

4-2019

## Reevaluating School Searches Following School-to-Prison Pipeline Reforms

Josh Gupta-Kagan

Follow this and additional works at: [https://scholarcommons.sc.edu/law\\_facpub](https://scholarcommons.sc.edu/law_facpub)



Part of the [Fourth Amendment Commons](#)

---

## ARTICLES

### REEVALUATING SCHOOL SEARCHES FOLLOWING SCHOOL-TO-PRISON PIPELINE REFORMS

*Josh Gupta-Kagan\**

*The U.S. Supreme Court held in *New Jersey v. T.L.O.* that school officials could search students without a warrant and with only reasonable suspicion, not probable cause, because of schools' need for discipline and the relationship between educators and students. That case belongs to a body of Fourth Amendment cases involving, in T.L.O.'s terms, "special needs, beyond the normal need for law enforcement." What Fourth Amendment standard, then, governs searches involving one of the roughly 20,000 school resource officers (SROs) in American schools? Most state courts to decide the issue in the 1990s and 2000s found that T.L.O. applied to SRO-involved searches, likening SROs to school officials and drawing a line between SROs and other police officers.*

*Reforms largely enacted in the 2010s, in contrast, draw a line between school officials and SROs, emphasizing that SROs are law enforcement officers, not school disciplinarians. Reflecting the consensus that law enforcement responses to school misbehavior harm children, these reforms limit SRO involvement to more serious crimes or immediate safety risks.*

*This Article is the first to explore how these recent reforms undermine earlier cases applying T.L.O. to SROs. These recent reforms place SROs on the law enforcement side of the "special needs" line. This analysis also shows how searches conducted under policies requiring schools to turn over evidence of criminal activity to law enforcement transform the character of searches conducted by school officials into law enforcement searches. Finally, this Article offers a doctrinal path to limiting warrantless school searches to narrower circumstances, thus letting authorities respond to the risk of deadly weapons at schools while limiting the risk that reduced Fourth Amendment protections will contribute to the school-to-prison pipeline.*

---

\* Associate Professor, University of South Carolina School of Law. The author would like to thank Ann Eisenberg, Avni Gupta-Kagan, Lisa Martin, Claire Raj, and Emily Suski for thoughtful comments on early drafts and John Waelde for excellent research assistance.

INTRODUCTION.....	2015
I. HOW SROs OFTEN ESCAPED REGULAR FOURTH AMENDMENT LIMITATIONS .....	2018
<i>A. A Lower Fourth Amendment Standard for School Officials' Unique Roles.....</i>	2019
<i>B. Standards for SRO-Involved Searches Remain Unresolved by the Supreme Court.....</i>	2022
<i>C. The Majority Rule: State Courts View SROs Like School Officials.....</i>	2024
1. Cases Explicitly Treating SROs as School Officials.....	2025
2. Cases Making It Easy to Establish SRO Involvement as Serving a School Purpose .....	2027
3. Cases Do Not Generally Hold That Children Are Always Entitled to Less Privacy .....	2030
<i>D. Longstanding Criticisms of the Majority Rule .....</i>	2032
1. Minority Jurisdictions .....	2032
2. Critiques of the Majority Rule .....	2033
II. THE SCHOOL-TO-PRISON PIPELINE AND CALLS TO REFORM THE ROLES OF SROs .....	2038
<i>A. SROs' Roles .....</i>	2039
<i>B. The School-to-Prison Pipeline and Reform Efforts .....</i>	2040
III. REFORMS DRAW CLEAR LINES BETWEEN SCHOOL DISCIPLINE AND LAW ENFORCEMENT .....	2046
<i>A. Federal Reforms Push States and Localities to Limit SROs' Roles .....</i>	2047
<i>B. State Reforms from Multiple Angles: South Carolina ...</i>	2049
<i>C. Ferguson, Missouri, Reforms Build a Sharper Division Between Law Enforcement and School Discipline.....</i>	2051
<i>D. Local Memoranda of Understanding and Other Reforms Limit SROs' Role.....</i>	2052
IV. RECONSIDERING SCHOOL-SEARCH STANDARDS IN AN AGE OF REFORM.....	2057
<i>A. Applying the Supreme Court's Principles Leads to T.L.O.'s Inapplicability to SRO-Involved Searches .....</i>	2058
<i>B. Reforms Also Render T.L.O. Inapplicable to Searches by School Officials Under Policies Requiring Referrals to Law Enforcement.....</i>	2061
<i>C. Policy Benefits of a Doctrinal Shift: Incentives to Limit the School-to-Prison Pipeline .....</i>	2063

V. WHAT ABOUT SCHOOL SHOOTINGS?: A CALL FOR A SCHOOL-SPECIFIC STANDARD FOR <i>TERRY</i> SEARCHES RATHER THAN ANY SEARCH .....	2064
CONCLUSION .....	2066

#### INTRODUCTION

School resource officers (SROs)<sup>1</sup> are now a regular feature in American public schools. After growing substantially in the 1990s and early 2000s in response to the early-1990s peak crime rate and mass shootings at schools, there are now roughly 20,000 sworn police officers stationed at schools.<sup>2</sup> At the same time, policies that toughened school disciplinary and law enforcement consequences for school rule and criminal law violations took effect, causing what became known as the school-to-prison pipeline. SROs' presence was an important part of this story. SROs became involved in school misbehavior—such as fights and disobedience—that school officials would have handled in prior generations, and SROs increasingly arrested and charged students for such incidents.<sup>3</sup> SROs also became involved in searches of students for evidence of crimes—both by searching students directly and through policies requiring school officials to turn over the fruits of their searches to SROs. In the past, a student found to have stolen money from another student or with a joint in his pocket could have been subject to school discipline—say, detention or suspension, with a requirement to return stolen items or participate in substance-abuse counseling—but now also faces arrest.

SRO involvement in searches raises difficult questions under the Fourth Amendment. The U.S. Supreme Court decided *New Jersey v. T.L.O.*<sup>4</sup> in 1985—before the sharp increase in SRO presence in schools—and held that primary and secondary school officials could search students without a warrant and with only reasonable suspicion of a school rule or criminal law violation.<sup>5</sup> The Court emphasized schools' need for discipline and the relationship between educators and students in crafting this exception to normal Fourth Amendment rules, and it explicitly avoided any decisions regarding school searches conducted by officers or by school officials “in

---

1. Local jurisdictions use a range of alternative terminology for police officers assigned to schools, including “school liaison officer” and “school board officer.” *See, e.g.*, *People v. Dilworth*, 661 N.E.2d 310, 313 (Ill. 1996) (using the term “liaison officer”). This Article uses the term “school resource officer” and its acronym because it is the most common term and for ease of reference. This Article uses that term even when cited authorities use alternative terms, with the exception of quotations.

2. *See infra* Part II.

3. *See, e.g.*, Jason P. Nance, *Implicit Racial Bias and Students' Fourth Amendment Rights*, 94 IND. L.J. (forthcoming 2019) (manuscript at 36) (explaining how “intense surveillance measures,” including SRO involvement in school searches and discipline, “are a component of involving more students in the criminal justice system”).

4. 469 U.S. 325 (1985).

5. *Id.* at 341–42.

conjunction with or at the behest of law enforcement agencies.”<sup>6</sup> That nondecision is unsurprising because *T.L.O.* belongs to a body of Fourth Amendment cases involving “special needs, beyond the normal need for law enforcement” that justify exceptions to the Fourth Amendment’s warrant and probable cause requirements.<sup>7</sup> That phrase—coined in Justice Harry Blackmun’s influential *T.L.O.* concurrence and used in a series of later Supreme Court cases—emphasizes the need to draw lines between law enforcement and school discipline searches. Drawing that line in SRO-involved searches became difficult for state courts.

Although many state courts still have not decided the question nearly three-and-a-half decades after *T.L.O.*, the majority that have apply *T.L.O.*’s reduced Fourth Amendment protections to SRO-involved searches.<sup>8</sup> These decisions, reached mostly in the 1990s and early 2000s, hold that SROs are different than other law enforcement officers and they, unlike most officers, are not subject to normal Fourth Amendment limitations. Several leading cases described SROs as school officials for Fourth Amendment purposes in all instances.<sup>9</sup> Other cases effectively did the same, construing SROs as part of a school team and thus entitled to the same Fourth Amendment standard as other members of that team in individual instances.<sup>10</sup>

These cases draw a line between SROs and other law enforcement officers. Other officers perform law enforcement searches, while SROs are on the school-discipline side of the line—even if they are sworn law enforcement officers who not only have power to arrest children but, in the relevant cases, do in fact arrest and charge children. This line-drawing has been strongly criticized by academics and some courts.<sup>11</sup> The roles of SROs blurred lines to some extent: many SROs could and did engage in school discipline in addition to law enforcement duties.<sup>12</sup>

Reforms largely enacted in the 2010s make it easier to draw a line between school officials and SROs for Fourth Amendment purposes.<sup>13</sup> Responding to concerns about the school-to-prison pipeline and SROs’ role in it, reforms emphasize that SROs are law enforcement officers, not school disciplinarians, and should not become involved in school discipline.<sup>14</sup> Given the harms that come from a law enforcement response, especially to more minor misbehavior, these reforms posit that SROs should only become

---

6. *Id.* at 341 n.7.

7. *See id.* at 351 (Blackmun, J., concurring).

8. *See infra* Part I.C.

9. *See infra* Part I.C.1.

10. *See infra* Part I.C.2.

11. *See infra* Part I.D.

12. To be clear, whether such policing behaviors that mix law enforcement and school discipline should qualify for *T.L.O.*’s rule is debatable, and, in my view, doubtful, because SROs’ roles in investigating crimes and arresting students should have placed them on the law enforcement side of the special needs doctrine’s line. Nonetheless, courts adopting the majority rule could in the 1990s and early 2000s logically point to such mixed roles to justify treating SROs like school officials.

13. *See infra* Part III.

14. *See infra* Parts III.C–D.

involved when more serious crimes occur or when immediate security risks exist.<sup>15</sup> Such reforms are evident in federal administrative guidance; some state statutes, regulations, and administrative guidance; as well as many local memoranda of understanding between school districts and law enforcement agencies.<sup>16</sup>

This Article is the first to explore how these 2010s reforms undermine the idea from 1990s and 2000s cases that SROs engage in school discipline just like school officials and thus undermine a basic pillar of the majority rule regarding SRO-involved searches. These reforms show that SROs have a law enforcement role, which places them solidly on the law enforcement side of *T.L.O.*'s "special needs" line. Building on prior critiques of the majority rule, this argument shows why courts should refuse to apply *T.L.O.*'s reasonable suspicion standard and exception to the warrant requirement to school searches involving SROs.

These recent reforms also help explain why many school searches not directly involving SROs should not qualify for *T.L.O.*'s exception to the warrant and probable cause requirements. A variety of laws and policies now require schools to turn over evidence of criminal activity to law enforcement, which transforms the character of searches conducted by school officials.<sup>17</sup> Consider a teenager suspected of possessing a cell phone stolen from another child. A search conducted by an SRO for that cell phone and a search conducted by a school administrator under a policy requiring her to turn over evidence of crimes to the SRO both lead to the SRO having evidence of the crime and, often, arresting the child. The Court in *Ferguson v. City of Charleston*,<sup>18</sup> a post-*T.L.O.* special needs case, held that such disclosures of evidence to law enforcement render the special needs standard inapplicable.<sup>19</sup> Recent reforms defining SROs' roles as law enforcement mean that disclosing evidence to them represents a plain policy choice to transform a school search into a law enforcement matter. It entangles school officials with law enforcement nearly as much as including law enforcement in the search itself and should trigger *Ferguson*'s result.

These arguments are not without risks; declining to apply *T.L.O.* to school searches entangled with law enforcement could make it more difficult to search for weapons—a result many courts might find intolerable in an era of far-too-frequent school shootings. This Article also offers an alternative doctrinal path to permitting warrantless searches with less than probable cause when there is reason to suspect deadly weapons are present in school.<sup>20</sup> Such situations call for *Terry* searches—searches intended to eliminate an immediate risk to individuals' safety, and whose scope is tailored to the risk at issue.<sup>21</sup> Such an approach is far more targeted to legitimate safety aims

---

15. See *infra* Part III.

16. See *infra* Part III.

17. See *infra* Part IV.B.

18. 532 U.S. 67 (2001).

19. *Id.* at 84.

20. See *infra* notes 390–400 and accompanying text.

21. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

than applying *T.L.O.* wholesale, and it limits the risk that reduced Fourth Amendment standards will continue to contribute to the school-to-prison pipeline.

This Article proceeds as follows. Part I provides the doctrinal background. It analyzes *T.L.O.*, its holding regarding searches by school officials without law enforcement entanglement, and its implications for cases involving such entanglement. Part I also explores how subsequent Supreme Court school-search cases address related issues but do not change the underlying analysis, and explains and critiques the majority rule. Part II summarizes the post-*T.L.O.* growth of SROs and critiques of SROs' roles as fueling the school-to-prison pipeline. Part III describes and illustrates the recent reforms that draw lines between law enforcement and school discipline, and limit SROs' role to law enforcement functions. Part IV argues that these reforms require reexamination of state rules permitting SRO searches under reasonable suspicion rather than probable cause and without a warrant. Finally, Part V explores relatively narrow options to permit authorities to search for weapons at school to keep schools safe without raising the same school-to-prison pipeline concerns as broader permission for SRO searches.

#### I. HOW SROs OFTEN ESCAPED REGULAR FOURTH AMENDMENT LIMITATIONS

No U.S. Supreme Court ruling definitively states the Fourth Amendment standard that applies to searches by or involving school resource officers. The Court decided its leading school-search case before SROs were as common as they are today, and subsequent Supreme Court school-search cases did not involve SROs.<sup>22</sup> The Court has clearly held that school officials "acting alone and on their own authority" do not generally need to seek a warrant and may search based on reasonable suspicion, but it explicitly avoided any ruling on searches "conducted by school officials in conjunction with or at the behest of law enforcement agencies" or by law enforcement officers themselves.<sup>23</sup> In that vacuum, most state courts to decide the issue have distinguished SROs from other police officers or construed searches involving SROs as ones initiated or primarily led by school officials.<sup>24</sup> The majority of states that have decided these issues, therefore, apply the lowered Fourth Amendment standard for school officials to SROs.<sup>25</sup>

This Part describes how this majority rule came to be, as well as contrary rules in other states and the critical commentary that the majority rule has engendered. Neither Supreme Court nor state decisions have held that students always have a reduced expectation of privacy. Crucially, the

---

22. *See, e.g., Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368 (2009) (explaining that an assistant principal and administrative assistant conducted the search of a student's bag).

23. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 n.7 (1985). The Court cited a federal district court case holding that a police search at school required probable cause. *Id.* (citing *Picha v. Wielgos*, 410 F. Supp. 1214, 1219–21 (N.D. Ill. 1976)).

24. *See infra* Part I.C.1.

25. *See infra* Part I.C.

majority rule depends on analogizing SROs' roles to school officials' and distinguishing those roles from other police officers.

*A. A Lower Fourth Amendment Standard for School Officials'  
Unique Roles*

In *T.L.O.*, after an assistant principal searched a student's purse and found marijuana,<sup>26</sup> the subsequent juvenile court case presented a series of Fourth Amendment questions whose answers—or nonanswers—from the Court form the foundation for present law regarding school searches. The Court made clear that students have some meaningful expectation of privacy at school, protected by the Fourth Amendment, but that the relationship between students and educators and the goals of maintaining discipline within schools justify an exception to the warrant and probable cause requirements. The Court applied that exception to school officials,<sup>27</sup> but it left unanswered whether the exception extends to searches by or involving law enforcement at school.<sup>28</sup> Importantly, the Court's analysis distinguishes searches by school officials from searches by law enforcement. That distinction is particularly evident in *T.L.O.*'s concurring opinions, which were written by justices whose votes were essential to forming a majority and whose analysis shaped later cases.

The first question presented by *T.L.O.* was whether the Fourth Amendment protected students from searches by educators at all.<sup>29</sup> New Jersey argued that it did not because teachers could not be limited by the Fourth Amendment and because students lacked Fourth Amendment privacy interests.<sup>30</sup> The Court rejected both ideas, holding that the Fourth Amendment governs school searches.<sup>31</sup> The State emphasized the difference between law enforcement and school searches and argued “that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers” and not public school officials.<sup>32</sup> This argument was easy to reject based on a long history, dating to the nineteenth century, in which the Court applied the Fourth Amendment to searches by civil authorities.<sup>33</sup> The Court further held that school officials exercise state authority, not authority delegated by parents, so constitutional limitations must govern them as they govern any state actor.<sup>34</sup>

---

26. *T.L.O.*, 469 U.S. at 328.

27. *Id.* at 341.

28. *See id.* at 341 n.7.

29. *Id.* at 333.

30. *Id.* at 334.

31. *Id.* at 336–37.

32. *Id.* at 334.

33. *Id.* at 335.

34. *Id.* at 336. In addition to prior cases treating school officials as state authorities, the Court emphasized compulsory education laws and the reality that school officials implement state educational and disciplinary policies to explain why it treats those officials as state actors. *Id.* at 336–37.



The State also argued that children at school had no reasonable expectation of privacy because that was “incompatib[le]” with “the maintenance of a sound educational environment” and because children did not need to have any personal items with them at school.<sup>35</sup> Again, the Court easily rejected the argument by noting the plainly legitimate reasons that students would carry private items to school—“the necessities of personal hygiene” and “such nondisruptive yet highly personal items as photographs, letters, and diaries.”<sup>36</sup> Searching a child or a closed bag held by the child “no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.”<sup>37</sup> In short, the Court recognized that children are entitled to some amount of privacy, and the Fourth Amendment protects them from unreasonable searches.

Second, the Court held that school officials searching students at school may do so without a warrant and need only reasonable suspicion, not probable cause.<sup>38</sup> Crucially, the rationale for this holding rested on the unique needs of school discipline and the relationships between educators and pupils. The Court began its discussion by recognizing both the need for “a certain degree of flexibility in school disciplinary procedures” and “the value of preserving the informality of the student-teacher relationship.”<sup>39</sup> The Court couched its specific holdings in reference to both of these elements. The Court excused school officials from seeking warrants before searching students because that “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”<sup>40</sup> The need of teachers and administrators to maintain order justified a standard less than probable cause—there must be “reasonable grounds” that the search will reveal evidence of violating the law or a school rule, and the scope of the search must be “reasonably related to the objectives of the search and not excessively intrusive.”<sup>41</sup> This lower standard provided a particular benefit to teachers and other school staff—they would be “spare[d] . . . the necessity of schooling themselves in the niceties of probable cause.”<sup>42</sup> This standard built on earlier cases, especially *Terry v.*

---

35. *Id.* at 338.

36. *Id.* at 339.

37. *Id.* at 337–38.

38. *See id.* at 367 (Brennan, J., concurring in part and dissenting in part). While neither “probable cause” nor “reasonable suspicion” are easily defined standards, the former imposes more limits on government authority and more protection for individual liberty and privacy. As the Court noted in a later school-search case,

Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer’s evidence search is that it raise[s] a “fair probability” or a “substantial chance” of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.

*Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 371 (2009) (quoting *Illinois v. Gates*, 462 U.S. 213, 237, 243 n.13 (1983)).

39. *T.L.O.*, 469 U.S. at 340.

40. *Id.*

41. *Id.* at 342.

42. *Id.* at 343.

*Ohio*,<sup>43</sup> which established an exception to the warrant and probable cause requirements for police officers to take “minimally necessary” action for a “protective seizure and search for weapons.”<sup>44</sup> *T.L.O.* cited *Terry* for its two-pronged test and to describe what reasonable suspicion is necessary to justify a search by school officials.<sup>45</sup>

Importantly, *T.L.O.* authorized a much broader range of warrantless searches than *Terry*. *Terry* approved limited searches for weapons deemed “necessary for the protection of [police officers] and others.”<sup>46</sup> *T.L.O.*, in contrast, authorized school officials to conduct warrantless searches whenever they reasonably suspect any legal or school rule violation.<sup>47</sup>

*T.L.O.*’s concurring opinions—which, given the Court’s vote breakdown, are particularly important<sup>48</sup>—distinguish searches by school officials from searches by police even more explicitly and perhaps offer guidance for some principled limitations on searches authorized by *T.L.O.* Justice Lewis Powell, Jr. wrote that teachers’ and students’ “close association with each other, both in the classroom and during recreation periods” reduces children’s expectation of privacy regarding those teachers.<sup>49</sup> Justice Powell explicitly contrasted this “special relationship” with “[l]aw enforcement officers[, who] function as adversaries of criminal suspects,”<sup>50</sup> and he further contrasted “establishing discipline and maintaining order” in schools with “the enforcement of criminal laws.”<sup>51</sup>

Justice Blackmun also concurred, describing a test used by the Court to analyze a variety of searches conducted by individuals other than police or for reasons other than criminal law enforcement.<sup>52</sup> Such searches, he wrote, could escape the Fourth Amendment’s warrant and probable cause requirements “[o]nly in those exceptional circumstances in which special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable.”<sup>53</sup> School searches *by school officials* presented such special needs. School discipline is very important and often requires “an immediate response,”<sup>54</sup> and teachers should focus “on

43. 392 U.S. 1 (1968).

44. *Id.* at 29–30.

45. *T.L.O.*, 469 U.S. at 341–42, 345–46.

46. *Terry*, 392 U.S. at 30; *see also T.L.O.*, 469 U.S. at 352 (describing *Terry* as only permitting “steps to assure [an officer] that the person he has stopped to question is not armed with a weapon that could be used against him”).

47. *T.L.O.*, 469 U.S. at 355 (Brennan, J., concurring in part and dissenting in part) (describing the search in *T.L.O.* as more intrusive than the pat-down in *Terry* and observing that, “[w]isely, neither petitioner nor the Court today attempts to justify the search of T.L.O.’s pocketbook as a minimally intrusive search in the *Terry* line”).

48. Six justices supported the result in *T.L.O.*, but Justice Lewis Powell, Jr.—joined by Justice Sandra Day O’Connor—and Justice Harry Blackmun wrote concurring opinions. *Id.* at 326–27.

49. *Id.* at 348 (Powell, J., concurring).

50. *Id.* at 349.

51. *Id.* at 350.

52. *See id.* at 351 (Blackmun, J., concurring).

53. *Id.* (emphasis added).

54. *Id.* at 352–53.

teaching and helping students,” not “developing evidence” against students or considering “the complexities of probable cause” in particular situations.<sup>55</sup> Blackmun’s “special needs” test became the basis for later Supreme Court cases that determined when state actors were exempted from warrant and probable cause requirements before conducting a search, and these later cases underscored its distinction between “special needs” and “the normal need for law enforcement.”<sup>56</sup>

Given the centrality of the discussion of school officials’ roles and relationships with students in the plurality and concurring opinions, and the explicit and implicit contrasts between school officials and police officers, it is no surprise that the Court declined to address police searches in school or searches conducted “in conjunction with or at the behest of law enforcement agencies.”<sup>57</sup> After deciding several more cases involving searches “divorced from the State’s general interest in law enforcement,”<sup>58</sup> the Court, in 2001, emphasized this limit on *T.L.O.*’s holding.<sup>59</sup>

Indeed, there is little reason to think that the *T.L.O.* Court, writing years before SROs become prominent fixtures in public schools nationally and the development of policies intertwining school discipline and law enforcement, anticipated the Fourth Amendment questions raised by later SRO searches. *T.L.O.* assumed that any such overlap “is sufficiently rare to warrant treating the two institutions distinctly.”<sup>60</sup> Once those developments arose, however, *T.L.O.*’s rationale set up an important question: Are searches by school resource officers, or searches by school officials at the behest of or in conjunction with SROs, governed by *T.L.O.*? Are SROs more like other police officers, and thus subject to normal Fourth Amendment rules, or are they more like school officials, whose special relationship with children justifies a lower standard?

*B. Standards for SRO-Involved Searches Remain Unresolved by the Supreme Court*

The Supreme Court has examined school searches on several occasions since deciding *T.L.O.*, but none of those cases has considered what standard should govern searches involving SROs. This point is essential because, as *T.L.O.* made clear, determining Fourth Amendment standards is contextual,<sup>61</sup> and its analysis of the context shows that law enforcement searches should be treated differently.<sup>62</sup> Its holding depends not on a generalized reduction of students’ Fourth Amendment rights at school, but on the particular context of searches by school officials in furtherance of maintaining school discipline

---

55. *Id.* at 353.

56. *See, e.g.,* *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)).

57. *T.L.O.*, 469 U.S. at 341 n.7.

58. *Ferguson*, 532 U.S. at 79.

59. *Id.* at 79 n.15.

60. Catherine Y. Kim, *Policing School Discipline*, 77 *BROOK. L. REV.* 861, 880 (2012).

61. *T.L.O.*, 469 U.S. at 337.

62. *See supra* notes 26–60 and accompanying text.

and the educational environment. No more recent Court case leads to a different result.

This point bears emphasis because some have argued, I believe incorrectly, that the Court's later school-search cases hold that children at school are a "special subpopulation" with reduced expectations of privacy justifying lower standards for searches.<sup>63</sup> The most important cases in this regard are the Court's two cases involving schools testing wide groups of students for drug use: *Vernonia School District 47J v. Acton*<sup>64</sup> and *Board of Education v. Earls*.<sup>65</sup> Both cases involve fairly similar facts. School districts required students who participated in certain voluntary activities—sports in *Acton*<sup>66</sup> and any extracurricular activity in *Earls*<sup>67</sup>—to consent to urinalysis drug tests. Positive tests would require students to participate in a program intended to help children stop using drugs. Failure to participate in such programs or failure to consent to drug tests would bar participation in voluntary activities but carry no law enforcement consequences.<sup>68</sup>

Despite dicta that, when taken out of context, could suggest a more generalized reduction in schoolchildren's Fourth Amendment rights,<sup>69</sup> a closer and more contextual reading of the Court's cases reveals a more nuanced rule. In particular, children's expectation of privacy at school depends on the context of a search<sup>70</sup> and, especially, whether the search involves law enforcement actors, purposes, or consequences. The Court recognized that evaluating an individual's legitimate expectations of privacy "of course" requires a contextual analysis.<sup>71</sup> And the Court's contextual analysis made clear that it discussed searches involving only school officials,<sup>72</sup> with consequences limited to voluntary school activities, not law enforcement. Children's supervision by a "schoolmaster" with "custodial and tutelary" duties comes with a degree of supervision and control that

---

63. See, e.g., Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 270–71 (2011).

64. 515 U.S. 646 (1995).

65. 536 U.S. 822 (2002).

66. See *Acton*, 515 U.S. at 648.

67. See *Earls*, 536 U.S. at 826 (noting that the policy applied to "any extracurricular activity" but "has been applied only to competitive extracurricular activities . . . such as Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom pon, cheerleading, and athletics").

68. *Id.* at 833–34; see also *Acton*, 515 U.S. at 650–51.

69. See *Earls*, 536 U.S. at 830 ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety."); *Acton*, 515 U.S. at 655–56 ("[W]hile children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))).

70. Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 68–69 (2011).

71. *Acton*, 515 U.S. at 654.

72. *T.L.O.* refers to "teachers and administrators." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). I use the broader phrase "school officials" to encompass other staff such as athletic coaches or nurses whose job duties could entail assisting with the school environment but would not include law enforcement.

reduces children's privacy expectations vis-à-vis those schoolmasters.<sup>73</sup> This language echoes *T.L.O.*'s emphasis on the special relationship between teachers and students and offers no reason to suggest that this special relationship extends beyond educators, and especially not to law enforcement.

If anything, *Acton* and *Earls* emphasized the distinction between school discipline and law enforcement even more than *T.L.O.* The Court noted that a "rather critical consideration"<sup>74</sup> in both cases was that consequences of the drug tests were relatively minor and, in particular, that law enforcement would not obtain the results so no delinquency or criminal charges would result.<sup>75</sup>

More recent Supreme Court cases continue to leave the question of SRO-involved school searches unaddressed. *Safford Unified School District #1 v. Redding*<sup>76</sup> held that the strip search of a thirteen-year-old girl suspected of possessing prescription-strength ibuprofen violated her Fourth Amendment rights, even if the individuals who conducted the search were entitled to qualified immunity.<sup>77</sup> The Court's summary of the facts does not indicate any law enforcement involvement or plans to involve law enforcement and, given that school officials found no evidence of any wrongdoing, there was nothing to turn over to law enforcement.<sup>78</sup> The Court's language carefully noted that *T.L.O.* applied to "searches by school officials,"<sup>79</sup> before moving on to the focus of that case.<sup>80</sup>

The absence of a definitive Supreme Court ruling in any subsequent school-search case<sup>81</sup> has largely left resolution of the question to state courts, which handle nearly all delinquency and criminal prosecutions of children based on searches at school.

### C. The Majority Rule: State Courts View SROs Like School Officials

Without a definitive ruling from the Supreme Court, state courts have decided in the first instance what Fourth Amendment standards to apply to SRO searches of students at school. While many states' courts have not yet

---

73. *Earls*, 536 U.S. at 830 (quoting *Acton*, 515 U.S. at 655).

74. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(c), at 631 n.139 (5th ed. 2012).

75. *Earls*, 536 U.S. at 829, 833–34; *Acton*, 515 U.S. at 658; see also Nance, *supra* note 3 (manuscript at 52) (noting courts' emphasis of the limited invasion of privacy in the searches at issue).

76. 557 U.S. 364 (2009).

77. *Id.* at 368.

78. *Id.* at 368–70, 372–73.

79. *Id.* at 370 ("We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student . . .").

80. *Safford* focused not on who conducted the search or the level of suspicion required, but on whether the scope of the search reasonably related to its basis; it did not. *Id.* at 373–77.

81. In addition to *Acton*, *Earls*, and *Safford*, the Court has also considered school seizures in a child-protection context. See generally *Camreta v. Greene*, 563 U.S. 692 (2011). But the Court dismissed that case as moot. *Id.* at 698.

addressed the issue, the majority of state courts to do so have held that SROs could take advantage of *T.L.O.*'s reduced Fourth Amendment limitations.<sup>82</sup>

Notably, the collective legal theory of these cases explicitly likens SROs to school officials and describe SROs' tasks as including school discipline, assisting school staff, and even teaching classes. These cases view any law enforcement purposes as either absent or subordinate to school disciplinary purposes. This legal theory views SROs as unlike other police officers and views them instead as at most "quasi-law enforcement."<sup>83</sup> Courts ask whether SROs operate more like school officials who fall under *T.L.O.* or other police officers who do not,<sup>84</sup> and the majority of courts have answered with the former.

### 1. Cases Explicitly Treating SROs as School Officials

The leading case for the majority view is *People v. Dilworth*,<sup>85</sup> a 1996 Illinois Supreme Court case involving an SRO's search of a student, Kenneth Dilworth, who an SRO suspected was selling drugs on school grounds.<sup>86</sup> Upon finding drugs on Dilworth, the SRO arrested him and the State prosecuted him as an adult in criminal court.<sup>87</sup> Dilworth argued that the SRO needed probable cause because he was a police officer.<sup>88</sup> The Illinois Supreme Court rejected this argument, concluding that the SRO was "properly considered to be a school official."<sup>89</sup> The court noted that the SRO was involved in both criminal and school disciplinary incidents, and it emphasized that blended role at least three times<sup>90</sup> and explained that, like

---

82. Courts have acknowledged that this is the majority rule. *See, e.g.*, *R.D.S. v. State*, 245 S.W.3d 356, 367 (Tenn. 2008); *see also* EMILY MORGAN ET AL., COUNCIL OF STATE GOV'TS, THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM 247 (2014); *Developments in the Law—Policing Students*, 128 HARV. L. REV. 1747, 1748 (2015) (concluding that "most courts hold that reasonable suspicion that a student is violating a law or school rule is constitutionally sufficient" for a search involving SROs).

83. Kirk A. Bailey, *Legal Knowledge Related to School Violence and School Safety*, in HANDBOOK OF SCHOOL VIOLENCE AND SCHOOL SAFETY: FROM RESEARCH TO PRACTICE 31, 38 (Shane R. Jimerson & Michael J. Furlong eds., 2006).

84. *Id.*; *see also* MORGAN ET AL., *supra* note 82, at 247 ("Whether a municipal or county SRO or school police officer is considered a 'school official' is also a critical determination when it comes to the search standards to which officers are subject.").

85. 661 N.E.2d 310 (Ill. 1996). A Westlaw KeyCite search conducted on January 26, 2019, showed that *Dilworth* has been cited in at least sixty-five cases, including twenty-three outside of Illinois. It is also reported in law school casebooks as a leading case for its conclusion. *See, e.g.*, BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 244 (5th ed. 2018); LESLIE J. HARRIS ET AL., CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 444 (3d ed. 2012).

86. *See Dilworth*, 661 N.E.2d at 312–13 (summarizing facts); *id.* at 317 (concluding that the SRO was "conducting a search on his own initiative and authority").

87. *Id.* at 314.

88. *Id.* at 316.

89. *Id.* at 320.

90. *Id.* at 313, 317, 320.

teachers, the officer “was authorized to give a detention.”<sup>91</sup> As one commentator noted, this was “an SRO empowered to discipline students under the school’s rules.”<sup>92</sup> Given this authority, the court concluded that the SRO’s search primarily furthered not law enforcement aims (despite the arrest and prosecution that immediately followed) but “the school’s attempt to maintain a proper educational environment.”<sup>93</sup>

*Dilworth*’s view of the SRO as a school official—now reflecting the majority view<sup>94</sup>—echoes through cases holding that SROs can use *T.L.O.*’s lower Fourth Amendment standard.<sup>95</sup> Multiple other state appellate courts cite *Dilworth* and apply *T.L.O.* to searches by SROs.<sup>96</sup> These cases either cite and apply *Dilworth* without adding new analysis or assert a similar reason that SROs count as school officials for Fourth Amendment purposes. For instance, a Pennsylvania court wrote that SROs’ “presence in school buildings during the school day ensures the safety and security of the learning environment” to justify the court’s application of the reasonable suspicion standard rather than probable cause standard to SROs.<sup>97</sup>

Other cases reach the same result. A Florida appellate court held that SROs “should be treated as part of the school administrative team and not as outside police officers.”<sup>98</sup> An Indiana appellate court held that a police officer acting as a school security officer on school premises could use the *T.L.O.* standard,<sup>99</sup> and the Indiana Supreme Court later offered some support for this result for SROs who “perform[] school-discipline duties” (though it

91. *Id.* at 313.

92. See *Developments in the Law—Policing Students*, *supra* note 82, at 1751.

93. *Dilworth*, 661 N.E.2d at 317.

94. Whether this rule was the majority rule at the time of *Dilworth* is subject to debate. Compare *id.* at 319–20 (citing cases in other jurisdictions that apply a reasonableness test to school police officer searches), with *id.* at 323 (Nickles, J., dissenting) (“All Federal and State decisions reviewed indicate that *police officers, including police liaison officers*, are required to have probable cause to search a student if they are significantly involved in the search.”).

95. See, e.g., *In re Devon T.*, 584 A.2d 1287, 1300 (Md. Ct. Spec. App. 1991) (applying *T.L.O.* to a school security guard identified as an “officer” who placed the child under arrest and who the court distinguished from “an investigative police officer”); *Russell v. State*, 74 S.W.3d 887, 892 (Tex. App. 2002) (“We believe the *Dilworth* analysis properly applies . . .”).

96. See, e.g., *In re William V.*, 4 Cal. Rptr. 3d 695, 699–701 (Ct. App. 2003); *State v. D.S.*, 685 So. 2d 41, 43 (Fla. Dist. Ct. App. 1996) (“We specifically hold that a search conducted by a *school* police officer only requires *reasonable suspicion* . . . as distinguished from the probable cause that is usually required to support a search conducted, away from the school property, by an *outside police officer* . . .”); *In re Ana E.*, No. D-10378/01, 2002 WL 264325, at \*9–11 (N.Y. Fam. Ct. Jan. 14, 2002) (citing *Dilworth* and holding that SROs supervised by the New York Police Department only needed reasonable suspicion to search students); *Commonwealth v. J.B.*, 719 A.2d 1058, 1065 (Pa. Super. Ct. 1998) (“A reasonable suspicion standard applies when school officials, including teachers, teachers’ aides, school administrators, school police officers and local police school liaison officers, conduct a search acting on their own authority.” (emphasis omitted)).

97. *J.B.*, 719 A.2d at 1066; see also *William V.*, 4 Cal. Rptr. 3d at 700 (asserting that there is no distinction between school-employed security and city-employed police stationed at schools and expressing concern about establishing incentives for schools to use the former rather than the latter).

98. *M.D. v. State*, 65 So. 3d 563, 565 (Fla. Dist. Ct. App. 2011).

99. *S.A. v. State*, 654 N.E.2d 791, 795 (Ind. Ct. App. 1995).

did leave open the possibility that SROs who perform law enforcement duties might not benefit from the same result).<sup>100</sup> Other cases apply *T.L.O.* to SRO-involved searches without analysis or explanation.<sup>101</sup>

The view of SROs as school officials also appears in an Indiana statute, which seems to be an effort to apply that lower standard in all cases in the face of more nuanced court decisions. After the Indiana Supreme Court suggested that SRO searches under *T.L.O.* depended on SROs pursuing school-discipline rather than law enforcement duties,<sup>102</sup> the Indiana legislature enacted a statute permitting an SRO to use the reasonable suspicion standard for searches and seizures without limitation.<sup>103</sup> The Indiana statute somewhat ironically also asserts law enforcement powers—clarifying that SROs may make arrests, carry firearms, and “exercise other police powers”—all while taking advantage of *T.L.O.*’s special needs standard designed for educators.<sup>104</sup>

Such statutes represent a codification of the majority rule and thus help illustrate the scope of that rule’s application. These statutes cannot, however, force a particular constitutional result for those subject to them. As the leading Fourth Amendment hornbook concludes, it “is quite clearly not the case” that the state may conduct a particular type of search by providing advance notice that it can.<sup>105</sup>

## 2. Cases Making It Easy to Establish SRO Involvement as Serving a School Purpose

Several courts reached similar results through less direct means. Rather than state explicitly that they would treat SROs as school officials, they examined the facts of specific searches to reach case-specific determinations that an SRO acted more like a school official than an officer. This approach leaves open the possibility of applying the warrant and probable cause requirements in later SRO-involved search cases, but the analyses suggest such possibility is slim.

These cases went to some length to find that SROs acted more like school officials and less like law enforcement.<sup>106</sup> The Wisconsin Supreme Court

---

100. *K.W. v. State*, 984 N.E.2d 610, 613 (Ind. 2013); *see also T.S. v. State*, 863 N.E.2d 362, 371 (Ind. Ct. App. 2007) (concluding that the SRO “act[ed] to further educationally related goals” and was entitled to *T.L.O.*’s standard).

101. *See, e.g., State v. Voss*, 267 P.3d 735, 736, 738–39 (Idaho Ct. App. 2011) (noting SRO involvement and applying *T.L.O.* without discussion); *State v. Taylor*, 38 So. 3d 360 (La. 2010); *State v. Taylor*, 50 So. 3d 922, 923 (La. Ct. App. 2010) (noting that an SRO searched a student); *In re Steven A.*, 764 N.Y.S.2d 99, 99–100 (App. Div. 2003) (applying *T.L.O.* to a police department employee without explanation).

102. *K.W.*, 984 N.E.2d at 613.

103. IND. CODE § 20-26-18.2-3(a)(2) (2017).

104. *Id.* § 20-26-18.2-3(a)(4).

105. *See* 5 LAFAVE, *supra* note 74, § 10.11(b), at 620.

106. *See, e.g., State v. Alaniz*, 815 N.W.2d 234, 239 (N.D. 2012) (applying *T.L.O.* to an SRO “who was working with other school officials to investigate violations of school rules and the law” even though the SRO used information gleaned from an out-of-school investigation to inform the principal of his suspicions regarding the child).



held that *T.L.O.* applies when SROs search students “at the request of, and in conjunction with, school authorities”; therefore, the school officials’ request effectively extended the school officials’ Fourth Amendment standards to law enforcement.<sup>107</sup> That logic would seem to apply even if the school requested the SRO to search a student precisely because the student was suspected of committing a crime that the school believed required a law enforcement response. Applying the Wisconsin case, a North Carolina appellate court concluded that SROs could use the *T.L.O.* standard when they searched a child in conjunction with the school principal—even when three armed and uniformed officers accompanied a single school official and when the school official consulted the officers about whether to search students.<sup>108</sup> A later North Carolina case extended that rule to cover a situation in which an SRO, on his own, suspected a child possessed marijuana and initiated a search; the court held that because the SRO “assisted school officials with school discipline” and “was furthering the school’s educational related goals when he stopped the juvenile,” *T.L.O.*’s standard would apply.<sup>109</sup> Similarly, the New Mexico Court of Appeals described “a full-time, commissioned police officer assigned to a public high school as a resource officer”<sup>110</sup> who worked both to enforce the criminal law and help maintain a positive educational environment.<sup>111</sup> When a school official asked the SRO to search a student who the school official suspected of possessing drugs and an unknown object that presented a “safety issue,” the court concluded that “the officer was the arm of the school official” and was thus entitled to use the *T.L.O.* standard.<sup>112</sup> In rejecting a child’s federal civil rights challenge to a search, the Eighth Circuit, like the state court in *Dilworth*, emphasized facts regarding an SRO’s role that made his purpose closer to school discipline, especially that the SRO was “instructed to cooperate with the school officials.”<sup>113</sup> Accordingly, when school officials asked the SRO for assistance searching a child, the court concluded that the SRO’s involvement

---

107. See *In re Angelia D.B.*, 564 N.W.2d 682, 684 (Wis. 1997); see also *In re Sumpter*, No. 2004-CA-00161, 2004 WL 2806428, at \*5 (Ohio Ct. App. Nov. 29, 2004) (applying *T.L.O.* when an assistant principal requested that an SRO search a student because the search was initiated by school staff, not the SRO); *F.S.E. v. State*, 993 P.2d 771, 773 (Okla. 1999) (“[A] school official may utilize law enforcement to assist with an investigation or search of a student . . . so long as the public school official has a reasonable suspicion . . .”).

108. See *In re D.D.*, 554 S.E.2d 346, 348, 352–54 (N.C. Ct. App. 2001).

109. *In re S.W.*, 614 S.E.2d 424, 425, 427 (N.C. Ct. App. 2005).

110. *In re Josue T.*, 989 P.2d 431, 433 (N.M. Ct. App. 1999) (noting that the SRO “searched a student at the behest of a school official”). This language suggests that a different rule might apply if the SRO acted on his own authority.

111. *Id.* at 437.

112. *Id.*; see also *In re J.D.*, 170 Cal. Rptr. 3d 464, 471 (Ct. App. 2014) (holding that *T.L.O.* applied to a search initiated by “campus security officers” who were “acting at the behest of Richmond High School administrators”). More limited involvement in one case—when a school administrator searched a student while SROs happened to be in the same room—led to the same result. *State v. Burdette*, 225 P.3d 736, 738 (Kan. Ct. App. 2010).

113. *Cason v. Cook*, 810 F.2d 188, 190 (8th Cir. 1987).

did not change the character of the search from school discipline to law enforcement.<sup>114</sup>

Although these cases do not state an absolute rule that SRO-involved searches always qualify for *T.L.O.*'s standard, their analysis and dicta suggest that they usually will. These cases describe SROs as part of the school's team, explicitly authorized and encouraged to engage in ordinary school discipline, and as predominantly serving schools' special needs and only rarely serving law enforcement goals. After reciting various security concerns present in schools, the Wisconsin Supreme Court said it "may reasonably infer" that an SRO stationed full-time at a school has a core mission of "assist[ing] school officials in maintaining a safe and proper educational environment," a goal which triggered the *T.L.O.* standard.<sup>115</sup> The North Carolina Court of Appeals similarly "infer[red]" that SROs served goals related to the educational environment even without stating evidence supporting such an inference.<sup>116</sup> Both cases involved students suspected of possessing illegal contraband who, in fact, were detained and charged once contraband was found on them.<sup>117</sup> Yet neither addressed when, if ever, an SRO search could have primarily law enforcement goals. One unpublished case illustrates the narrow circumstances in which this analysis would lead a court to not apply *T.L.O.*—when school officials had already "completed [their] investigation" of the student and imposed discipline, which made it impossible to construe a subsequent search by the SRO as anything other than law enforcement.<sup>118</sup> A slight change of facts would make that case look like other SRO-involved searches deemed to fall under *T.L.O.*

Notably, these cases do not address the criminal or juvenile justice consequences of particular searches. These searches, presumably conducted for school disciplinary purposes, led to some kind of law enforcement consequences, usually arrests and charges, and often for relatively minimal behavior—such as the child who borrowed a knife from another student on a school bus and was charged with possessing a dangerous weapon on school property.<sup>119</sup> Because the courts viewed these cases as involving school searches, they left those consequences unaddressed.

---

114. *Id.* at 191–92. The Eighth Circuit reaffirmed this approach in *Shade v. City of Farmington*, in which it rejected a challenge to a search by SROs "[b]ecause school officials initiated the investigation and search . . . in furtherance of the school's interest in maintaining a safe learning environment, and because they asked officers to assist them in furtherance of that interest . . ." 309 F.3d 1054, 1061 (8th Cir. 2002).

115. *In re Angelia D.B.*, 564 N.W.2d 682, 690 (Wis. 1997).

116. *In re D.D.*, 554 S.E.2d 346, 354 (N.C. Ct. App. 2001).

117. *Id.* at 350; *Angelia D.B.*, 564 N.W.2d at 684.

118. *In re Welfare of T.D.B.*, No. 13-JV-15-142, 2018 WL 492641, at \*6 (Minn. Ct. App. Jan. 22, 2018). Perhaps notably, this is a more recent case, decided in 2018, after the reforms discussed in Part III.

119. *Shade*, 309 F.3d at 1058; *see also, e.g.*, *Cason v. Cook*, 810 F.2d 188, 190 (8th Cir. 1987) (describing how an SRO gave child suspects "juvenile appearance cards" to report to the police station); *State v. Burdette*, 225 P.3d 736, 738 (Kan. Ct. App. 2010) (charging the child with possession of marijuana and possession of drug paraphernalia); *R.D.S. v. State*, 245 S.W.3d 356, 361 (Tenn. 2008) (charging the child with simple possession or casual exchange of marijuana and possession of drug paraphernalia).

The lack of analysis of the consequences of searches is consistent with the broad approval of *T.L.O.*'s application to searches conducted by school officials regardless of what those officials do with the fruits of the search. *Dilworth*'s analysis began by noting that school officials benefit from *T.L.O.*'s reduced Fourth Amendment standard.<sup>120</sup> One illustrative trial court explained, "The Court finds the school has an absolute right to conduct searches for protection of students and there's no showing here that any of this search was as a result of officer action."<sup>121</sup> One element that might distinguish such searches from *T.L.O.* is that school districts now have policies and agreements with law enforcement requiring school officials to turn over evidence of crimes discovered in school searches.<sup>122</sup> By focusing on whether the search itself "was a result of officer action," courts avoid analyzing whether those policies and agreements affect *T.L.O.*'s applicability. That issue is explored in Part I.D.2, which describes critiques of the majority rule.

### 3. Cases Do Not Generally Hold That Children Are Always Entitled to Less Privacy

An important corollary to state courts' arguments that SROs are school officials for Fourth Amendment purposes is that children at school are not susceptible to searches and seizures based on the reasonable suspicion standard in all circumstances—only when searched by someone who qualifies as a school official. If children's expectation of privacy at school was reduced in all circumstances, these cases would have been much easier for courts to decide—they would not have to analyze SROs' roles and articulate how they qualify as school officials.

That said, *Dilworth* implies that children do have reduced expectations of privacy. *Dilworth* applied *Acton*'s balancing test, and quoted it as providing that "students within the school environment have a lesser expectation of privacy than members of the population generally."<sup>123</sup> That citation cannot fairly be read as supporting a holding that children always have a reduced expectation of privacy at school.<sup>124</sup> At least one state court has held

---

120. *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996); *see also* *State v. Scott*, 630 S.E.2d 563, 565 (Ga. Ct. App. 2006) (recognizing "a bright line between searches conducted solely by school officials and those involving a law enforcement officer" and holding that the former are "subject only to the most minimal restraints necessary to insure that students are not whimsically stripped of personal privacy and subjected to petty tyranny" (quoting *State v. Young*, 216 S.E.2d 586, 593 (Ga. 1975))).

121. *A.W. v. State*, 510 S.W.3d 811, 814 (Ark. Ct. App. 2017) (quoting the trial court).

122. *See infra* Part IV.B.

123. *Dilworth*, 661 N.E.2d at 318 (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995)).

124. *See* Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 *Miss. L.J.* 847, 888–89 (2011) (criticizing *Dilworth*'s use of the *Acton* factors); Henning, *supra* note 70, at 68–69 (describing the proper analysis as context-specific).

similarly, also citing *Acton*, though this case is an outlier compared to those discussed in Parts I.C.1 and I.C.2.<sup>125</sup>

Any suggestion or holding that children have lesser expectations of privacy in reference to *any* search at school is hard to square with the cases those courts rely upon. Crucially, the *Acton* language came in the context of a search by school officials with no law enforcement consequences, as discussed in Part I.B above. And the cited *Acton* language includes a quote from Justice Powell's *T.L.O.* concurrence which, as discussed in Part I.A above, explicitly contrasted school officials' searches from law enforcement searches.<sup>126</sup>

Moreover, both *Dilworth*, individually, and the weight of state court opinions, more generally, make clear that students sometimes do have a significant expectation of privacy at school. *Dilworth* indicates that when "outside police officers" conduct or initiate a search, probable cause is required<sup>127</sup>—a holding which reaffirms that who does the search and, perhaps, the reasonably expected consequences of that search, matter to the Fourth Amendment standard. If children always had a reduced expectation of privacy at school, then the identity of the person searching them would not matter. Yet courts almost universally have held that searches by outside police officers at school do not trigger *T.L.O.*'s standard.<sup>128</sup>

That distinction regarding outside police officers suggests two essential points. First, it underscores how these cases, rightly or wrongly, treat SROs differently than other police officers and the importance of how the law characterizes SROs' roles. Second, it shows that the purpose of a search and the identity of the searcher provide the decisive context for determining the proper Fourth Amendment standard.<sup>129</sup> Instead of holding that children always lack a reasonable expectation of privacy, *Dilworth* and cases holding similarly rely on the identification of SROs as acting more like school officials tasked with primarily protecting a school's learning environment than law enforcement officers. *Dilworth* and its progeny reflect not a rewriting of *T.L.O.*'s holding about students' reasonable expectation of privacy writ large, but an SRO-specific conclusion that classified SROs as school officials and made that classification define the boundary between special needs searches under *T.L.O.* and normal law enforcement searches.

---

125. See *Lindsey ex rel. Lindsey v. Caddo Par. Sch. Bd.*, 954 So. 2d 272, 274 (La. Ct. App. 2007).

126. See *supra* notes 49–51 and accompanying text.

127. *Dilworth*, 661 N.E.2d at 317.

128. See, e.g., *Commonwealth v. Villagran*, 81 N.E.3d 310, 314 (Mass. 2017) (declining to apply *T.L.O.* to a search by a non-SRO police officer); *State v. Tywayne H.*, 933 P.2d 251, 253–56 (N.M. Ct. App. 1997) (same); *In re Thomas B.D.*, 486 S.E.2d 498, 500 (S.C. Ct. App. 1997) (same); see also 5 LAFAVE, *supra* note 74, § 10.11(b), at 627 ("This is certainly the correct conclusion when an officer whose duties normally are performed elsewhere comes to the school and initiates a search there or gets school officials to so act on his behalf.").

129. *In re D.D.*, 54 S.E.2d 346, 352–53 (N.C. Ct. App. 2001).

*D. Longstanding Criticisms of the Majority Rule*

*Dilworth's* majority rule is not without dissenters, both among courts and commentators.

## 1. Minority Jurisdictions

While *Dilworth* and other cases discussed in Part I.C represent the majority rule, that rule is not universally accepted. *Dilworth's* dissenting opinion argued that SROs are more accurately considered law enforcement officers for Fourth Amendment purposes.<sup>130</sup> More importantly, several state courts have adopted the dissent's view, concluding that SROs qualify as law enforcement officers and distinguishing them from school officials. In 2012, the Washington Supreme Court refused to apply *T.L.O.* to a search by an SRO because his law enforcement role created "a fundamental difference" with a search by school officials.<sup>131</sup> The facts of the SRO's role mattered. While the SRO in *Dilworth* had authority to impose school disciplinary consequences on students,<sup>132</sup> the Washington SRO "ha[d] no authority to discipline students."<sup>133</sup> The New Hampshire Supreme Court refused to apply *T.L.O.* to an SRO whose "job essentially was to investigate criminal activity on school grounds," and who had an agreement with the school principal that the school would handle discipline and the SRO would handle criminal law enforcement.<sup>134</sup> A Georgia appellate court ruled that SROs cannot use *T.L.O.* but did not offer much of an explanation for that conclusion.<sup>135</sup> And Iowa has codified a rule preventing peace officers from using *T.L.O.'s* relaxed standard.<sup>136</sup>

Tennessee has placed itself in a middle ground that emphasizes the importance of closely analyzing SROs' role. The Tennessee Supreme Court held that the appropriate Fourth Amendment standard for a search conducted by an SRO at school depends on whether the SRO's "duties more closely align with the duties of a school official."<sup>137</sup> Applying that lower standard requires finding that the SRO's duties are "beyond those of a[n] ordinary law

---

130. *Dilworth*, 661 N.E.2d at 321 (Nickels, J., dissenting); see also *M.D. v. State*, 65 So. 3d 563, 568–71 (Fla. Dist. Ct. App. 2011) (Hawkes, J., dissenting) (arguing that SROs are not school officials and thus may not rely on *T.L.O.*).

131. *State v. Meneese*, 282 P.3d 83, 86 (Wash. 2012) (en banc).

132. See *supra* notes 91–92 and accompanying text.

133. *Meneese*, 282 P.3d at 87.

134. *State v. Heirtzler*, 789 A.2d 634, 636 (N.H. 2001). The facts of *Heirtzler* were more complicated, involving a referral of suspicious activity from a teacher to the SRO to school administrators, who conducted the search and then turned its fruits over to the officer. *Id.* at 637. These facts are discussed in Part IV.B.

135. *Patman v. State*, 537 S.E.2d 118, 120 (Ga. Ct. App. 2000). Additionally, a Florida appellate court also ruled that an SRO cannot use *T.L.O.* *A.J.M. v. State*, 617 So. 2d 1137, 1138 (Fla. Dist. Ct. App. 1993). However, a more recent Florida case came to the opposite conclusion. *M.D. v. State*, 65 So. 3d 563, 566 (Fla. Dist. Ct. App. 2011).

136. IOWA CODE § 808A.3 (2015). The Iowa code limits *T.L.O.* to school officials, and it defines such officials to include "unlicensed school employees employed for security or supervision purposes" but not officers. *Id.* § 808A.1(3).

137. *R.D.S. v. State*, 245 S.W.3d 356, 370 (Tenn. 2008).

enforcement officer such that he or she may be considered a school official as well as a law enforcement officer.”<sup>138</sup> The court remained neutral on whether this test was met and remanded for further proceedings.<sup>139</sup> The unpublished decision on remand concludes that the SRO was a law enforcement officer and therefore needed probable cause,<sup>140</sup> but no precedential opinion decides the issue beyond that case.

In addition to state courts adopting the minority rule for Fourth Amendment purposes, several other courts have adopted a rule, in different contexts, which treats SROs as law enforcement officers. Those cases address interrogations of students at school and determine what circumstances amount to custody for *Miranda* purposes.<sup>141</sup> An interrogation by school officials alone does not generally amount to a custodial interrogation, which would require authorities to provide the *Miranda* warnings.<sup>142</sup> Despite the majority rule for Fourth Amendment purposes, however, several courts and other state authorities have treated SROs as law enforcement officers when determining if a school interrogation is custodial for *Miranda* purposes.<sup>143</sup>

## 2. Critiques of the Majority Rule

Academics have long criticized courts for applying a Fourth Amendment test designed for school disciplinary purposes to SRO-involved searches in

---

138. *Id.* at 369.

139. *Id.* at 370.

140. *State v. R.D.S.*, No. M2008-01724-COA-R3-JV, 2009 WL 2136324, at \*9 (Tenn. Ct. App. July 16, 2009). For further discussion of this case, see *infra* notes 356–59 and accompanying text.

141. *Miranda* requires authorities to inform suspects of their rights to silence and an attorney before authorities begin a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

142. See, e.g., *Boynton v. Casey*, 543 F. Supp. 995 (D. Me. 1982); Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 40–41 (2006). But see RANDY HERTZ, ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES 614 (2015), <https://njdc.info/wp-content/uploads/2015/09/Hertz-Trial-Manual-Update.pdf> [<https://perma.cc/ZFV5-EYMU>] (noting that requiring a student to report to the principal’s office should be considered a custodial interrogation).

143. See, e.g., *B.A. v. State*, 100 N.E.3d 225 (Ind. 2018); *N.C. v. Commonwealth*, 396 S.W.3d 852, 855 (Ky. 2013); *In re R.J.E.*, 630 N.W.2d 457 (Minn. Ct. App. 2001), *rev’d on other grounds*, 642 N.W.2d 708 (Minn. 2002); *State v. Antonio T.*, 352 P.3d 1172, 1180 (N.M. 2015); *In re R.H.*, 791 A.2d 331, 333 (Pa. 2002); Ariz. Office of the Att’y Gen., No. 104-003, Opinion on Law Enforcement Interviews of Students at Public Schools, at 2 n.1 (2004). Some of these cases possibly create tension with Fourth Amendment law in a particular state. For instance, the Indiana Supreme Court held in *B.A.* that a student interrogated by a vice principal and SRO was in custody for *Miranda* purposes. *B.A.*, 100 N.E.3d at 233. But an Indiana statute, building on earlier state court precedent, provides that SROs may use the reasonable suspicion standard. See *supra* notes 102–03 and accompanying text.

school<sup>144</sup> and even to searches only indirectly involving law enforcement.<sup>145</sup> Michael Pinard wrote that “the increased interdependency between law enforcement authorities and public school officials, as well as the increased use of the criminal justice system to monitor and punish behavior” require stronger Fourth Amendment protections than those provided by *T.L.O.* and cases like *Dilworth*.<sup>146</sup> Barry Feld echoed these concerns, arguing that “[e]quating the search standard of school officials with SROs conflates the two despite the substantial difference in roles, disregards the greatly expanded police presence in school, and ignores the increased referrals of youths to juvenile courts from cases originating in schools.”<sup>147</sup>

These arguments emphasize that SROs are law enforcement officers, regardless of any school disciplinary tasks in which they might engage. Federal law defining SROs (as part of a federal grant program) makes clear that SROs are “career law enforcement officer[s]” who should have “sworn authority.”<sup>148</sup> SROs’ tasks are “to address crime and disorder problems,” including gangs and drugs at school, and to engage in a range of crime prevention and education efforts.<sup>149</sup> Those other efforts might distinguish an SRO’s job from other officers, but they do not make the job something other than law enforcement; the federal statute describes these tasks as “community-oriented policing.”<sup>150</sup> SROs’ law enforcement authority is evident in literally every case discussed in Part I.C—SROs in those cases arrested, charged, or somehow imposed a non-school-related, law enforcement consequence on students.

Critiquing cases which involve SROs and other law enforcement officials only indirectly is more difficult. In such cases, school officials suspect students possess evidence of a crime, search students for that evidence without SRO involvement, and then, following school district policies or agreements with law enforcement, turn over any such evidence they find to the SRO.<sup>151</sup> While conducting searches without law enforcement superficially suggests that *T.L.O.* applies, the presence of policies requiring disclosure to law enforcement and post-*T.L.O.* special needs and administrative-search cases support a different view—such searches are so entangled with law enforcement that *T.L.O.* should no longer apply.

---

144. See, e.g., Feld, *supra* note 124, at 888–89; Josh Kagan, *Reappraising T.L.O.’s “Special Needs” Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 296 n.13 (2004); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1070 (2003); *Developments in the Law—Policing Students*, *supra* note 82, at 1758–59. *T.L.O.* itself has long been an unpopular opinion among academics. See, e.g., JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 194 (2018) (collecting early academic critiques of *T.L.O.*).

145. See, e.g., Kagan, *supra* note 144, at 304–13.

146. See Pinard, *supra* note 144, at 1069–70.

147. See Feld, *supra* note 124, at 892.

148. See 34 U.S.C. § 10389(4) (2012).

149. See *id.* § 10389(4)(A).

150. *Id.* § 10389(4).

151. For examples of such cases, see *supra* notes 120–24 and accompanying text.

The U.S. Supreme Court offered support for this conclusion via *Ferguson v. City of Charleston*, in which it held that “extensive entanglement” with law enforcement prevented authorities from categorizing a search by nurses at a public hospital as a special needs search entitled to an exception from warrant and probable cause requirements.<sup>152</sup> *Ferguson* involved a joint effort between the hospital, local police, local prosecutors, and substance abuse and child protection agencies to identify women who used illegal drugs while pregnant.<sup>153</sup> Under protocols agreed upon by the hospital, police, and prosecutors, hospital staff would test pregnant and postpartum women for cocaine use and turn over positive tests to law enforcement.<sup>154</sup> While the local government defendants asserted that “special non-law-enforcement purposes” satisfied *T.L.O.*’s special needs test,<sup>155</sup> the Court concluded that the searches at issue were too entangled with law enforcement purposes for that test to apply.<sup>156</sup>

The Court’s reasoning analogizes to school searches. First, the Court noted that the only special needs searches it had approved were “divorced from the State’s general interest in law enforcement.”<sup>157</sup> Consistent with that language, *Ferguson* emphasized both that *T.L.O.* should not be read to endorse school searches involving law enforcement<sup>158</sup> and that the non-law-enforcement consequences in *Acton* provided essential context for the searches at issue in that case.<sup>159</sup>

Second, *Ferguson* emphasized that to determine whether the special needs test is met, the Court must perform a “close review” of the claimed special need.<sup>160</sup> The Court offered different formulations of what this review should entail, but the bottom line is the same—“extensive entanglement of law enforcement cannot be justified by reference to legitimate needs.”<sup>161</sup> The majority opinion sought to identify the “primary” and “programmatic purpose” of the searches.<sup>162</sup> The Court recognized that the “ultimate” purpose of the searches involved “therapeutic” aims, but what mattered was the “immediate objective . . . to generate evidence for law enforcement purposes.”<sup>163</sup> Concurring, Justice Anthony Kennedy critiqued the “ultimate goals” versus “immediate purposes” distinction,<sup>164</sup> but he concluded that

---

152. *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.20 (2001).

153. *Id.* at 70–71.

154. *Id.* at 72.

155. *Id.* at 73.

156. *Id.* at 79–84.

157. *Id.* at 79 (emphasis added).

158. *Id.* at 79 n.15.

159. *See id.* at 77–78 (noting that *Acton* only approved the loss of the ability to participate in an extracurricular activity).

160. *Id.* at 81 (quoting *Chandler v. Miller*, 520 U.S. 305, 322 (1997)).

161. *Id.* at 83 n.20.

162. *Id.* at 81.

163. *Id.* at 82–83, 83 n.20.

164. *Id.* at 86–88 (Kennedy, J., concurring). Five justices joined the majority opinion, and Justice Kennedy concurred separately. *Id.* at 69 (majority opinion).



“substantial law enforcement involvement” made the special needs test inapplicable:

The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.<sup>165</sup>

*Ferguson*'s analysis underscores the importance of distinguishing law enforcement and school discipline goals when considering school searches.<sup>166</sup> Just as school searches involving SROs may be intended to serve broad goals of maintaining a positive school environment, the searches in *Ferguson* sought to reduce drug abuse—but neither goal means the special needs test applies. “[L]aw enforcement involvement always serves some broader social purpose or objective,” so closer analysis is required.<sup>167</sup> In *Ferguson*, the Court could not distinguish legitimate special needs from the law enforcement action. The Court reviewed official policies developed by a public entity and law enforcement, and where law enforcement officers “were extensively involved in the day-to-day administration of the policy.”<sup>168</sup> In contemporary school searches, a “non-law enforcement special need for a search becomes indistinguishable from the law enforcement purposes of the search.”<sup>169</sup>

*Ferguson*'s analysis also illustrates how a search's consequences matter for determining whether that search must satisfy normal Fourth Amendment rules or instead qualifies as a special needs search. *Ferguson* noted that a search that could disqualify an individual from an activity to which he had no constitutional entitlement—such as an extracurricular high school activity, as in *Acton* or *Earls*—involves a far more modest invasion of privacy than a search leading to law enforcement consequences.<sup>170</sup> Focusing on such consequences both explains existing special needs case law and normatively justifies when Fourth Amendment rights should be greater or lesser.<sup>171</sup> This focus on consequences evokes earlier cases that emphasized that the Fourth Amendment's warrant and probable cause requirements may be waived when “nothing of constitutional magnitude is involved,”<sup>172</sup> as well

---

165. *Id.* at 88 (Kennedy, J., concurring).

166. *See* Pinard, *supra* note 144, at 1101 n.174 (analogizing school officials required to report all criminal incidents to law enforcement to the hospital staff in *Ferguson*).

167. *Ferguson*, 532 U.S. at 84.

168. *Id.* at 82.

169. *Developments in the Law—Policing Students*, *supra* note 82, at 1760.

170. *Id.* at 1762.

171. Feld, *supra* note 124, at 918; Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 406–21 (2012).

172. *Wyman v. James*, 400 U.S. 309, 324 (1971); *see also* Gupta-Kagan, *supra* note 171, at 408–09.

as scholarship endorsing “constitutional values” impacted by searches and seizures.<sup>173</sup>

Giving a law enforcement officer with the power to arrest individuals the fruits of a search—and thus increasing the likelihood of arrests and charges—imposes law enforcement consequences on school searches and should affect the Fourth Amendment analysis.<sup>174</sup> At least one state appellate court has recognized that the more severe consequences included in “punishment for violating a criminal statute” as compared with violating school rules explains why law enforcement officers require probable cause before they may search someone.<sup>175</sup> These consequences can, of course, flow even if law enforcement officers are not the ones conducting a search, especially when school policies or agreements require disclosure to law enforcement. Catherine Kim has made analogous arguments—that consequences involving the juvenile justice system cannot be said to serve children’s interests and thus differ from how *T.L.O.* imagined school discipline.<sup>176</sup> Given those consequences, practices that primarily serve law enforcement goals should trigger “the full scope of constitutional protections that would be available to youth outside of the school context,” meaning, at a minimum, that *T.L.O.* would not apply.<sup>177</sup>

One state court has addressed these *Ferguson*-based arguments, but it unconvincingly attempted to distinguish that case. In *Commonwealth v. Lawrence L.*,<sup>178</sup> a child sought to suppress marijuana found in a search by a vice principal and turned over to law enforcement pursuant to an agreement between the school district and the local police department and district attorney’s office.<sup>179</sup> The Massachusetts Supreme Judicial Court, however, held that this agreement did not render the school an “agent of the police” and that *T.L.O.* still applied.<sup>180</sup> The court’s focus on agency is misplaced, as *Ferguson* focused on programmatic purposes and entanglement with law enforcement.<sup>181</sup> The Massachusetts court then asserted that the “ultimate interests involved here differ substantially” from *Ferguson*, and, in particular, that school officials have an interest in “maintaining a safe learning environment and taking swift disciplinary action.”<sup>182</sup> Yet the court offered no explanation as to why this interest trumped the law enforcement purposes codified in the agreement requiring disclosure of evidence by

---

173. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805 (1994).

174. See *Developments in the Law—Policing Students*, *supra* note 82, at 1762 (“[T]he identity of who uses the result of a search does bear on the seriousness of the privacy intrusion.”).

175. *R.D.S. v. State*, 245 S.W.3d 356, 368 (Tenn. 2008).

176. See Kim, *supra* note 60, at 891–92.

177. *Id.* at 894.

178. 792 N.E.2d 109 (Mass. 2003).

179. *Id.* at 110–11.

180. *Id.* at 112–13. The court framed its agency focus as rooted in the defendant’s argument. *Id.*

181. See *supra* notes 160–65 and accompanying text.

182. *Lawrence L.*, 792 N.E.2d at 113.

school officials, or how the interest in school discipline differed from the public health interest in preventing the use of drugs during pregnancy and inducing individuals with drug problems to obtain substance abuse treatment. In the end, both *Ferguson* and school searches like that in *Lawrence L.* involved law enforcement purposes codified in memoranda of understanding with police departments and intertwined with legitimate special needs. In addition, both led to law enforcement consequences that weigh against applying a special needs exception to the warrant requirement.<sup>183</sup> Neither special need is adequately distinguished from law enforcement to justify *T.L.O.*'s application.

## II. THE SCHOOL-TO-PRISON PIPELINE AND CALLS TO REFORM THE ROLES OF SROs

That the bulk of cases discussed in Parts I.C and I.D were decided in the 1990s and 2000s is no coincidence—that is when SROs became a fixture of American schools. The number of SROs grew substantially over the past generation, leading some to describe “[s]chool-based policing” as “the fastest growing area of law enforcement.”<sup>184</sup> While SROs numbered less than 100 in the 1970s, their numbers grew dramatically alongside concerns about crime at school and elsewhere in the 1980s and beyond: there were 12,300 SROs by 1997 and nearly 20,000 by 2007.<sup>185</sup> A survey published in 2015 reported that 30 percent of public schools nationally had SROs,<sup>186</sup> and a majority of middle and high schools now have SROs.<sup>187</sup> High-profile school shootings have catalyzed a range of actions to provide more SROs in schools.<sup>188</sup>

---

183. See *supra* notes 170–76 and accompanying text.

184. *About NASRO*, NAT'L ASS'N SCH. RESOURCE OFFICERS, <https://nasro.org/about/> [<https://perma.cc/4X5H-RV52>] (last visited Mar. 15, 2019); see also TOM R. TYLER & RICK TRINKNER, WHY CHILDREN FOLLOW RULES: LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY 54 (2017) (describing the “unprecedented surge of law enforcement presence in schools”); Amanda Merkwae, Note, *Schooling the Police: Race, Disability and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 158 (2015).

185. SARAH E. REDFIELD & JASON P. NANCE, ABA JOINT TASK FORCE ON REVERSING THE SCHOOL-TO-PRISON PIPELINE 51 (2016), [https://www.americanbar.org/content/dam/aba/administrative/diversity\\_pipeline/stp\\_preliminary\\_report\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf) [<https://perma.cc/722A-29AZ>]; see also *R.D.S. v. State*, 245 S.W.3d 356, 367 (Tenn. 2008) (“Since *T.L.O.* was decided, there has been an increasing presence of law enforcement officers in public schools . . .”). The number of SROs grew substantially between 1997 and 2008 following federal grants supporting the hiring and training of more than 6500 new SROs. Barbara Fedders, *The Anti-Pipeline Collaborative*, 51 WAKE FOREST L. REV. 565, 570–71 (2016).

186. LUCINDA GRAY ET AL., NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC SCHOOL SAFETY AND DISCIPLINE: 2013–14, at 10 tbl.7 (2015), <https://nces.ed.gov/pubs2015/2015051.pdf> [<https://perma.cc/A5DD-BR66>].

187. Fedders, *supra* note 185, at 571; see also TYLER & TRINKNER, *supra* note 184, at 163 (discussing the increasing presence of law enforcement officers in schools).

188. See, e.g., MORGAN ET AL., *supra* note 82, at 196 (summarizing federal and state steps to increase SROs after the December 2012 massacre at an elementary school in Newtown, Connecticut). Calls for increased numbers of SROs have followed more recent school shootings. F. Chris Curran, *A School Resource Officer in Every School?*, WTOP (Apr. 11,

As the numbers of school resource officers increased, so did several other trends. First, SROs' roles frequently expanded to include school discipline, consistent with the analysis of cases following the majority rule. Second, other policies which directed more children to the juvenile and criminal justice systems for school-based incidents developed, and SROs' roles furthered that trend.<sup>189</sup> That development became known as the school-to-prison pipeline, and criticisms of SROs' broad roles became a featured element of research and advocacy to reform that pipeline. Those criticisms informed later reform efforts, which are discussed in Part III.

#### A. SROs' Roles

That thousands of SROs were first stationed at public schools in the 1990s and 2000s is clear,<sup>190</sup> but what precisely they did—and how much of their activities could be categorized as law enforcement and how much as serving an educational special need—was somewhat hard to define. SROs follow a “triad” model, in which they engage in law enforcement, teach students (often about the law), and mentor students.<sup>191</sup> A 2005 study of a variety of programs found that which corner of the triad received the most emphasis “varie[d] considerably across and within programs.”<sup>192</sup> Other studies found similar variation.<sup>193</sup>

Most SROs engaged in a range of activities well beyond law enforcement, and non-law-enforcement activity increased over time. These activities were consistent with cases adopting the majority rule, which emphasized non-law-enforcement roles.<sup>194</sup> Some written agreements between law enforcement

---

2018, 6:49 AM), <https://wtop.com/education/2018/04/a-school-resource-officer-in-every-school/> [https://perma.cc/ZC6M-MPRM]; Stephanie Saul et al., *School Officer: A Job with Many Roles and One Big Responsibility*, N.Y. TIMES (Mar. 4, 2018), <http://www.nytimes.com/2018/03/04/us/school-resource-officers-shooting.html> [https://perma.cc/ZTD4-HM6E]; Maayan Schechter & Jamie Self, *Gov. McMaster Wants Police Officers in Every SC School. One Big Obstacle—Money*, STATE (Mar. 1, 2018, 3:43 PM), <https://www.thestate.com/news/local/article202910609.html> [https://perma.cc/6TSC-FV3Y]; Carly Zervis, *Sheriff, School Board Agree: More SROs Needed. But How Many?*, CITRUS COUNTY CHRON. (Mar. 16, 2018), [http://www.chronicleonline.com/news/education/sheriff-school-board-agree-more-sros-needed-but-how-many/article\\_2a3c5488-292c-11e8-9a4e-d7c8c5e59103.html](http://www.chronicleonline.com/news/education/sheriff-school-board-agree-more-sros-needed-but-how-many/article_2a3c5488-292c-11e8-9a4e-d7c8c5e59103.html) [https://perma.cc/UR2T-5YW3]. These calls have led to some increases in the number of schools with SROs. See, e.g., Press Release, S.C. Dep't of Educ., 38 South Carolina School Districts to Receive Funding for New School Resource Officers (Sept. 5, 2018), <https://ed.sc.gov/newsroom/news-releases/38-south-carolina-school-districts-to-receive-funding-for-new-school-resource-officers/> [https://perma.cc/27S4-2VU3]. Such efforts are contested. See, e.g., ADVANCEMENT PROJECT ET AL., POLICE IN SCHOOLS ARE NOT THE ANSWER TO SCHOOL SHOOTINGS 3 (2018), <https://dignityinschools.org/wp-content/uploads/2018/03/Police-In-Schools-2018-FINAL.pdf> [https://perma.cc/WKD2-PJP8].

189. See, e.g., Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 327–31 (2016) (describing various contributors to the pipeline).

190. See Fedders, *supra* note 185, at 567.

191. PETER FINN ET AL., COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS 1 (2005).

192. *Id.*

193. Kim, *supra* note 60, at 882–83.

194. FINN ET AL., *supra* note 191, at 13; see also *The Evolving Role of Police in Schools*, TEX. SCH. SAFETY CTR., <https://txssc.txstate.edu/topics/law-enforcement/articles/evolving->

agencies and school districts specified that SROs should “enforce the school district’s student disciplinary process.”<sup>195</sup> Some memoranda of understanding (MOUs) called on SROs to avoid any school disciplinary work, but many others lacked clear descriptions of SROs’ intended activities.<sup>196</sup> In practice, that led to SROs engaging in a range of activity beyond traditional law enforcement. One report highlighted an SRO who admitted “playing [school discipline] by ear” and eventually asserting a greater role in writing school discipline reports on issues as minor as school uniform violations.<sup>197</sup> Surveys of law enforcement agencies with SRO programs found that SROs spent, on average, half of their time on law enforcement activities and the rest on other activities (though those surveys did not define “law enforcement activities”).<sup>198</sup>

One report funded by the U.S. Department of Justice (DOJ) on SRO activities implied that law enforcement activities would blend with school discipline, and it described the effects of SROs “arresting, citing, or turning in students to school administrators” and referred to the children receiving this response not as delinquents but with broader language such as “troublemakers.”<sup>199</sup> The report went on to critically describe one school principal’s efforts to limit SROs to a law enforcement role.<sup>200</sup> The report suggested that a model in which SROs became engaged in a wide set of activities was both better and more common. In practice, this meant an entirely novel shift in school discipline; as one scholar put it, “[T]he introduction of law enforcement officers into schools has transformed student misconduct into a matter to be dealt with by the criminal justice system.”<sup>201</sup>

### B. *The School-to-Prison Pipeline and Reform Efforts*

The growth in the number of SROs and the expansion of their roles into school discipline did not occur in a vacuum. It began in the 1990s, at a time when concern about juvenile crime—which peaked in 1994 and has steadily declined since—led to a range of reforms that treated children more punitively.<sup>202</sup> At the same time, policies and practices developed which furthered the “criminalization of school discipline.”<sup>203</sup> State laws and school district policies required that schools refer student misbehavior in schools to

---

role-of-police [<https://perma.cc/6Z6Y-BX78>] (last visited Mar. 15, 2019) (“[S]chool-based law enforcement officers have expanded their range of duties since they were first assigned to schools.”). This point does not endorse those cases and only observes that some of those cases’ descriptive points were accurate.

195. FINN ET AL., *supra* note 191, at 31.

196. *Id.* at 24–26.

197. *Id.* at 30–31.

198. *Id.* at 14–15.

199. *Id.* at 19.

200. *Id.* at 19–20.

201. Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591, 596 (2006).

202. MORGAN ET AL., *supra* note 82, at 189–90; REDFIELD & NANCE, *supra* note 185, at 51.

203. REDFIELD & NANCE, *supra* note 185, at 50–51 (citing sources for the phrase).

law enforcement.<sup>204</sup> Broad criminal laws—such as those criminalizing any behavior which amounted to “disturbing schools”—rendered a large swath of adolescent misbehavior criminal.<sup>205</sup> In combination with these policies, SROs’ increased presence and involvement in school discipline led to a sharp increase in arrests for incidents arising at school.<sup>206</sup> Searches involving SROs, in particular, “increase the likelihood of . . . being swept into the juvenile justice system by being arrested, adjudicated, or detained.”<sup>207</sup>

Schools became a primary source of delinquency cases referred to juvenile court. The proportion of all juvenile charges arising from incidents at school was found to be 17 percent nationally and significantly higher in some jurisdictions, which demonstrates a significant overlap between school discipline and law enforcement.<sup>208</sup> Reformers named policies leading to these figures the “school-to-prison pipeline,” a phrase which began among academics and advocates,<sup>209</sup> but which entities like the American Bar Association (ABA) and the DOJ have subsequently adopted.<sup>210</sup>

This increased rate of school-based arrests and charges led to a reform movement that focused on SROs’ roles and sought to end the “criminalization” of school discipline.<sup>211</sup> The same feature described by proponents as a feature of SROs’ presence at school—their involvement in school discipline—was, in the eyes of reformers, reason to worry that such involvement led to an increasing number of arrests for minor misbehavior.<sup>212</sup> A variety of studies concluded that children receiving law enforcement responses were dramatically harmed, especially when incarcerated but even

204. MORGAN ET AL., *supra* note 82, at 189–90; REDFIELD & NANCE, *supra* note 185, at 5; *see also* Josh Gupta-Kagan, *The School-to-Prison Pipeline’s Legal Architecture: Lessons from the Spring Valley Incident and Its Aftermath*, 45 FORDHAM URB. L.J. 83, 115–16 (2017).

205. Gupta-Kagan, *supra* note 204, at 103–07.

206. REDFIELD & NANCE, *supra* note 185, at 14, 50–54 (summarizing causes of the pipeline, and noting large numbers of school-based arrests and law enforcement referrals).

207. TYLER & TRINKNER, *supra* note 184, at 163.

208. Kim, *supra* note 60, at 881–82.

209. Ken McGrew traces the origins of the school-to-prison pipeline metaphor from a 2003 academic conference to becoming “dominant” in news reports by 2004. Ken McGrew, *The Dangers of Pipeline Thinking: How the School-to-Prison Pipeline Metaphor Squeezes Out Complexity*, 66 EDUC. THEORY 341, 343–45 (2016).

210. The ABA has established a project on “Reversing the School-to-Prison Pipeline” and published a report analyzing the pipeline’s causes and possible reforms. *School to Prison Pipeline*, A.B.A., [https://www.americanbar.org/groups/diversity/racial\\_ethnic\\_justice/projects/StPP.html](https://www.americanbar.org/groups/diversity/racial_ethnic_justice/projects/StPP.html) [<https://perma.cc/GSX7-FLPP>] (last visited Mar. 15, 2019); *see also* REDFIELD & NANCE, *supra* note 185. The DOJ has used the phrase in court pleadings. *See, e.g.*, Statement of Interest of the United States at 4–5, *Kenny v. Wilson*, No. 2:16-cv-02794-CWH (D.S.C. Nov. 28, 2016), ECF No. 86.

211. Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 962 (2009); *see also* REDFIELD & NANCE, *supra* note 185, at 50–51.

212. *See, e.g.*, Kaitlin Banner, *Breaking the School-to-Prison Pipeline: New Models for School Discipline and Community Accountable Schools*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 301, 301–02 (Nancy E. Dowd ed., 2015).

when an arrest did not lead to a juvenile court adjudication.<sup>213</sup> Law enforcement responses to school misbehavior served neither broader school disciplinary goals—because they harmed the overall school environment<sup>214</sup>—nor broader crime control goals—because they increase the risk of recidivism.<sup>215</sup>

Beyond these aggregate harms, reformers offered extreme stories of harmful uses of law enforcement in school discipline, often involving arrests in response to nonviolent misbehavior, especially by young children, disproportionate arrests of black youth, and aggressive police searches often with little or no suspicion.<sup>216</sup>

These critiques, which are only briefly summarized here, have extended beyond academics to family court judges who adjudicate school-based delinquency cases. The National Council of Juvenile and Family Court Judges criticized policies and practices which led to arresting and charging children for relatively minor conduct at school when less formal and less punitive approaches would have served children better.<sup>217</sup> This leading national group of judges challenged criminalizing “minor infractions” as filling court dockets with frivolous cases that unnecessarily harmed children.<sup>218</sup> Leading family court judges have written about the harms that come from arresting and charging children for such incidents.<sup>219</sup> Other professional groups issued similar calls for reform beyond those whose ideology might make such critiques predictable. The American Psychological Association, for instance, argued in 2008 that “minor, developmentally influenced misbehavior should not be interpreted or dealt with as a criminal infraction.”<sup>220</sup> The Council of State Governments issued a report recognizing the concern regarding “the ticketing and arresting of students for minor offenses” and recommending reforms “to keep students engaged in school and out of the juvenile justice system.”<sup>221</sup>

Relatively recent high-profile cases have highlighted these critiques—such as video of an SRO pulling a teenage girl out of her desk and throwing

---

213. See Alexis Karteron, *Arrested Development: Rethinking Fourth Amendment Standards for Seizures and Uses of Force in Schools*, 18 NEV. L.J. 863, 871–77 (2018); Nance, *supra* note 189, at 319–21.

214. Nance, *supra* note 189, at 344–45.

215. *Id.* at 319–24.

216. See, e.g., KATHLEEN NOLAN, *POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL* 19–20 (2011); Banner, *supra* note 212, at 302; Nance, *supra* note 3 (manuscript at 4–5).

217. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *JUDICIALLY-LED RESPONSES TO THE SCHOOL PATHWAYS TO THE JUVENILE JUSTICE SYSTEM PROJECT* background to 1 (2016).

218. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *SCHOOL PATHWAYS TO THE JUVENILE JUSTICE SYSTEM* 4 (2014).

219. Steven C. Teske & J. Brian Huff, *When Did Making Adults Mad Become a Crime? The Court’s Role in Dismantling the School-to-Prison Pipeline*, JUV. & FAM. JUST. TODAY, Winter 2011, at 14, 14–17.

220. Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 858 (2008).

221. MORGAN ET AL., *supra* note 82, at xvii, 13.

her across the floor while arresting her for disturbing school by refusing to put away a cell phone.<sup>222</sup> Scholars have cited that case as a leading example of the harm school policing can create, especially when SROs are involved in “minor, quotidian in-school misbehavior” and transform such incidents into law enforcement and juvenile court matters.<sup>223</sup>

A central target for reforms has been the role of SROs, based explicitly on the concern that involving SROs in school discipline leads to unnecessary arrests of students—especially students of color—for what the ABA termed “trivial infractions.”<sup>224</sup> Multiple studies have found that assigning SROs to schools increased the number of arrests for low-level offenses, even when taking into account various measures for the rates of crime in and around schools and legal requirements to report certain crimes to law enforcement.<sup>225</sup> Chongmin Na and Denise Gottfredson found that, after controlling for previous crime rates, SRO presence led to an increase in the rate of reporting minor violent crimes—simple assaults and other charges arising largely from fights between students—showing that “increased use of SROs facilitates the formal processing of minor offenses.”<sup>226</sup> Matthew Theriot found more nuanced but consistent results: SROs’ presence reduced the likelihood of school-based arrests for weapons possession (perhaps by deterring students from bringing weapons to school), a finding in tension with other studies.<sup>227</sup> Even so, Theriot found that SROs’ presence resulted in an even larger increase—more than 100 percent—in arrests for disorderly conduct, the most common charge in the jurisdictions studied.<sup>228</sup> Judges have written that SROs’ law enforcement role “dictates” more arrests for such conduct.<sup>229</sup> Reduced Fourth Amendment standards through the application of *T.L.O.* to SRO-involved searches surely can contribute to increased arrests as well.<sup>230</sup>

These findings, coupled with other factors, increased concern that racial disparities are particularly—and unjustifiably—large in school-based arrests. Jason Nance found that the percentage of nonwhite students at a school “is a strong predictor of whether the school uses a combination of strict security

---

222. For a summary of this event, how it illustrated the school-to-prison pipeline, and subsequent state reform efforts, see generally Gupta-Kagan, *supra* note 204.

223. Fedders, *supra* note 185, at 576.

224. REDFIELD & NANCE, *supra* note 185, at 14.

225. *Id.* at 53; Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 JUST. Q. 619, 642 (2011); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 967–70 (2016); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 282 (2009).

226. Na & Gottfredson, *supra* note 225, at 640.

227. Compare Theriot, *supra* note 225, at 285, with Na & Gottfredson, *supra* note 225, at 642.

228. Theriot, *supra* note 225, at 285. Theriot’s study—which focused on Clayton County, Georgia, and Jefferson County, Alaska—controlled for various factors, including economic disadvantage within the student body, in comparing schools with and without assigned SROs. *Id.* at 284–85.

229. Teske & Huff, *supra* note 219, at 16.

230. *Developments in the Law—Policing Students*, *supra* note 82, at 1758–59.



measures.”<sup>231</sup> Nonwhite students, therefore, are more likely to go to a school with SROs and thus face the results of increased arrests.<sup>232</sup> Moreover, in practice, Nance has shown that “extreme surveillance measures” impose a range of harms on schools and students.<sup>233</sup>

These criticisms of the school-to-prison pipeline emphasize one central proposal: SROs should be less involved in incidents of minor misbehavior, which should instead be the subject of school discipline.<sup>234</sup> As Theriot explained:

[I]t . . . is important to change teachers’ and school administrators’ expectations of SRO interventions. . . . [T]eachers more often are turning to police officers to handle difficult students. Teachers and principals are ignoring the “teachable moments” that come from student misbehavior and failing to take advantage of opportunities to work with adolescents in need.<sup>235</sup>

Relatedly, evidence accumulated to show that using police officers to enforce school discipline (and the arrests and charges which result) harmed students. Students who were arrested had higher school dropout and recidivism rates, and such arrests were not found to improve school discipline for students who were not punished.<sup>236</sup>

Courts have also begun to question the policy wisdom of, and raise legal concerns unrelated to the Fourth Amendment about, involving SROs in school discipline. Then-Judge Neil Gorsuch critiqued an SRO’s involvement in a case involving a middle school child’s repeated burping in gym class, which culminated in the SRO arresting the child for “interfer[ing] with the educational process.”<sup>237</sup> That case provides a vivid illustration of how stationing SROs at schools and involving them in ordinary school discipline incidents leads to unnecessary arrests. In that case, a middle schooler

---

231. Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 41 (2013).

232. *Id.*

233. See Nance, *supra* note 3 (manuscript at 55) (“The use of extreme surveillance measures, especially when applied disproportionately on minority students, delegitimizes the educational process, harms students’ interests, furthers racial inequalities, weakens trust in government institutions, skews minorities’ perceptions of their standing in our society, and sends harmful messages to everyone that students attending majority-white schools have greater privileges and superior privacy rights.”). To address these harms, Nance recommends that courts give such measures greater weight when applying a special needs balancing test, especially to suspicionless searches of large numbers of students. *Id.* (manuscript at 58–67). This doctrinal suggestion focuses on improved application of the special needs test; my recommendation, developed in Part IV, focuses on improved determinations of when that test applies.

234. See, e.g., Banner, *supra* note 212, at 306 (calling for efforts to better “define law enforcement’s mission in school” and noting local efforts to do so); Nance, *supra* note 189, at 340 (criticizing the use of SROs for “routine discipline matters”).

235. Theriot, *supra* note 225, at 285 (citation omitted).

236. Kim, *supra* note 60, at 889–92 (collecting studies).

237. *A.M. v. Holmes*, 830 F.3d 1123, 1130 (10th Cir. 2016). The child challenged his arrest, which was premised on the following state law: “No person shall willfully interfere with the educational process of any public or private school by committing . . . any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.” N.M. STAT. ANN. § 30-20-13(D) (2018).

“generated several fake burps” in gym class, “which made the other students laugh and hampered class proceedings.”<sup>238</sup> The teacher then made the child sit in the hallway, but the child “leaned into the classroom entranceway and continued to burp and laugh.”<sup>239</sup> The teacher then called the SRO regarding this repeated childish behavior, and the SRO arrested the child.<sup>240</sup> The Tenth Circuit decided the case based on the scope of the state criminal statute.<sup>241</sup> In dissent, Judge Gorsuch harshly criticized the notion that the SRO had any business in responding to a mildly disruptive student:

If a seventh grader starts trading fake burps for laughs in gym class, what’s a teacher to do? Order extra laps? Detention? A trip to the principal’s office? Maybe. But then again, maybe that’s too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen year old to the principal’s office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention.<sup>242</sup>

The result, Gorsuch wrote, was to make the law “a ass.”<sup>243</sup>

Even more forcefully (if less colorfully), the Fourth Circuit criticized unnecessary law enforcement responses to routine school disciplinary matters in *E.W. ex rel. T.W. v. Dolgos*.<sup>244</sup> That case involved a ten-year-old elementary school student arrested for a fight with another child on a school bus several days prior to her arrest.<sup>245</sup> She filed a claim for excessive force against the SRO, who handcuffed her when making the arrest.<sup>246</sup> Though ruling for the SRO on immunity grounds, the Fourth Circuit suggested that teachers could routinely handle minor fights without SROs or the use of force.<sup>247</sup> It also questioned law enforcement’s response to children who commit “minor offenses” at school:

Unnecessarily handcuffing and criminally punishing young schoolchildren is undoubtedly humiliating, scarring, and emotionally damaging. We must be mindful of the long-lasting impact such actions have on these children and their ability to flourish and lead prosperous lives—an impact that should be a matter of grave concern for us all.<sup>248</sup>

These cases reflect growing concern about the point that was foundational to *Dilworth* and other cases applying *T.L.O.* to school searches—the notion that SROs are like other school officials and not like law enforcement. The crux of these criticisms is that SROs are like law enforcement and that law

---

238. *A.M.*, 830 F.3d at 1129.

239. *Id.* at 1129–30.

240. *Id.* at 1130.

241. *Id.* at 1150 (concluding that the officer had an objectively reasonable belief that the child had violated the statute and thus that arresting the child was lawful).

242. *Id.* at 1169 (Gorsuch, J., dissenting).

243. *Id.* at 1170 (quoting CHARLES DICKENS, *OLIVER TWIST* 520 (Dodd, Mead & Co. 1941) (1838)).

244. 884 F.3d 172 (4th Cir. 2018).

245. *Id.* at 176.

246. *Id.*

247. *Id.* at 183.

248. *Id.* at 188.

enforcement responses are inappropriate for routine school discipline. As Part III establishes, that criticism has led to clearer demarcation between law enforcement and school discipline and a clearer understanding that SROs are law enforcement, not school officials. Those reforms and demarcations require a reevaluation of decisions applying *T.L.O.* to SRO searches.

### III. REFORMS DRAW CLEAR LINES BETWEEN SCHOOL DISCIPLINE AND LAW ENFORCEMENT

Courts decided the bulk of cases applying *T.L.O.* to SRO-involved searches in the 1990s and 2000s, as the number of SROs was increasing and as criticisms of SROs' roles at schools were also growing. In the 2010s, the reform movement described in Part II.B has taken root, and many jurisdictions across the United States have turned a corner toward "[t]he [d]ecriminalization of the [c]lassroom."<sup>249</sup> While much work remains to be done, we are now in a "children are different"<sup>250</sup> era in which a deeper understanding of adolescent development is fostering reforms designed to make juvenile justice more rehabilitative and less punitive.<sup>251</sup>

One set of these reforms is intended to keep children from facing delinquency and criminal charges for minor school-based misconduct and, more particularly, constrain the role of SROs so they are not involved in school discipline. These reforms focus SROs' time on more serious offenses requiring law enforcement responses<sup>252</sup> and other law enforcement tasks like "intelligence gathering."<sup>253</sup> Crucially, many recent reforms make that shift explicit, drawing lines between SROs' law enforcement focus and school discipline. Those reforms, therefore, require a reevaluation of cases relying on the notion that SROs are school officials.

This Part will describe the range of federal, state, and local reforms in the 2010s that have cabined SROs' work to law enforcement. All of these reforms share a common central feature: they all limit when SROs can be involved in school discipline and draw stark lines between law enforcement and school discipline. While not every jurisdiction has adopted such

---

249. Jessica Feerman, *The Decriminalization of the Classroom: The Supreme Court's Evolving Jurisprudence on the Rights of Students*, 13 J.L. SOC'Y 301 (2011); see also PADRES & JÓVENES UNIDOS & ADVANCEMENT PROJECT, LESSONS IN RACIAL JUSTICE AND MOVEMENT BUILDING: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE IN COLORADO AND NATIONALLY 3 (2014) ("[O]ver the last several years, a vibrant and robust national movement has emerged to address the School-to-Prison Pipeline, and there has been a dramatic sea change across the country with regard to school discipline.").

250. *Miller v. Alabama*, 567 U.S. 460, 480–81 (2012).

251. See, e.g., Sayali Himanshu Bapat & Barbara Bennett Woodhouse, *Is There Justice for Juveniles in the United States, India, and Italy?: Towards a Framework for Transnational Comparisons*, in THE FUTURE OF JUVENILE JUSTICE: PROCEDURE AND PRACTICE FROM A COMPARATIVE PERSPECTIVE 37, 45–46 (Tamar R. Birckhead & Solange Mouthaan eds., 2016).

252. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 218, at 11 ("Alternatives to zero tolerance policies will allow non-violent behaviors to be addressed without officer involvement, providing law enforcement and SROs more time to focus on violent offenses.").

253. Teske & Huff, *supra* note 219, at 17.

reforms—and thus not every jurisdiction faces the Fourth Amendment implications of those reforms discussed in Part IV—a geographically and politically diverse set of state and local governments have enacted these reforms.

*A. Federal Reforms Push States and Localities to Limit SROs' Roles*

The federal government has taken several steps in recent years to limit SROs' role to law enforcement. First, in 2014, the U.S. Department of Education (DOE) published "Guiding Principles" regarding school discipline.<sup>254</sup> Those principles included "focus[ing] officers' roles primarily on safety."<sup>255</sup> The DOE recommended that schools collaborate with local law enforcement agencies, but for discrete purposes distinct from general school discipline—for example, to develop plans for emergencies and for students returning to school after juvenile justice commitments.<sup>256</sup> One of the DOE's guiding principles was that SROs' role should be "focused on protecting the physical safety of the school," policing "criminal conduct of persons other than students," and "reducing inappropriate student referrals to law enforcement."<sup>257</sup> The DOE's vision for SROs was thus one focused on law enforcement: SROs should "not become involved in routine school disciplinary matters," and schools should not refer such matters to law enforcement.<sup>258</sup>

Two years later, the DOJ and DOE issued joint guidelines for SROs with the explicit goal "to close a *school-to-prison pipeline*."<sup>259</sup> Two of their central recommendations are to "[e]liminate the involvement of SROs in non-criminal matters" and for schools and law enforcement agencies to enter into memoranda of understanding that clarify that SROs and school officials have "different roles," especially related to minor school misbehavior.<sup>260</sup>

Criticisms of the school-to-prison pipeline and concerns about the harms caused by turning disciplinary matters into delinquency cases animated the DOE's guidance. The DOE noted that keeping SROs focused on law enforcement improved both academic outcomes and school safety.<sup>261</sup> It

---

254. U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2014).

255. *Id.* at 3.

256. *Id.* at 8–9.

257. *Id.* at 9.

258. *Id.*; *see also id.* at 10 ("[SROs'] role should be focused on school safety, with the responsibility for addressing and preventing serious, real, and immediate threats to the physical safety of the school and its community. By contrast, school administrators and staff should have the role of maintaining order and handling routine disciplinary matters.").

259. Press Release, U.S. Dep't of Justice & U.S. Dep't of Educ., Safe School-Based Enforcement Through Collaboration, Understanding, and Respect (SECURE) State and Local Policy Rubric 9 (May 27, 2018) [hereinafter SECURE Rubric]. The departments released this document in 2016. Press Release, U.S. Dep't of Justice, Press Release No. 16-1024, Obama Administration Releases Resources for Schools, Colleges to Ensure Appropriate Use of School Resource Officers and Campus Police (Sept. 8, 2016).

260. SECURE Rubric, *supra* note 259, at 9.

261. *Id.* at 10.

further noted the value of reducing law enforcement referrals and juvenile justice system involvement, which reduces the collateral consequences of such involvement.<sup>262</sup> On that issue, the DOE is supported by research showing that arrests or charges—even when they are ultimately dismissed—increase the risk that children will drop out of high school.<sup>263</sup> The DOE echoed concerns raised by critics of the school-to-prison pipeline about racial disproportionality in school-based arrests.<sup>264</sup>

The Trump administration has indicated its approval of a central pillar of these reforms—the distinction between SROs’ law enforcement role and school discipline—even though it has indicated that it is likely to rescind related Obama administration guidance regarding school discipline.<sup>265</sup> The Trump administration convened a Federal Commission on School Safety in the aftermath of the February 2018 mass shooting at Marjory Stoneman Douglas High School, and this Commission expressed doubts about the Obama administration’s focus on reducing racial disparities in school discipline and asserted that this guidance may have had a “chilling effect on classroom teachers’ and administrators’ use of discipline.”<sup>266</sup> Whatever the merits or demerits of the Commission’s view on that point,<sup>267</sup> its discussion of SROs, however, is consistent with the Obama administration’s commitment to distinguishing between their law enforcement duties and school discipline. The Commission focused on SROs’ special law enforcement training—they are “best positioned to respond to acts of violence,”<sup>268</sup> and the Commission emphasized the importance of clearly defining SROs’ roles as compared with school staff.<sup>269</sup> The Commission cited only one model definition, and that example provides that SROs “will not be used to enforce” school district rules.<sup>270</sup>

Moreover, the reforms that the Obama-era guidance furthered have continued to be implemented at the state and local level, in both politically

---

262. *Id.* at 9.

263. See generally David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36 (2013); Gary Sweeten, *Who Will Graduate?: Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462 (2006).

264. U.S. DEP’T OF EDUC., *supra* note 254, at 9.

265. FED. COMM’N ON SCH. SAFETY, FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 72 (2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf> [<https://perma.cc/DAC4-KZPQ>].

266. *Id.* at 67.

267. For an early critique of the Trump administration’s hostility to the Obama administration’s school discipline guidance, see Derek Black, *Zero Tolerance Discipline Policies Won’t Fix School Shootings*, CONVERSATION (Mar. 15, 2018, 6:44 AM), <https://theconversation.com/zero-tolerance-discipline-policies-wont-fix-school-shootings-93399> [<https://perma.cc/3J6U-HZ9M>].

268. FED. COMM’N ON SCH. SAFETY, *supra* note 265, at 101.

269. *Id.*

270. The Commission cited the Montgomery County (Maryland) Public Schools’ MOU with local law enforcement agencies. *Id.* at 102. That memo distinguishes SROs’ from school discipline. Memorandum of Understanding Between Montgomery County Public Schools et al. 3 (Oct. 17, 2017), <https://www.montgomeryschoolsmd.org/uploadedFiles/departments/security-new/Executed%20SRO%20MOU.PDF> [<https://perma.cc/RPQ5-N27L>].

liberal and conservative jurisdictions, as described in the next several sections. That guidance has wide bipartisan support, evident in a 2014 report from the bipartisan Council on State Governments, whose title emphasized the “consensus” nature of its recommendations.<sup>271</sup> A core theme in the Council’s recommendations is drawing a line between law enforcement and school discipline and establishing policies to ensure SROs “are not used for classroom management and routine discipline.”<sup>272</sup> Those recommendations echoed the federal guidance regarding limiting SROs’ role—they called for clear policies to prevent school officials from involving SROs in routine student disciplinary matters and noted increasing opposition from both law enforcement and educators to SRO involvement in such matters.<sup>273</sup>

### B. State Reforms from Multiple Angles: South Carolina

One particularly dramatic set of reforms was enacted in South Carolina following the well-publicized use of force by an SRO against a student at Spring Valley High School in Columbia.<sup>274</sup> An SRO was called to assist a teacher and school administrator with a school discipline matter—the student refused to put away her cell phone—and the SRO arrested her for disturbing school.<sup>275</sup> In the county where that incident occurred, the local sheriff’s department and school district revised their memoranda of agreement to provide that “[f]irst and foremost the SROs will perform law enforcement duties” and that “[t]he SRO shall not act as a school disciplinarian, as disciplining students is a school responsibility.”<sup>276</sup> In addition, in August 2016, the Richland County Sheriff’s Department entered into a voluntary agreement with the DOJ.<sup>277</sup> The voluntary agreement provides, perhaps more broadly, that SROs should not engage “in classroom management or school discipline matters that should be appropriately handled by school staff.”<sup>278</sup>

---

271. The title was “The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System.” MORGAN ET AL., *supra* note 82; *see also id.* at x (describing the “consensus-based” process behind the report, which included input from school administrators, police, juvenile justice agencies, and others).

272. *Id.* at 186.

273. *Id.* at 213–15, 220.

274. Gupta-Kagan, *supra* note 204, at 84–85. That incident has become a leading illustration of the school-to-prison pipeline. *See, e.g.*, CARA DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY 46 (2018).

275. Gupta-Kagan, *supra* note 204, at 84–85.

276. 2017–18 Memorandum of Agreement between Richland County School District One, and the Richland County Sheriff’s Department 3 (Apr. 1, 2017) (on file with author) [hereinafter 2017–18 MOA]. I have criticized that memorandum for not including enough reforms and, in particular, for its language that requires school officials to report all crimes to SROs. Gupta-Kagan, *supra* note 204, at 137–38. That critique goes not to the existence of a line between law enforcement and school discipline, but to where to place that line.

277. Letter from Michael Alston et al., U.S. Dep’t of Justice, to Leon Lott, Sheriff, Richland Cty. Sheriff’s Dep’t (Aug. 10, 2016), <https://ojp.gov/about/ocr/pdfs/RCSD-SRO-ComplianceReview-08102016.pdf> [<https://perma.cc/MH9U-EJ9T>] (regarding the compliance review of the Richland County Sheriff’s Department).

278. Voluntary Resolution Agreement Between the United States Department of Justice and the Richland County Sheriff’s Department para. 4 (Aug. 9, 2016), <https://ojp.gov/about/>

In 2017, the South Carolina Department of Education adopted regulations that require a similar approach across the state.<sup>279</sup> The regulations explicitly “distinguish school discipline from law enforcement and prohibit the involvement of school resource officers in school discipline.”<sup>280</sup> The regulations categorize student misbehavior into three categories. Even the names of these categories reflect a line between discipline and law enforcement—the two less severe categories, “behavioral misconduct” and “disruptive conduct,” do not suggest the need for law enforcement involvement, in contrast to the most severe category, “criminal conduct.”<sup>281</sup> The regulations provide a list of allowed responses to each category of misbehavior and makes clear that SRO involvement is limited. No SRO involvement is permitted for “behavioral misconduct.”<sup>282</sup> At the other end of the spectrum, the regulations provide that “criminal conduct” “usually require[s] . . . the intervention of the School Resource Officer or other local law enforcement authorities.”<sup>283</sup> As the phrase “criminal conduct” suggests, all behavior listed in that category violates the criminal law.<sup>284</sup> Still, these regulations reflect the desire to prevent SROs’ involvement with misbehavior that could be considered criminal but is better handled by school officials. The regulation excludes from its list of “criminal conduct” minor offenses, including disturbing schools, breach of peace, disorderly conduct, and assaults that do not “pose a . . . serious threat to the safety of oneself or others in school.”<sup>285</sup> In the middle ground, “disruptive conduct” may lead to law enforcement referral when “the conduct rises to a level of criminality” and “the conduct presents an immediate safety risk to one or more people or it is the third or subsequent act which rises to a level of criminality in that school year.”<sup>286</sup> The essence of these regulations is to permit schools to refer misbehavior to SROs only when incidents create a security threat or are severe enough to require a law enforcement response; otherwise, SROs should not be involved. Finally, schools must include all of these limitations

---

ocr/pdfs/RCSD-SRO-ComplianceReview-08102016.pdf [https://perma.cc/MH9U-EJ9T]. For a more detailed discussion of the voluntary agreement, see Gupta-Kagan, *supra* note 204, at 136–37.

279. Shortly after the Spring Valley incident, the South Carolina Department of Education convened a Safe Schools Task Force, which recommended new regulation regarding SROs and revisions to an existing regulation regarding school discipline codes. See S.C. DEP’T OF EDUC., SOUTH CAROLINA SAFE SCHOOLS TASKFORCE REPORT 5 (2016), <http://ed.sc.gov/newsroom/public-information-resources/south-carolina-safe-schools-taskforce-report/> [https://perma.cc/7XGU-SBHR].

280. 41 S.C. Reg. § 43-210(V) (May 26, 2017).

281. 41 S.C. Reg. § 43-279(IV) (May 26, 2017).

282. The regulation excludes an SRO or law enforcement referral from its list of enforcement procedures. *Id.* § 43-279(IV)(A)(3). The Department proposed these regulations in a document with tables listing possible consequences for different levels of misconduct. The table for behavioral misconduct shaded in the column for “call to law enforcement,” indicating it is not a permitted option. See S.C. DEP’T OF EDUC., *supra* note 279.

283. See S.C. DEP’T OF EDUC., *supra* note 279, at 12–13.

284. 41 S.C. Reg. § 43-279(IV)(C)(2) (May 26, 2017).

285. *Id.* § 43-279(IV)(C)(2)(a), (3).

286. *Id.* § 43-279(IV)(B)(3)(d).

on SRO involvement in memoranda of understanding with local law enforcement agencies to keep SROs out of school discipline.<sup>287</sup>

Moreover, the South Carolina General Assembly made the line between law enforcement and school discipline clearer by significantly narrowing the scope of a criminal statute banning school disturbances.<sup>288</sup> That statute made it a crime “for any person willfully or unnecessarily to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State.”<sup>289</sup> That broad language echoed similar language in multiple other states, and a series of legislative, judicial, and administrative decisions had broadened its scope over the years, until it became commonly used for school misbehavior and, eventually, the second-most frequent charge referred to South Carolina family courts.<sup>290</sup> It was also the charge filed in the Spring Valley incident.<sup>291</sup> Now, the statute is significantly narrowed so it does not apply to students properly at school.<sup>292</sup> The result is that most student misbehavior—such as the disobedience at issue in the Spring Valley incident,<sup>293</sup> loud or rude back talk, or the burping at issue in *A.M. v. Holmes*<sup>294</sup>—is now excluded from the criminal law, which makes the line between SROs’ law enforcement duties and school discipline easier to enforce.

*C. Ferguson, Missouri, Reforms Build a Sharper Division Between Law Enforcement and School Discipline*

Ferguson, Missouri, presents another leading example of school-to-prison pipeline reforms that prevent SRO involvement in general school discipline. Following the high-profile police shooting of an unarmed black man and ensuing mass protest, the DOJ opened a wide-ranging investigation into the Ferguson Police Department, which led to a series of critical findings, including some regarding SROs.<sup>295</sup> The DOJ found that the Department’s SROs “treat[ed] routine discipline issues as criminal matters.”<sup>296</sup> This problem resulted, in part, from the failure of an MOU between the police

287. 41 S.C. Reg. § 43-210(V) (May 26, 2017).

288. S.C. CODE ANN. § 16-17-420 (2018).

289. *Id.*

290. Gupta-Kagan, *supra* note 204, at 102–03. Disturbing school referrals declined dramatically after the Spring Valley incident, but it still ranked as the fifth most frequent charge statewide. *Id.* at 130. For a review of how the statute gradually expanded over the years, see generally Kristen Coble, Note, *Disturbing Schools Law in South Carolina*, 69 S.C. L. REV. 859 (2018).

291. Gupta-Kagan, *supra* note 204, at 93.

292. The revised statute applies to “a person who is not a student,” defined as someone not enrolled at school or who is suspended or expelled from the school, and who engages in certain listed actions. B. 182, 122d Gen. Assemb. § 1 (S.C. 2018) (codified at S.C. CODE ANN. § 16-17-420 (2018)). Threatening to kill or physically injure remains outlawed. *Id.* § 2 (codified at S.C. CODE ANN. § 16-17-425 (2018)).

293. See *supra* notes 274–78 and accompanying text.

294. See *supra* notes 237–43 and accompanying text.

295. See generally CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015).

296. *Id.* at 37.



department and local schools to “clearly define the SROs’ role or limit SRO involvement in cases of routine discipline or classroom management.”<sup>297</sup> As a result, the Ferguson Police Department filed multiple charges against schoolchildren for failure to comply, peace disturbance, and similarly petty charges, which triggered concerns about criminalizing school discipline. The DOJ investigation reported that “SROs told us that they viewed increased arrests in the schools as a positive result,” which indicated a “failure of training” and lack of appreciation for the harmful effects of criminalizing disciplinary infractions.<sup>298</sup>

The remedy for these problems explicitly involved drawing sharper lines between law enforcement and school discipline. The DOJ’s investigation included a set of recommendations, including that SROs avoid “unnecessarily treating disciplinary issues as criminal matters.”<sup>299</sup> DOJ and city officials subsequently negotiated a detailed consent decree with various provisions under the heading “SRO Non-Involvement in School Discipline.”<sup>300</sup> Those provisions explicitly treat SROs as providing security and law enforcement services separate from school disciplinary purposes. The core element of the consent decree is that SRO involvement is limited to situations posing a physical safety risk and is expressly forbidden in any situation that can be “safely and appropriately” handled by the school’s internal disciplinary team.<sup>301</sup> The consent decree designates “minor offenses committed by students,” such as disorderly conduct, trespassing, “and fighting not involving a weapon and not resulting in physical injury,” as disciplinary matters that should not trigger SRO involvement.<sup>302</sup> When SROs are involved for security reasons, the consent decree requires them to “de-escalate the situation” and then end their involvement and refer the matter to school officials “at the earliest opportunity.”<sup>303</sup>

Not only does this consent decree exclude SROs from school discipline, but its language places SROs alongside other law enforcement officers—not school officials. The consent decree refers to “SROs and other [Ferguson Police Department] officers” three separate times,<sup>304</sup> language that treats SROs like other law enforcement officers and not like school officials.

#### *D. Local Memoranda of Understanding and Other Reforms Limit SROs’ Role*

The elements recommended by federal proposals and present in South Carolina and Ferguson, Missouri, reforms are also evident in a range of local

---

297. *Id.*

298. *Id.* at 38.

299. *Id.* at 94.

300. Consent Decree at 50, *United States v. City of Ferguson*, No. 4:16-cv-00180-CDP (E.D. Mo. Apr. 19, 2016).

301. *Id.* para. 212.

302. *Id.*

303. *Id.* para. 213. The consent decree also required the city to enter in an MOU with the school district that included the consent decree’s requirements. *Id.* para. 211.

304. *Id.* paras. 212–13, 222.

reforms. They are particularly notable in local MOUs, including those which the DOJ listed as illustrative of good school and law enforcement collaborations.<sup>305</sup> Such agreements are particularly important because of the consensus that schools and law enforcement agencies should enter them and that they “should clearly state the roles and responsibilities” of SROs and school officials.<sup>306</sup> The federal government has advised that MOUs should distinguish SROs’ law enforcement roles from school discipline by explicitly providing that SROs should not be involved in the latter.<sup>307</sup>

Denver’s 2013 agreement,<sup>308</sup> which the DOJ cited as a model MOU,<sup>309</sup> provides a leading example of recent agreements that separate school discipline from law enforcement and limit SROs’ work to the latter. This agreement followed statewide legislation that declared the harms from referring children to law enforcement and that “[i]nvolvement of students in the criminal or juvenile justice systems should be avoided when addressing minor misbehavior.”<sup>310</sup> The law “encouraged” schools to consider several factors before referring incidents to law enforcement, including a student’s age, disciplinary history, and disability (if any), as well as the severity of the misbehavior and “[w]hether a lesser intervention would properly address” the situation.<sup>311</sup> The Denver agreement put those legislative declarations into practice. This agreement includes some general language about how SROs contribute to schools’ overall learning environment;<sup>312</sup> more specific provisions provide a distinct line between SROs’ core law enforcement duties and schools’ discipline duties. Crucially, the agreement states that “the primary duty of an SRO is to handle criminal matters at the school.”<sup>313</sup> To enforce this rule, the agreement requires SROs to “differentiate between disciplinary issues and crime problems and respond appropriately.”<sup>314</sup> The agreement requires SROs to “understand” that the school seeks to “minimize

---

305. See SECURE Rubric, *supra* note 259.

306. NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 11 (2013); see also MORGAN ET AL., *supra* note 82, at 186 (encouraging the use of MOUs “to help ensure proper implementation and accountability” of SRO programs).

307. Office of Cmty. Oriented Policing Servs., U.S. Dep’t of Justice, Fact Sheet: Memorandum of Understanding for FY 2013 School-Based Partnerships 2 (2013), [https://cops.usdoj.gov/pdf/2013\\_MOU-FactSheet\\_v2\\_091613.pdf](https://cops.usdoj.gov/pdf/2013_MOU-FactSheet_v2_091613.pdf) [<https://perma.cc/M8RV-MK6T>].

308. Intergovernmental Agreement Concerning the Funding, Implementation and Administration of Programs Involving Police Officers in Schools, Agreed to by the City and County of Denver, and the Denver Public Schools (2013) [hereinafter Denver Intergovernmental Agreement], [http://b.3cdn.net/advancement/e746ea2668c2ed19b3\\_urm6iv28k.pdf](http://b.3cdn.net/advancement/e746ea2668c2ed19b3_urm6iv28k.pdf) [<https://perma.cc/ZA7K-DG6G>].

309. SECURE Rubric, *supra* note 259, at 8.

310. H.B. 12-1345, 68th Gen. Assemb. § 21(1)(b) (Colo. 2012); see also PADRES & JÓVENES UNIDOS & ADVANCEMENT PROJECT, *supra* note 249, at 25–27 (describing legislative advocacy and reforms in that bill).

311. H.B. 12-1345 § 21(1)(f)(III)(F).

312. Denver Intergovernmental Agreement, *supra* note 308, at 2.

313. *Id.* at 4.

314. *Id.* at 2.

the use of law enforcement intervention” in response to disciplinary issues.<sup>315</sup> This agreement followed local activism calling for SROs to “only be used for appropriate purposes,”<sup>316</sup> and activists hailed Denver Public Schools’ 57 percent reduction in its rate of referring children to law enforcement.<sup>317</sup>

Like Colorado, Utah enacted legislation in 2016, which required local law enforcement agencies and school districts to develop agreements that distinguish school discipline from law enforcement.<sup>318</sup> The Utah law requires local entities to identify “offenses that are administrative issues” and which SROs must leave to school administrators to handle.<sup>319</sup> Other “offenses,” including “minor” criminal violations, require SROs to “confer” with school officials—this creates a process by which SROs and school officials can define the line between law enforcement and discipline.<sup>320</sup>

The nation’s two largest school systems have adopted similar reforms. Officials in New York City agreed to an MOU in 1998 which explicitly empowered SROs to enforce school disciplinary rules in addition to criminal laws and “encourage[d]” school staff to “avail themselves of appropriate NYPD input and assistance” in enforcing school discipline.<sup>321</sup> Fifteen years later, New York City schools embarked on various reforms based on the “recognition that non-criminal, school-based discipline matters are best addressed by school staff” and not by the NYPD’s School Safety Division.<sup>322</sup> New York officials dated these reforms to 2012 and credited them with a 29 percent decline in arrests at school from 2012–2015.<sup>323</sup> In 2014, the Los Angeles School Police Department adopted a new policy governing SRO response to “minor law violations” based explicitly on the federal guidance discussed in Part III.A.<sup>324</sup> The Department made plain that school police

---

315. *Id.*

316. PADRES & JÓVENES UNIDOS & ADVANCEMENT PROJECT, *supra* note 249, at 27.

317. *Id.* at 32.

318. School Resource Officers and School Administrators Training and Agreement, H.B. 460, 61st Leg., 2016 Gen. Sess. (Utah 2016) (codified at UTAH CODE ANN. § 53G-8-703 (2017)).

319. UTAH CODE ANN. § 53G-8-703(d) (2017).

320. *Id.* § 53G-8-703(c).

321. Memorandum of Understanding Among the Board of Education of the City of New York, the Chancellor of the City School District of the City of New York and the City of New York on the Performance of School Security Functions by the New York City Police Department for the Benefit of the City School District of the City of New York and Its Students and Staff paras. 2, 18 (Sept. 17, 1998), <https://assets.documentcloud.org/documents/4163589/NYC-Current-MOU.pdf> [<https://perma.cc/2NDW-2S7J>]. While the original MOU was only in effect for four years, New York City officials extended it indefinitely in 2003. *Id.* para. 24; Letter of Agreement Regarding Continuation of the September 17, 1998, Memorandum of Understanding on the Performance of School Security Functions 17 (Jan. 22, 2003).

322. MAYOR’S LEADERSHIP TEAM ON SCH. CLIMATE & DISCIPLINE, MAINTAINING THE MOMENTUM: A PLAN FOR SAFETY AND FAIRNESS IN SCHOOLS: PHASE TWO RECOMMENDATIONS 39 (2016).

323. *Id.* Those same officials recommended memorializing these changes in a revised memorandum. *Id.*

324. Steven K. Zipperman, Chief of Police, L.A. Sch. Police Dep’t, Roles and Responsibilities for: Enforcement, Citation and Arrest Protocols on School Campus and Safe

officers “enforce the law” and “do not respond to routine school discipline matters” absent a safety need.<sup>325</sup> The policy reiterates in several ways a line between SROs’ law enforcement duties and schools’ broader discipline goals.<sup>326</sup>

Other jurisdictions have similarly reformed the role of their SROs. The MOU between law enforcement and the school district in Broward County, Florida, similarly states that SROs do not provide school discipline.<sup>327</sup> To distinguish law enforcement from school discipline roles—and thus enforce that limitation on SRO roles—Broward County’s agreement created a school discipline matrix that defined when school officials were supposed to refer matters to SROs; otherwise, school officials should intervene on their own.<sup>328</sup> San Francisco, California, public schools entered into an MOU in 2013 which provided that school staff may *only* request assistance from SROs “when . . . necessary to protect the physical safety of students and staff,” to address a crime by a nonstudent, and when required by law—and “not . . . in a situation that can be safely and appropriately handled by the District’s internal disciplinary procedures.”<sup>329</sup> Kentucky officials adopted a model MOU that emphasizes that an “SRO shall not act as a school disciplinarian,” a task that falls to school officials.<sup>330</sup>

The DOJ also noted model MOUs presented by the Pennsylvania Department of Education, which emphasize that SROs should not provide

---

Passages 1 (2014), <http://www.fixschooldiscipline.org/wp-content/uploads/2014/10/LASPD-Arrest-and-Citation-Reform-Policy.-8-15-14.pdf> [<https://perma.cc/K66E-67WP>].

325. *See id.*

326. *See id.* at 2 (providing that SROs should focus on school safety, “not . . . enforce school discipline,” and that school officials, not SROs, should handle “minor offenses of the law,” and additionally requiring SROs to consider if school officials could adequately respond to an incident and, if so, refer the matter to school administrators, removing themselves from the response); *id.* at 4 (listing various offenses, including fighting and theft under \$50 as requiring school administrative responses).

327. SECURE Rubric, *supra* note 259, at 9–12; *see also id.* at 10 (“[T]he school principal and their designees will be the primary source of intervention and disciplinary consequences.”).

328. *Id.* at 10–11. Notably, the Trump administration’s criticism of Obama-era discipline guidance focused on Broward County’s reform, especially because the Parkland, Florida, school shooting occurred there. Erica L. Green, *Trump Finds Unlikely Culprit in School Shootings: Obama Discipline Policies*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/politics/trump-school-shootings-obama-discipline-policies.html> [<https://perma.cc/BXB8-CN6S>]. Local school officials maintained their commitment to the program. *See id.* (quoting the Broward County superintendent as stating, “We’re not going to dismantle a program that’s been successful in the district because of false information.”).

329. Memorandum of Understanding Between the San Francisco Police Department and the San Francisco Unified School District 6 (2013). The Council of State Governments cited this MOU as a model in 2014. MORGAN ET AL., *supra* note 82, at 421 n.123.

330. *School Resource Officer Agreement*, KY. CTR. FOR SCH. SAFETY, <https://www.kycss.org/pdfs-docs/clearpdf/issuesbriefs/sromoa.pdf> [<https://perma.cc/49LV-4ZV4>] (last visited Mar. 15, 2019); *see also School Resource Officers*, KY. CTR. FOR SCH. SAFETY, <https://www.kycss.org/schoolresource.php> [<https://perma.cc/Y5AM-GA5T>] (last visited Mar. 15, 2019).

regular school discipline.<sup>331</sup> Both example models state that SROs must not act as school disciplinarians.<sup>332</sup> The Department also offered model SRO job descriptions that emphasize that an SRO serves in “a sworn law-enforcement position” and must be “[a]ble to differentiate what constitutes a crime and what incidents are school conduct violations.”<sup>333</sup> Despite some general language suggesting that SROs serve both law enforcement and school discipline goals,<sup>334</sup> more specific lists of core job functions emphasize SROs’ law enforcement duties and preparation for and response to emergency situations.<sup>335</sup>

The Trump administration’s Federal Commission on School Safety cited the Montgomery County, Maryland, 2017 MOU, which provides similar distinctions.<sup>336</sup> That MOU explicitly provides that SROs “will not . . . enforce” school district rules.<sup>337</sup> Moreover, the MOU made clear that relatively minor incidents on the line between school discipline and law enforcement need not be reported to SROs. Only “critical incidents” must be reported, defined as assaults “that require[] medical attention outside of the school health room,” thefts of property worth \$500 or more, weapon possession, or possession of drugs with the intent to distribute them.<sup>338</sup> Less severe offenses—most fights, petty thefts, and simple possession of drugs—would not trigger that reporting requirement and thus could receive a school disciplinary response only.

The National Association of School Resource Officers (NASRO)—a private organization which advocates for the importance of SROs and for model SRO programs and trainings—also emphasizes the primacy of SROs’ law enforcement role. NASRO explains that SROs are police officers who serve “as part of a total community-policing strategy” and spend most of their time “on school-safety and law-enforcement activities.”<sup>339</sup> Their law enforcement expertise helps SROs investigate and respond to suspected

331. SECURE Rubric, *supra* note 259, at 2–3. The model MOUs are included in a state agency’s request for grant applications from police departments and municipalities. *See generally* Penn. Dep’t of Educ., Office for Safe Schools Targeted Grants for School Resource Officer, Municipality/Police Department Request for Application 2017–2018 [hereinafter Penn. SRO Application], <https://www.education.pa.gov/Documents/K-12/Safe%20Schools/Safe%20Schools%20Targeted%20Grants/2017-2018/2017-2018%20Safe%20Schools%20Initiative%20-%20Municipality%20SRO%20-%20RFA.pdf> [https://perma.cc/E7A5-F7GN] (last visited Mar. 15, 2019).

332. Example 1 states that “[t]he school resource officer shall not act as a school disciplinarian, as disciplining students is a school responsibility.” Penn. SRO Application, *supra* note 331, app. A at 9. Example 2 states that the SRO “[w]ill not be involved in ordinary school discipline, unless it pertains to preventing a potential disruption and/or climate that places students at risk of harm. Disciplining students is a School District responsibility . . . .” *Id.* app. A at 15.

333. *Id.* app. B at 21.

334. *See id.* app. B at 18 (Purpose Statement).

335. *See id.* app. B at 18–19, 21–22.

336. FED. COMM’N ON SCH. SAFETY, *supra* note 265, at 102.

337. Montgomery County MOU, *supra* note 270, at 3.

338. *Id.* at 7–9.

339. NAT’L ASS’N OF SCH. RESOURCE OFFICERS, TO PROTECT & EDUCATE: THE SCHOOL RESOURCE OFFICER AND THE PREVENTION OF VIOLENCE IN SCHOOLS 23 (2012).

crimes and threats “larger than an isolated fight.”<sup>340</sup> This law enforcement focus requires a line between SROs and school discipline; NASRO identifies a “best practice” for situations when an SRO identifies a school rule violation: the SRO should “tak[e] the student(s) to where school discipline can be determined solely by school officials.”<sup>341</sup>

School districts and law enforcement agencies’ MOUs have explicitly cited NASRO for the propositions that

the SRO is first and foremost a law enforcement officer . . . . Enforcement of the code of student conduct is the responsibility of teachers and administrators. The SRO shall refrain from being involved in the enforcement of disciplinary rules that do not constitute violations of law, except to support staff in maintaining a safe school environment.<sup>342</sup>

The examples described in this section are not exhaustive. A “growing number” of MOUs contain similar limitations and school districts’ codes of conduct “increasingly” include provisions that call on school staff to refer matters to SROs only when the seriousness of the act, prior violations, and the student’s age and grade make it appropriate.<sup>343</sup>

#### IV. RECONSIDERING SCHOOL-SEARCH STANDARDS IN AN AGE OF REFORM

In the 1990s and 2000s, *Dilworth* and other cases applying the majority rule drew a line between SROs and outside police officers for Fourth Amendment purposes.<sup>344</sup> The reforms described in Part III occurred in the 2010s and drew the line at a different spot—between SROs, who focus on law enforcement, and school officials, who manage school discipline. Where *Dilworth* described an SRO with power to impose school discipline on students and other cases described SROs as obliged to cooperate with school officials, these reforms limit SROs to law enforcement roles and direct them to not intervene in routine school disciplinary matters.<sup>345</sup>

Applying the Fourth Amendment principles discussed in Part I to this new line requires reevaluating the majority rule. This new distinction (in jurisdictions governed by such reforms) aligns with what critics have argued—SROs are law enforcement officers, and Fourth Amendment doctrine should treat them as such. Especially in jurisdictions that have

340. *Id.* at 24.

341. *Id.* at 23.

342. 2013–2017 School Resource Officer Memorandum of Understanding Between the City of Ashland Police Department and the Ashland School District 2–3 (2017), [http://www.ashland.or.us/files/police\\_and\\_school\\_mou.atch.pdf](http://www.ashland.or.us/files/police_and_school_mou.atch.pdf) [https://perma.cc/PJ68-8HQS] (“The SRO Program shall utilize the SRO Triad concept as set forth by NASRO . . .”).

343. MORGAN ET AL., *supra* note 82, at 217. The Council’s report lists examples in Baltimore, Maryland; Buffalo, New York; Chicago, Illinois; Fort Wayne, Indiana; and San Diego, California. *Id.* at 217–18.

344. *See supra* Part I.C.

345. *Compare* Part III (describing reforms), *with* *People v. Dilworth*, 661 N.E.2d 310, 313 (Ill. 1996) (noting that the SRO “was authorized to give a detention”), *and* *Cason v. Cook*, 810 F.2d 188, 190 (8th Cir. 1987) (“The liaison officer is instructed to cooperate with the school officials.”).

engaged in reforms along the lines described in Part III, a search involving an SRO is now unmistakably a search entangled with law enforcement purposes and thus cannot seriously be considered a search serving a “special need[], beyond the normal need for law enforcement.”<sup>346</sup>

This Part makes that doctrinal argument in two settings—first, in the relatively easy case when SROs are directly involved in conducting a search, and, second, in the more difficult case in which SROs are not involved in a search itself but by contractual agreement or other force of law, school officials must turn over evidence of crimes from such searches to SROs. In both categories, reforms that emphasize SROs’ law enforcement, and not school discipline, roles support the conclusion that *T.L.O.* does not generally apply to SROs.

*A. Applying the Supreme Court’s Principles Leads to T.L.O.’s Inapplicability to SRO-Involved Searches*

*T.L.O.*’s holding that school officials can generally search students with only reasonable suspicion—and without probable cause or a warrant—depends on the unique needs of school discipline and the relationships between educators and students.<sup>347</sup> In reform jurisdictions, SROs’ focus is now more clearly on law enforcement, not school discipline. SROs therefore do not need “a certain degree of flexibility” because that flexibility belongs “in school disciplinary procedures.”<sup>348</sup> Nor do they need a Fourth Amendment standard that lets them implement “swift and informal disciplinary procedures.”<sup>349</sup> State courts applying the minority rule emphasized facts that showed a now more common line between law enforcement and discipline, such as an informal agreement between an SRO and a principal to follow such a line or the absence of authority in an SRO to impose any school discipline.<sup>350</sup>

The argument is not that SROs will operate like all other police officers, but that SROs’ jobs distinguish them from the school disciplinary purposes that provide the foundation of *T.L.O.*’s reduced Fourth Amendment standard. In addition to enforcing the law in response to relatively serious crimes committed at school, SROs will continue to work to prevent crimes by working to keep children from joining gangs, educating children about the law, and even mentoring children.<sup>351</sup> Like other community-policing tasks, those activities serve crime-prevention goals that do not distinguish SROs for Fourth Amendment purposes. Rather than those tasks, it was work as a member of a school team imposing school discipline that state courts found justified applying *T.L.O.* to SRO-involved searches.<sup>352</sup> Thus, it is reforms

---

346. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

347. *See supra* notes 38–55 and accompanying text.

348. *T.L.O.*, 469 U.S. at 340.

349. *Id.*

350. *See supra* notes 131–34 and accompanying text.

351. *See MORGAN ET AL.*, *supra* note 82, at 197.

352. *See supra* Part I.C.

that prevent SROs from engaging in routine school discipline that requires reevaluating such decisions.

Moreover, knowing that SROs will not engage in routine disciplinary incidents necessarily communicates to students that an SRO's involvement changes the character of any interaction involving a search that does occur between students and SROs. Where teachers and other school officials see children in class and at lunch and must respond to the multitude of major and minor disruptions each day caused by juvenile behavior, SROs are called in only in narrower situations. In such situations, the SRO's mere presence communicates to students that the incident is no longer between the student and the school but is now a matter for law enforcement.<sup>353</sup> That clarity makes it less likely that SROs can develop the "close association" that Justice Powell saw between educators and students and frames those interactions "adversar[ially]" as any other interaction between police and criminal suspects.<sup>354</sup>

Justice Blackmun's *T.L.O.* concurrence—whose language forms the basis of later Supreme Court cases—even more directly leads to this conclusion. *T.L.O.* only applies when "special needs, beyond the normal need for law enforcement," so require.<sup>355</sup> When an SRO, who state and local policy define as a law enforcement official and who may only become involved in searches or seizures related to criminal law enforcement situations, gets involved, the situation has crossed the line from special need to law enforcement.

Litigation in Tennessee from the early part of the present reform era follows the model of this argument. The Tennessee Supreme Court held that the standard that properly applies to an SRO depends on whether SROs more closely resemble law enforcement officers or school officials, but it did not decide which standard should apply in the case before it, instead remanding for further factual development.<sup>356</sup> On remand, an intermediate appellate court held in an unpublished opinion that the SRO was a law enforcement officer and therefore needed probable cause before conducting the search at issue.<sup>357</sup> The court began by reviewing the relevant MOU, which specified that the SRO will not serve as a school disciplinarian—a school responsibility—and described the SRO's role in multiple places as relating to law enforcement duties.<sup>358</sup> In addition, the SRO worked for the local law enforcement agency, wore a uniform at the school, was armed, drove to school in a marked police car, participated in a range of law enforcement activities, and was perceived by others at the school as a law enforcement officer.<sup>359</sup>

---

353. See Holland, *supra* note 142, at 77–78 (describing how SROs' role shapes the nature of SRO-student interactions).

354. *T.L.O.*, 469 U.S. at 348–49 (Powell, J., concurring).

355. *Id.* at 351 (Blackmun, J., concurring).

356. *R.D.S. v. State*, 245 S.W.3d 356, 370 (Tenn. 2008).

357. *State v. R.D.S.*, No. M2008-01724-COA-R3-JV, 2009 WL 2136324, at \*8 (Tenn. Ct. App. 2009).

358. *Id.* at \*5–6.

359. *Id.* at \*7.



Applying this approach should lead to the same result in jurisdictions that have adopted the reforms discussed in Part III, or similar reforms. There, state and local authorities have drawn a line between school officials and SROs. The former are in charge of school discipline—the special need that justifies the exception from the warrant and probable cause requirements under *T.L.O.* The latter have law enforcement purposes, and they do not work toward the special need identified in *T.L.O.*

Applying this standard will necessarily involve close analysis of SROs' function in both policy and practice, a point which may vary from one school district to another. State and local laws, local MOUs, and local policies and practices all will bear significantly on the analysis. A jurisdiction that rejects the reforms described in Part III could convincingly show that nothing there has changed since the majority rule following *Dilworth* was cemented in the 1990s and early 2000s.<sup>360</sup>

Notably, NASRO agrees with this general approach. When SROs respond to incidents directly, they “engage[] in routine law-enforcement activities indistinguishable from duties performed off campus” and “[s]tandard Fourth Amendment requirements govern.”<sup>361</sup> But NASRO seeks to limit this conclusion, citing the Tennessee case discussed above<sup>362</sup> to caution local governments to not enter a “flawed MOU” that could deny SROs the ability to use *T.L.O.*<sup>363</sup> Putting aside the policy wisdom of that position,<sup>364</sup> it is difficult to see how a state or local jurisdiction can keep SROs focused on law enforcement and not school discipline without creating the implication that SROs should not qualify for the *T.L.O.* standard when they are involved in conducting searches.

NASRO does not, however, extend this position to searches led by school officials that involve SROs. NASRO asserts that when assisting an educator in a search that the educator initiates, the SRO is acting in “educator-support mode” and *T.L.O.* applies.<sup>365</sup> The reforms described in Part III, however, make it hard to endorse the notion that an “educator-support mode” should trump an SRO's law enforcement roles. Calling in an SRO is fully appropriate when the situation requires law enforcement. And it comes with consequences—both to the individual suspected of wrongdoing, who may be arrested by that officer, and to the Fourth Amendment standard. That is, the line between law enforcement and school discipline—a line NASRO itself endorses—means that involving SROs changes the character of the school officials' search.

---

360. Such a jurisdiction would still be vulnerable to the doctrinal critiques discussed in Part I.D and the policy critiques discussed in Part II.B.

361. See NAT'L ASS'N OF SCH. RESOURCE OFFICERS, *supra* note 339, at 35.

362. See *R.D.S. v. State*, 245 S.W.3d 356 (Tenn. 2008).

363. NAT'L ASS'N OF SCH. RESOURCE OFFICERS, *supra* note 339, at 48.

364. The policy benefits of not applying *T.L.O.* to SRO-involved searches are discussed in Part IV.C.

365. See NAT'L ASS'N OF SCH. RESOURCE OFFICERS, *supra* note 339, at 36.

*B. Reforms Also Render T.L.O. Inapplicable to Searches by School Officials Under Policies Requiring Referrals to Law Enforcement*

The more difficult question is whether and how recent reforms affect Fourth Amendment standards for searches by school officials who, pursuant to state and local policies, turn over the fruits of those searches to SROs. This question is particularly important because school officials can, under *T.L.O.*, conduct many searches of students without having probable cause or a warrant, and courts have generally approved such searches even when, by policy or interagency agreement, the fruits of such searches are turned over to law enforcement.<sup>366</sup>

Moreover, following this Article's argument would create an incentive for school officials to conduct even more searches because they could arguably take advantage of *T.L.O.* while SROs could not. Indeed, in jurisdictions that have followed the minority rule and held SROs to a higher Fourth Amendment standard, the precise result has been "a system in which [school] administrators are conducting most searches and questioning youth" and then turning over evidence of crimes to law enforcement.<sup>367</sup> School administrators take advantage of the *T.L.O.* standard to search a broader set of students than SROs could, with SROs likely engaging in willful blindness—keeping themselves away from school administrator searches so they do not taint administrators' ability to search with the lower standard, and knowing that they can receive the fruits of such searches.<sup>368</sup>

Courts have noted this dynamic and offered disapproving language,<sup>369</sup> but they do not always act on that disapproval. One Colorado case, *In re P.E.A.*,<sup>370</sup> presented a particularly clear example of a police officer seeking to evade Fourth Amendment requirements by prompting school officials to conduct a search. There, a regular police officer (not even an SRO) received a tip that several children were involved in selling marijuana at a local school, and the officer, who did not have probable cause to arrest the children, informed the school of the tip "with the intent to instigate an investigation by school officials."<sup>371</sup> An investigation ensued, and the Colorado Supreme Court deemed the school officials' subsequent search of one of the suspect's cars to be a school search under *T.L.O.* because, the court reasoned, no agency relationship existed between the police officer and school officials.<sup>372</sup> In another case, a New Hampshire appellate court ruled for a defendant when

---

366. *See supra* notes 120–21, 173–83 and accompanying text.

367. Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. SCH. L. REV. 977, 1009 (2010).

368. *See id.* (describing how "[m]ost SROs were also aware that they needed to keep a physical and visual distance from the school administrator during searches" so that the administrators are not "viewed as 'agents of the police'").

369. *See, e.g.*, *State v. Burdette*, 225 P.3d 736, 740 (Kan. Ct. App. 2010) ("[W]e note that school officials' power to search students cannot be used to cloak what is normally a police function performed by or at the behest of law enforcement officers.").

370. 754 P.2d 382 (Colo. 1988).

371. *Id.* at 385.

372. *Id.* at 385–86.

an SRO who lacked probable cause referred an investigation to school officials who, pursuant to a “silent understanding,” would conduct the investigation and share any contraband with the officer<sup>373</sup>—a more principled analysis than the Colorado case.

Such searches—both when school officials act following information provided by law enforcement and when school officials search for evidence of a crime and turn over such evidence pursuant to an agreement with law enforcement—should not qualify for *T.L.O.*’s standard for multiple reasons. First, *T.L.O.*’s standard seeks to help school officials maintain school discipline, not to help police officers escape Fourth Amendment limits by inducing school officials to conduct law enforcement investigations. More generally, such searches are too intertwined with law enforcement to qualify as special needs searches. This argument rests heavily on *Ferguson v. City of Charleston* and other special needs cases discussed in Part I.D. Those cases establish that the question is not whether school officials have become agents of law enforcement, as the Colorado Supreme Court asked in *In re P.E.A.*, but whether the relationship between schools and law enforcement makes it impossible to disentangle school disciplinary special needs from the normal need for criminal law enforcement. When a school official suspects a child possesses a small amount of marijuana<sup>374</sup> and searches the child under a policy and MOU that requires the official to refer any evidence of any illegal drug use to the SRO, then that search looks a lot like the hospital urine screens turned over to law enforcement in *Ferguson*. Such policies have long been commonplace,<sup>375</sup> and the reforms discussed in Part III do not change those reporting policies.

The clearer demarcation between school discipline and law enforcement that is the hallmark of reforms discussed in Part III helps demonstrate these searches’ law enforcement purposes.<sup>376</sup> School-to-prison pipeline reforms create a sharp line between SROs and other law enforcement and school discipline. MOUs that simultaneously draw that sharp line and direct school officials to cross that line by reporting evidence of certain crimes to law enforcement transform these searches from a school-discipline search to a law enforcement search. Otherwise, there is little reason to involve the SRO, and whatever action the school official is taking is no longer pursuing a “special need[], beyond the normal need for law enforcement.”<sup>377</sup> That was precisely the Supreme Court’s holding in *Ferguson*—that an agreement requiring non-law-enforcement officials to turn evidence of a crime over to police renders *T.L.O.*’s special needs test inapplicable.<sup>378</sup>

---

373. *State v. Heirtzler*, 789 A.2d 634, 637 (N.H. 2001).

374. If a school official searches a child based on suspicion of only a school rule violation and discovers evidence of a crime, that is a different matter. The purpose of the search itself is what determines whether the special needs doctrine applies.

375. *See Kagan, supra* note 144, at 307–10.

376. *See supra* Part III.

377. *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (emphasis added).

378. *See supra* notes 152–73 and accompanying text.

This scenario should make for an easier case than the New Hampshire case involving a “silent understanding” between the SRO and school officials.<sup>379</sup> There, the trial court had to determine if school officials searched a student at an SRO’s behest and whether this amounted to “‘a mere wink or nod’ or something more concrete.”<sup>380</sup> Clear policies that require school officials to turn over evidence of crimes to SROs provides concrete proof of law enforcement entanglement. In such situations, the state cannot justify a claim that the school officials acted only in furtherance of school discipline; they have “agree[d]”—via the agreements or policies at issue—“to take on the mantle of criminal investigation and enforcement,” and so must follow search and seizure standards applicable to law enforcement.<sup>381</sup>

*C. Policy Benefits of a Doctrinal Shift: Incentives to Limit the School-to-Prison Pipeline*

Excluding school searches entangled with law enforcement from the *T.L.O.* rule serves important policy purposes that help respond to the concerns about the school-to-prison pipeline discussed in Part II. Consistent with prevailing criticisms of the school-to-prison pipeline, this exclusion recognizes that the consequences of searches matter and that the consequences of turning relatively minor misdeeds into law enforcement matters are often harmful to children.

This Article’s proposed rule forces school districts to make a choice—if they wish to maintain the freedom to search students without a warrant or probable cause, then they must choose how to keep such searches focused on school discipline and their subjects out of the juvenile and criminal justice systems. They could choose, like the school districts in *Acton* and *Earls*, to search students but avoid referring the results of such searches to law enforcement.<sup>382</sup> If there are situations so serious that law enforcement involvement is desired, then schools should surrender use of the *T.L.O.* exception; having made the choice to refer a category of situations to law enforcement, there should be no pretending that resulting searches only serve school disciplinary goals.

This policy choice is consistent with post-*T.L.O.* cases’ focus on the “programmatic” purposes of searches.<sup>383</sup> That focus imposes Fourth Amendment consequences on policymakers’ deliberate programmatic or policy choices, and those consequences provide some incentives to limit the most coercive powers of government control over individuals. It places a modest weight on the scale in favor of a less law-enforcement-heavy response, which, especially in the school setting, would be a good result for all of the reasons discussed in Part II.B. More modest and practical benefits of forcing such policy choices exist too—a state or local policy describing

---

379. *State v. Heirtzler*, 789 A.2d 634, 637 (N.H. 2001).

380. *Id.* at 641 (quoting *State v. Bruneau*, 552 A.2d 585, 588 (N.H. 1988)).

381. *Id.* at 640.

382. *See supra* note 75 and accompanying text.

383. *See supra* notes 162–63 and accompanying text.

when SROs may search students and when school officials may do so and refer the evidence to law enforcement would likely impose some modest limits on such searches and thus balance their value with the harms of law enforcement referrals and the privacy invasions of such searches.<sup>384</sup>

V. WHAT ABOUT SCHOOL SHOOTINGS?: A CALL FOR A SCHOOL-SPECIFIC STANDARD FOR *TERRY* SEARCHES RATHER THAN ANY SEARCH

While schools remain generally safe locations for children,<sup>385</sup> any effort to make it more difficult to search students will undoubtedly raise concerns of undermining authorities' ability to protect schoolchildren from mass shootings and other gun violence. Indeed, I started writing this Article in the aftermath of the February 2018 school shooting in Parkland, Florida, and continued work during the Santa Fe, Texas, school shooting in May 2018, and it is reasonable to fear that further mass shootings may occur at one or more schools by the time it reaches publication. Moreover, less high-profile school shootings occur on a more frequent basis.<sup>386</sup> While it is easy to exaggerate the threats to children at school, it is widely accepted that any shootings and the threat or fear of such shootings in schools is unacceptable.

This Part outlines a response to these concerns: When authorities suspect the potential of deadly violence at school, then courts can craft a doctrinal path to permit limited searches to serve that goal. Doing so would rely on a narrower doctrine than applying *T.L.O.* to all SRO-involved searches and thus would limit the risk that such doctrine would trigger the school-to-prison pipeline concerns described in Part II.B.

When faced with suspicions that a student may have brought a weapon to school—from, for instance, a tip from another student—but unsure whether grounds for a warrant exist, what should school officials or SROs do? Their evidence may not provide probable cause, but the suspicion is of the utmost seriousness. The analytically easy first step is that authorities—school officials or law enforcement—should investigate more. An investigation may clarify that there is no threat or provide probable cause that a particular child has a weapon in a particular location, supporting a warrant to search that location<sup>387</sup> or, depending on the details, that there no warrant is required due to exigent circumstances. Less powerful evidence might establish reasonable suspicion that a child has a dangerous weapon on his person, which would justify a limited *Terry* search for that weapon.<sup>388</sup>

---

384. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416–19 (1974); Gupta-Kagan, *supra* note 171, at 403.

385. See JAMES & MCCALLION, *supra* note 306, at 16.

386. See John Woodrow Cox et al., *More than 220,000 Students Have Experienced Gun Violence at School Since Columbine*, WASH. POST (Dec. 19, 2018), <https://www.washingtonpost.com/graphics/2018/local/school-shootings-database/> [<https://perma.cc/A6EK-49LW>] (compiling school shooting data).

387. See 5 LAFAYE, *supra* note 74, § 10.11(b), at 604–05, nn.44–58 (concluding that most reported cases involve facts sufficiently strong to meet probable cause, even when they depend on student informants).

388. 392 U.S. 1 (1968).

*Terry* is one appropriate vehicle for such searches because it was intended to allow protective searches in response to the unique threat from firearms and the “extraordinary dangers” they can present.<sup>389</sup> It applies, of course, to law enforcement, and thus it applies to SROs even after they are properly recognized as law enforcement officers rather than school officials.

Even so, there may be some situations which do not satisfy even the lower standard of *Terry* and yet call for some kind of measures to ensure safety. As the Florida Court of Appeals wrote in 2011, “Allegations of gun possession on school campuses are different from traditional Fourth Amendment cases . . . because of the seriousness of the threat, the location of the threat, [and] the vulnerability and number of potential victims . . . .”<sup>390</sup> The Court has suggested such an approach in *Florida v. J.L.*<sup>391</sup>—“extraordinary dangers sometimes justify unusual precautions.”<sup>392</sup> In *J.L.*, the Court held that a search on a public street could not meet the standards for a *Terry* stop but suggested that the same facts at a school could support “protective searches on the basis of information insufficient to justify searches elsewhere.”<sup>393</sup> Where *J.L.* suggested something less than reasonable suspicion of a firearm might support protective searches at schools, the Fourth Circuit held that the “dire” implications of a firearm at a school justified an expanded scope of searches and seizures permitted by *Terry*.<sup>394</sup> The court upheld the detention a student suspected of bringing a gun to school in the principal’s office until school and law enforcement authorities had determined no such gun was present.<sup>395</sup> In such circumstances, warrantless searches based only on reasonable suspicion would be justified.

That analysis is untouched by the argument in this Article. Unlike the broader school-search framework, an emergency school search does not depend on either a purely school disciplinary purpose or the role of SROs. The *J.L.* Court’s suggestion is based on the particular vulnerability of schools to violence, the extreme dangers posed by firearms (or other weapons capable of killing or injuring many individuals in short periods of time), and the state’s special obligation to protect schoolchildren from such harm. This flexible *Terry* analysis is particularly appropriate in school searches for firearms because a school “is a special kind of place in which serious and

---

389. *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

390. *M.D. v. State*, 65 So. 3d 563, 566 (Fla. Dist. Ct. App. 2011); see also *In re J.D.*, 170 Cal. Rptr. 3d 464, 466–67 (Ct. App. 2014) (describing particular danger of guns at school). *M.D.* also stated that “the lessened expectation of privacy of students” justified a search in such cases. *M.D.*, 65 So. 3d at 565. For reasons discussed in Parts I.B. and I.C.2, cases approving various searches of students do not categorically hold that children always have a lessened expectation of privacy at school.

391. 529 U.S. 266 (2000).

392. *Id.* at 272.

393. *Id.* at 274.

394. *Wofford v. Evans*, 390 F.3d 318, 327 (4th Cir. 2004).

395. *Id.*

dangerous wrongdoing is intolerable,” which weighs in favor of searches narrowly intended to prevent such dangerous events.<sup>396</sup>

In such cases, the immediacy and severity of the threat justify a search, even with later law enforcement consequences. The same cannot be said for a student suspected of possessing a small amount of marijuana. The best way doctrinally to distinguish the two is to follow the rules for *Terry* stops within schools. Then, when a weapon is suspected, a lesser standard than probable cause is required and, as the Court suggested in *J.L.*, when particularly serious and immediate dangers are suspected, courts could permit a broader range of *Terry* searches than would be permissible in other public places. These searches would be limited “in scope to the circumstances which justified the interference in the first place”<sup>397</sup>—it would justify a search for a deadly weapon, but not a more invasive search. As importantly, it would not justify searches for less immediate dangers.

One case illustrates how this doctrinal shift would preserve authorities’ ability to protect schools without contributing so significantly to the school-to-prison pipeline. *In re Ana E.*<sup>398</sup> involved a child who got into a fight with another child, remained agitated after the fight, and threatened to “make the other student bleed.”<sup>399</sup> When a school official retrieved the student’s backpack from a classroom, other students were reluctant to give it to her and one said she should not search it.<sup>400</sup> School officials suspected that the bag contained a weapon and were particularly concerned that, given the student’s agitation and threat to the child with whom she had just fought, she might use any such weapon. For all the reasons explained in this Article, other courts should not follow the *Ana E.* court’s blanket holding that reasonable suspicion applies to any search of a student conducted by an SRO. But *Terry* would justify seizing the backpack given the immediacy and severity of the safety risk at issue.

Applying *Terry* (with *J.L.*’s gloss) but not *T.L.O.* both enables police to prevent the immediate risk of severe violence while ensuring searches are related to the specific risk, not to a broader and more amorphous concern about school discipline. It thus provides a more focused doctrinal path to keep schools safe from severe violence while mitigating the risk of broadening the school-to-prison pipeline. That is far more focused than giving SROs or school officials working closely with them carte blanche to search for evidence of a wide range of minor offenses.

#### CONCLUSION

The present decade has seen many promising reforms of the school-to-prison pipeline, especially reforms to keep SROs out of school discipline and

---

396. 5 LAFAYE, *supra* note 74, § 10.11(b), at 601 (quoting *People v. D.*, 315 N.E.2d 466, 486 (N.Y. 1974)).

397. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

398. No. D-10378/01, 2002 WL 264325, at \*11 (N.Y. Fam. Ct. Jan. 14, 2002).

399. *Id.* at \*11.

400. *Id.*

thus reduce the number of incidents in which law enforcement involvement can transform school disciplinary matters into delinquency cases. Other elements of the pipeline remain in need of reform, including the rule applied in a majority of states permitting SROs to use reduced Fourth Amendment standards to search students at school.

Most state courts have upheld school searches entangled with law enforcement based on a particular understanding of SROs' roles. In Fourth Amendment cases, courts conceived of SROs as either entirely equivalent to school officials or as functionally equivalent—that when they were involved in searches, it was to assist school officials and, implicitly, their involvement did not change the character of the search and justified application of *T.L.O.*'s relaxed search standard. This analysis drew a line between SROs and other law enforcement officers based on the idea that SROs' unique duties and collaboration with school officials made their searches more like school officials' searches than law enforcement searches. This line ignored the law enforcement consequences that flowed from such searches, but it did reflect the reality that SROs acted for both school disciplinary and law enforcement purposes. That reality was reflected in rules empowering SROs to impose school disciplinary consequences and policies and practices permitting SROs to become involved in school disciplinary matters.

More recent reforms have drawn a new line between school officials and SROs. The former are the primary actors responsible for a school's learning environment and school discipline, with a range of authorities limiting when SROs can become involved. SRO involvement is limited to more traditional police action—to enforce criminal laws and respond to incidents that threaten the immediate safety of one or more people (incidents that often, if not usually, involve some kind of criminal law violation). Where this new line exists—it is well developed in some jurisdictions, and emerging in others—it requires a reevaluation of Fourth Amendment law. This line shows that courts can no longer rationally see SROs as school officials, and it shows that involving SROs transforms an investigation from school discipline to law enforcement. This line clarifies that the programmatic purpose of SRO-involved searches is to enforce criminal law and that normal Fourth Amendment standards governing law enforcement must apply.