positive learning environment are instead removed from it and handed over to the juvenile justice system.

Schools should not be places where students' failures to meet expected standards of behavior or educational attainment leads to their exclusion from the education process. Rather, schools must shift their approach to safety and security such that students who misbehave have an opportunity to learn from their transgressions and become more productive members of their school communities. Schools can still show students that their actions have consequences while also providing students with the support necessary

¹⁷⁹ *School Resource Officers, School Police, & School Security Officers*, NATIONAL SCHOOL SAFETY AND SECURITY SERVICES (2012), <http://www.schoolsecurity.org/resources/school-resource-officers.html>.

¹⁸⁰ Students may find it hard to trust a school resource officer that is at times asking them to confide in him when he is counseling them and is at other times trying to extract information from them when he is conducting criminal investigations. See AARON KUPCHIK, HOMEROOM SECURITY 106-07 (2010) ("But the role of counselor can conflict with [SROs'] obligations as police officers. This is especially apparent when a student confides in the officer about illegal actions . . . here the officer has an obligation to take legal action, even if it means betraying the student's trust . . .").

to address the root causes of their misbehavior. This can only be achieved if arrests are used much more sparingly in schools as part of a larger effort to introduce evidence-based approaches to student misbehavior aimed at creating positive school environments that include all students (even those that misbehave) in the educational mission. Without such changes, students will continue to experience school disruption, and the school-to-prison pipeline will continue to pull students away from school and towards the justice system.