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WHEN IS A POLICE OFFICER AN OFFICER OF THE LAW?: THE STATUS OF POLICE OFFICERS IN SCHOOLS

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A key component of the "school to prison pipeline" is the constant presence of police officers in schools. School resource officers, though employed by the school district rather than the police department, should be treated legally as police officers, requiring them to follow commonly accepted standards of police conduct in investigating and interrogating crime in schools. This approach is better for all players in the school discipline scene: school officials, police officers and, most importantly, students.

I. INTRODUCTION

In March of 2005, a young girl threw a temper tantrum in kindergarten.[1] Temper tantrums are hardly unusual for a kindergartner.[2] Nonetheless, the school principal decided to call the police.[3] The police chief cancelled the call, as he thought it was inappropriate for police to be involved.[4] However, a local police officer, Officer Wilson, had recently visited the school and left his business card, so the principal called him directly when the police refused to come.[5] Officer Wilson came to the

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[1] Thomas C. Tobin, *Police Might Alter Kid Policy*, ST. PETERSBURG TIMES, Apr. 29, 2005, at 1A.

[2] As a former teacher, I have had to remove a kindergarten student from class and take him to the principal's office. Taking a student to the principal's office is almost always an indication of failure on the part of a teacher—inevitable failure, as teaching is tough business, but failure nonetheless. In this instance, the sting of failure was double: the offending kindergarten student was my own son.

[3] Tobin, *supra* note 1.

[4] *Id.*

[5] *Id.*

school and may have threatened to handcuff the girl if she did not comply with the teacher's requests.[6]

A week later, this precocious young girl had yet another tantrum, only this particular tantrum was extreme.[7] She threw desk items, tore paper off the wall, and even hit the assistant principal.[8] Once again, the school decided to call the police.[9] This time, Officer Wilson heard the call over the police radio.[10] Given his prior involvement with the girl and the school, he decided to go directly to the school.[11] The police supervisor did not cancel the call this time, but was unaware of Officer Wilson's decision to go to the school, and thus sent another car—resulting in a total of four police officers, as Officer Wilson was riding with an officer in training arriving to tackle this tough kindergartner.[12] When the officers entered the classroom, the girl was sitting quietly in her chair.[13] Despite her calm, the officers cuffed her and took her to the squad car.[14] There she remained shackled for three hours.[15] Her first introduction to the criminal justice system, at age five, is an experience sure to stick with her for a long time, and is emblematic of the school-to-prison pipeline.

In recent years, this pipeline has begun to garner more attention. It has had a disproportionate impact on poor and minority communities and has dramatically increased the number of juveniles that pass through the criminal justice system.[16] Ironically, this increase has occurred at the same time that overall and juvenile crime rates have declined.[17] A critical component of the pipeline is the role of police officers in the public schools. Thus, this Comment will examine the legal status of School Resource Officers (SROs) and other police officers who operate in schools. Part II

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[6] *Id.* The factual record on this point is in dispute. *Id.*

[7] *See id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*; *see* Videostream (Mar. 15, 2005), http://www.sptimes.com/2005/webspecials05/child-video-streaming/classroom/small.shtml (documenting child's behavior in the assistant principal's office and the officers' arrival and arrest).

[15] NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 14, http://www.naacpldf.org/content/pdf/pipeline/dismantling_the_school_to_prison_pipeline.pdf (last visited Mar. 20, 2009).

[16] ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), http://www.advancementproject.org/reports/FINALEOLrep.pdf.

[17] STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 119 (2005); NAACP LEGAL DEF. & EDUC. FUND, *supra* note 15, at 3.

will give an outline of the history behind zero-tolerance school discipline policies, the current prevalence of these policies, and of the use of SROs to enforce such policies. Part III will examine the Fourth and Fifth Amendment implications of these policies. Part IV will examine the legal status of police officers in current case law. Part V will recommend that uniform standards apply to police officers who operate in schools, whether those officers are SROs or not, with a legal and policy analysis to support this conclusion.

II. BACKGROUND OF THE SCHOOL-TO-PRISON PIPELINE

The school-to-prison pipeline has developed as a result of several educational and social factors. First, zero-tolerance discipline policies rose to prominence in the early 1990s, due to the perception that crime in schools was an increasingly large problem.[18] Contrary to the perception however, crime was actually decreasing.[19] Schools began implementing many other policies as well, including the increased reliance on police presence within schools.[20] This Part will analyze these factors and some of the practical ramifications of the increasing severity of punishment for relatively harmless violations. One important factor to consider when examining these various techniques is that of all the many disciplinary programs tried in the past fifteen years, the only one with serious research to support its effectiveness is the use of school uniforms.[21]

A. A HISTORY OF ZERO-TOLERANCE POLICIES

From 1975 to 1989, violent crime increased 80% nationwide;[22] that increase had a severe impact on schools. In 1989, as schools began to take notice of this crisis, school districts in California, New York, and Kentucky adopted the first zero-tolerance school disciplinary policies, mandating expulsion for fighting, drugs, and gang-related activity.[23] By 1993, zero-tolerance policies had been implemented across the country.[24] In 1994, President Clinton signed the Gun-Free Schools Act into law, which

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[18] RUSSELL J. SKIBA, IND. EDUC. POLICY CTR., POLICY RESEARCH REPORT NO. SRS2, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (2000), http://www.indiana.edu/~safeschl/ztze.pdf.

[19] LEVITT & DUBNER, *supra* note 17, at 119; NAACP LEGAL DEF. & EDUC. FUND, *supra* note 15, at 3.

[20] ADVANCEMENT PROJECT, *supra* note 16, at 7.

[21] SKIBA, *supra* note 18, at 8-9.

[22] LEVITT & DUBNER, *supra* note 17, at 119.

[23] SKIBA, *supra* note 18, at 2.

[24] *Id.*

mandated expulsion for gun offenses.[25] Schools were required to abide by this policy in order to receive federal funding.[26] Subsequent amendments to the bill have expanded it to include other weapons.[27] Additional amendments have attempted to bring special education legislation in line with this policy.[28]

Zero-tolerance policies have continued to expand at the local level to apply to a variety of different behaviors, including smoking, drinking, fighting, threats, and even swearing.[29] By 1997, 94% of all schools had zero-tolerance policies for possession of firearms or other weapons, 87% for alcohol possession, and 79% for tobacco possession and on-campus violence.[30] As a result, rates for serious disciplinary consequences have risen. In 2004, for example, over three million students were suspended at some point during the school year, with rates of suspension as high as 11.9% for all students and 15.3% amongst boys.[31] This rate is nearly twice the annual number of suspensions that occurred in the 1970s.[32] Additionally, over 106,000 expulsions occurred in 2004.[33] Of course, certain cities and communities experience even higher suspension and expulsion rates, for example, inner city schools in larger urban areas.[34]

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[25] *Id.*; Gun-Free Schools Act of 1994, Pub. L. No. 103-227, 108 Stat. 270 (codified as amended in scattered sections of 20 U.S.C. (2006)). The law does require cases to be handled on a case-by-case basis, although the anecdotal evidence seems to indicate that this rarely happens. Since all schools want and need federal funds, this is a de facto federal mandate. 20 U.S.C. § 7151(b)(1) (2006).

[26] 20 U.S.C. § 7151 (b)(1).

[27] SKIBA, *supra* note 18, at 2. The definition of a firearm includes any device that uses an explosive as a projectile, or to send a projectile. As any part of such a weapon counts as a violation, it can be construed quite broadly. 18 U.S.C. § 921(a) (2006).

[28] SKIBA, *supra* note 18, at 2.

[29] *Id.*; *see, e.g.*, W. VA. CODE ANN. § 18A-5-1a (LexisNexis 2007) (mandating suspension for a first-time drug offense, any weapon offense, or assault). First offenses may also result in expulsion, and second offenses will always result in expulsion. *Id.; cf.* Sally Falk Nancrede, *School to Take Foul Mouths to Task: Southport High Will Institute Zero-Tolerance Policy on Profanity*, INDIANAPOLIS STAR, Aug. 20, 1998, at A1 (discussing new profanity policy at local high school).

[30] SKIBA, *supra* note 18, at 3.

[31] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2008, at 231 tbl.153 (2008), *available at* http://nces.ed.gov/pubs2008/2008022.pdf. Louisiana and South Carolina are the states that reported these high numbers. *Id.*

[32] NAACP LEGAL DEF. & EDUC. FUND, *supra* note 15, at 14.

[33] NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, at 230 tbl.152.

[34] *See, e.g.*, *id.* at 225 tbl.150 (showing that the use of various security measures generally increases along with the size of the school, the number of students on free lunch, and the urban character of the environment).

Minority communities in particular have been disproportionally affected by aggressive school disciplinary measures.[35]

Zero-tolerance programs started as a response to two primary issues confronting schools, drugs and violence. Though the problems were and are real, the response has not been in proportion to the reality, nor has it been particularly effective.[36] Zero-tolerance programs began to proliferate after crime in schools began to decrease.[37] These policies have removed much discretion from teachers and administrators in the application of disciplinary procedures, producing several high-profile cases that have resulted in ridiculous punishment. Though only one of the stories below resulted in criminal sanction, they are all mentioned because, collectively, they highlight the three major concerns currently facing schools: (1) weapons, (2) drugs and alcohol, and (3) violence.[38]

In 1998, in Longmont, Colorado, a ten-year-old girl opened her lunch to find that her mother had left a steak knife in her lunchbox.[39] This girl knew that weapons were not allowed in school and did not want to get into trouble.[40] She immediately told one of her teachers about the knife and turned it in.[41] She did not intentionally bring the knife, she had no knowledge of it until lunch, she had no prior record, she immediately turned the knife over to school authorities upon discovery, and she was only ten years old; nonetheless, the school expelled her.[42]

In another case the same year, a second-grade student in Denver, Colorado was given chewable vitamin C by his mother on the way to school.[43] Without her knowledge, he pocketed an extra pill.[44] A friend at

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[35] NAACP LEGAL DEF. & EDUC. FUND, *supra* note 15, at 6-9.

[36] SKIBA, *supra* note 18, at 7-11.

[37] *See* LEVITT & DUBNER, *supra* note 17, at 119 (noting that crime began to fall precipitously in the 1990s); SKIBA, *supra* note 18, at 5 (noting that zero-tolerance policies began to increase at the same time).

[38] SKIBA, *supra* note 18, at 4-9; Ronnie Casella, *Zero Tolerance Policy in Schools: Rationale, Consequences, and Alternatives*, 105 TCHRS C. REC. 872, 874-78 (2005) (discussing rationales for zero-tolerance policies).

[39] Katherine Vogt, *School Votes It Can't Reinstate Expelled Girl*, DENVER POST, Feb. 2, 1998, at 1A.

[40] Jesse Katz, *Taking Zero Tolerance to the Limit*, L.A. TIMES, Mar. 1, 1998, at A1.

[41] Vogt, *supra* note 39.

[42] Katz, *supra* note 40. The board later reinstated the student, but she transferred to a different school. *Cf.* Elizabeth A. Brandenburg, Comment, *School Bullies—They Aren't Just Students: Examining School Interrogations and the* Miranda *Warning*, 59 MERCER L. REV. 731, 731-32 (2008) (describing a similar story in Georgia).

[43] *Vitamin Spurs School Suspension: Tablet Offered to Loveland Classmate*, DENVER POST, June 4, 1998, at 5B.

[44] *Id.*

school began harassing him to give her the vitamin, and he did.[45] The school suspended him for his transgression.[46] Using discretion, the principal decided not to expel him, but the fact that expulsion was even an option for such an offense only highlights the extreme punishments available for relatively minor offenses.[47]

Though these Colorado cases seem extreme, one incident in Florida was particularly disturbing. In the spring of 2007, a six-year-old girl in Avon Park, Florida named Desre'e Watson threw a tantrum in school.[48] She was violent and defiant.[49] The teachers removed her to another room, but she continued her behavior.[50] The administrators then called the police;[51] the police cuffed and arrested Desre'e, booked her, and fingerprinted her.[52] Desre'e was then charged with "battery on a school official," which is a felony, and two misdemeanors: disruption of a school function and resisting a law enforcement officer."[53]

When Bob Herbert of the New York Times said to the police chief "[b]ut she was six," the chief responded immediately, "Do you think this is the first six year-old we've arrested?"[54] As Herbert insightfully notes, once you begin to see ordinary childhood misbehavior as criminal, "it's easy to start seeing young children as somehow monstrous. 'Believe me when I tell you,' said Chief Mercurio, 'a six year-old can inflict injury to you just as much as any other person.'"[55] It is this prism of criminality and fear that has driven so many zero-tolerance policies and other security measures.[56] These stories illustrate a shift in educational priorities. No longer is education the primary goal; rather, the system emphasizes controlling children who are viewed as dangerous, even in kindergarten.[57]

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Bob Herbert, Op-Ed., *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17, *available at* http://select.nytimes.com/2007/04/09/opinion/09herbert.html.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] SKIBA, *supra* note 18, at 7-11 (noting that none of these policies have proven to be particularly effective); David Altheide, *The News Media, the Problem Frame, and the Production of Fear*, 38 SOC. Q. 647 (1997) (observing that the public's fear of social ills increases as the news media coverage increases). In fact, drug use has remained stagnant or increased since the first zero-tolerance policies were implemented in 1989. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, at 233 tbls.155-56.

[57] Of course, most educators are interested in educating all their students. But educators,

B. CRIME AND DRUGS—PERCEPTION VERSUS REALITY

By the 1980s, many school districts were in crisis. Violence was high, and teacher morale was low. This situation garnered much popular attention through movies such as *Stand and Deliver* and *Lean on Me* in the late 1980s and early 1990s.[58] These movies depicted teachers and principals reshaping institutions through their sheer force of will.[59] This reinforced the notion that what schools really needed to do to solve the epidemic of crime and violence was to "get tough."

Further, as the years went on, extended media attention to crimes such as the Columbine killings fueled popular perception that schools were reaching a breaking point.[60] This attention only accelerated the pace of zero-tolerance adoption in schools, and the increased use of security measures such as metal detectors, police officers on campus, and other measures. Yet, by the time zero-tolerance policies began to take hold in education,[61] the violence was already subsiding. Crime in school, and outside of the school walls, dropped significantly in the 1990s, dropping by half in schools between 1992 and 2002.[62]

Similarly, drug and alcohol use in schools dropped signficantly throughout the 1980s.[63] Although alcohol usage rates have dropped since 1990, the use of drugs has fluctuated since the implementation of zero-tolerance policies and is now roughly the same as it was in 1990.[64] The fact that drug use dropped rapidly prior to zero-tolerance policies, but has since

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especially in public schools, must abide by an ever-increasing body of law that shifts the focus from educational achievement to behavioral management.

[58] LEAN ON ME (Warner Bros. Pictures 1989); STAND AND DELIVER (Warner Bros. Pictures 1988).

[59] For example, *Lean on Me* featured Morgan Freeman as Joe Clark, a real-life principal who turned around a decaying inner city school in New York through the liberal use of tough, no-nonsense policies. LEAN ON ME, *supra* note 58.

[60] A LexisNexis search of all news sources for the ten days after the attack (on April 20, 1999) yields over 500 hits and, if the search is extended to six weeks after the attacks, over 3,000 hits. By comparison, a terrorist bombing at the "Valley of the Fallen" Church that same month garnered only three hits.

[61] Zero-tolerance policies first appeared in schools in 1989, and within five years they were nearly universal. SKIBA, *supra* note 18, at 2.

[62] ADVANCEMENT PROJECT, *supra* note 16, at 11. *But see* NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2005, at 76 tbl.4.1 (indicating an increase in students encountering weapons in school during that same time period).

[63] NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, at 234 tbl.156.

[64] *Id.* Usage rates for certain drugs, such as LSD and cocaine, are lower, while usage rates for others, such as marijuana and heroin, are higher. The overall usage rate, or percentage of students who reported having used drugs at least once, for the class of 1990 was 47.9%; the class of 2006 had a usage rate of 48.2%. *Id.*

leveled off or increased slightly, calls the efficacy of zero-tolerance policies into question.

Despite the rapid drop in crime and drug usage rates within schools, the public perception was that school crime and drug usage rates continued to increase, fueling the continued expansion of zero-tolerance policies to include more behaviors.[65] Not coincidentally reporting on crime generally spiked at the moment that crime in and out of schools was dropping, pushing crime to the forefront of the national conscience.[66] This increased fear of crime and drugs, particularly in schools, helped garner support for the continued expansion of zero-tolerance policies, along with an increase in other security measures, such as the increased presence of police officers in schools.

C. SUMMARY OF THE INCREASED PRESENCE OF POLICE IN SCHOOLS

In addition to zero-tolerance programs, schools adopted a number of other solutions to the problems of in-school violence and drug use.[67] One common choice has been to increase police presence in schools at all levels. During the 2003-2004 school year, nearly 54% of all public secondary schools had a daily police presence.[68] The same year over 70% of students between the ages of twelve and eighteen reported at least some police presence within their school, an increase of nearly 30% since just 1999.[69] Three factors are predictors for a daily police presence: (1) school size,[70] (2) percentage of children receiving reduced price school lunch,[71] and (3) school location, with urban environments having a larger police presence than rural ones.[72]

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[65] Altheide, *supra* note 56, at 649.

[66] *Id.* (citing David Shaw, *Headlines and High Anxiety*, L.A. TIMES, Sept. 11, 1994, at A1). In the same year that "for the first time, ABC, CBS and NBC nightly news programs devoted more time to crime than to any other topic," Americans told pollsters for the first time that "crime is 'the most important problem facing the country.'" Shaw, *supra*. Figures are unavailable for reporting on crime within schools specifically, but it is not an unreasonable assumption that such reporting increased as well.

[67] SKIBA, *supra* note 18, at 3. Other methods include controlled access to buildings, sign-in and sign-out policies, closed campus for lunch, mandatory school uniforms, and random or daily metal detectors. *Id.*

[68] NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, at 225 tbl.150.

[69] NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 62, at 63 fig.21.1.

[70] NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 31, at 225 tbl.150. Note that school size may actually be a duplicative factor. Secondary schools are far more likely than elementary schools to have a police presence, and they are also more likely to have larger student populations. To my knowledge, there are few, if any, elementary schools with 1,000 or more students, yet such a large student population is fairly common for high schools.

[71] *Id.* The correlation is direct.

[72] *Id.*

D. CONSEQUENCES OF ZERO-TOLERANCE POLICIES AND AN INCREASED POLICE PRESENCE IN SCHOOLS

The increase in police at a time when school violence has dropped so dramatically has led to inevitable outcomes. Police presence at schools must be justified by action, and therefore there has been a marked increase in the criminalization of infractions that would have been previously handled by school officials. For example, in one Texas school district, 17% of school arrests were for disruptive behavior, and 26% were for disorderly conduct.[73] This has dramatically increased the number of interactions that children, particularly those in low-income and minority communities, have with police officers in their lifetimes.[74]

Further, as any good teacher knows, if you reach for your most serious punishment too soon in the year, you have lost the class.[75] As disciplinary decisions and use of criminal sanctions for minor offenses increase, respect for the criminal arrest process may lessen. One can imagine a student thinking that if a kindergarten student is shackled in the back of a police cruiser for a temper tantrum, maybe being shackled by police is not such a big deal. In fact, there is now significant statistical support for this notion, as students in the communities with the most consistent police presence in schools are most likely to evince less respect for police and are far less likely to be "scared straight" by an encounter with police outside of school.[76]

All of these factors—increased reliance on zero-tolerance policies, increased use of police officers in schools (commonly referred to as School Resource Officers or SROs), the decrease in crime and drug use in schools, and the increased use of criminal sanctions for school disciplinary procedures—have raised a number of legal issues.[77] Most critically,

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[73] ADVANCEMENT PROJECT, *supra* note 16, at 15.

[74] *Id.* at 23. Denver referrals to the criminal justice system as a result of public-school conduct increased by 71% from 2000-2004. *Id.*

[75] *See, e.g.*, Paul Pedota, *Strategies for Effective Classroom Management in the Secondary Setting*, CLEARING HOUSE, Mar.-Apr. 2007, at 163. In handling student discipline, "the worst thing you can do is act hastily" or, conversely, to wait to respond to misbehavior until the only option is "harsh punishment." *Id.* at 165.

[76] HARVARD UNIV. CIVIL RIGHTS PROJECT & ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 10-12 (2000) (describing the negative impact zero-tolerance policies have on students' sense of justice and ability to form bonds with authority figures).

[77] In addition to the status of police officers in schools, the focus of this Comment, there are other Fourth and Fifth Amendment questions for searches and seizures and for questioning done by school administrators. *See* Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39 (2006) (arguing that in some circumstances teachers or administrators should give students *Miranda*

students who are disciplined in schools are significantly more likely to face consequences in the criminal justice system as a result of school actions. This increase has been dubbed the school-to-prison pipeline. The higher stakes for students, combined with their lack of sophistication, require a more thoughtful and clear policy to set fair limits for criminal investigations in schools.

III. THE STAKES: LEGAL CONSEQUENCES OF REDUCED STANDARDS

The increased use of criminal consequences for school-yard behavior has raised the stakes considerably for students caught up in the search for greater and greater deterrents. As these cases have reached the courts, they have raised Fourth and Fifth Amendment issues. The consequences are severe, and the learning outcomes for students who end up in the criminal justice system are not encouraging.[78] This Part will analyze the current state of the law regarding the Fourth and Fifth Amendment in school settings. A careful analysis of these two issues will demonstrate why the status of police officers and SROs is crucial to solving this problem.

A. MIRANDA RIGHTS IN SCHOOLS: WHO'S QUESTIONING WHO FOR WHOM?

Courts have been divided over when interrogations of students within school settings require the reading of their *Miranda* rights.[79] One helpful way of analyzing these cases is to borrow the *People v. Dilworth* court's explanation of search and seizure cases.[80] The Illinois Supreme Court said that such cases fell into three general categories: "(1) those where school officials initiate a[n] [interrogation] or where police involvement is minimal, (2) those involving school police or liaison officers acting on their own authority, and (3) those where outside police officers initiate a[n] [interrogation]."[81] In addition to these three categories, add a fourth: where

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warnings before questioning); Eleftheria Keans, Note, *Student Interrogations by School Officials: Out with Agency Law and in with Constitutional Warnings*, 27 B.C. THIRD WORLD L.J. 375 (2007) (drawing the same conclusion as Prof. Holland, but by applying the *Ferguson* decision to the school setting); *see also* 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 (2003) (suggesting more rigorous Fourth Amendment standards when police are involved in school searches). Also, there are a host of policy questions regarding the questionable effectiveness of such policies.

[78] *See* ADVANCEMENT PROJECT, *supra* note 16, at 12; NAACP LEGAL DEF. & EDUC. FUND, *supra* note 15, at 6.

[79] *See* Holland, *supra* note 77.

[80] 661 N.E.2d 310, 317 (Ill. 1996).

[81] *Id.* I have changed "search" to "interrogation" to fit the *Miranda* context.

a situation exists in which SROs, outside police officers, or both are heavily involved in the investigation but do so at the behest of school officials.

In the first category mentioned by the *Dilworth* court, school officials act independently. Under this category, school officials then turn over evidence to police if they find evidence of criminal behavior. In general, there is unanimity that school officials do not have an automatic obligation to Mirandize students in interrogations when school officials are acting on their own initiative.[82] The policy rationale is that school officials should have wide latitude in disciplinary proceedings.[83]

The second category in the *Dilworth* court's analysis, those investigations initiated by outside police officers, is at the other end of the spectrum from the first category. In this case, since the investigation is driven by outside police, courts have usually required *Miranda* warnings to be given.[84] The rationale is that there is no reason that police officers should be able to operate under different standards simply because they are inside a school.

Between these two extremes are two other categories. For the fourth category above, when outside police or SROs are acting at the behest of the school, most courts have ruled that *Miranda* warnings are unnecessary.[85] Though not always using agency terminology, courts have essentially treated the officers as agents of school officials and therefore not subject to the normal constraints of police work.

Finally, the second *Dilworth* category is when an SRO has directed the investigation on his or her own initiative. Courts have split on whether to treat the officer as a school employee, in which case *Miranda* is not

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[82] *See, e.g.*, Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992) ("There is no authority requiring a school administrator not acting on behalf of law enforcement officials to furnish Miranda warnings.").

[83] Though schools clearly need wide discretion in their own internal disciplinary procedures, it is highly questionable whether this discretion ought to be given when it comes to criminal matters. It results in an end run around the Fourth and Fifth Amendment rights of students. Suspending or expelling a student on evidence obtained without a *Miranda* warning or a search warrant is one thing, putting that student in jail is quite another. The Supreme Court has hinted at this in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), where the Court upheld policies requiring mandatory drug testing as a prerequisite for sports participation because the consequences for the drug testing were related to school activities only and did not involve turning evidence over to the police. However, despite this opinion, it seems the settled law is that school officials need not issue *Miranda* warnings to students, or worry about search and seizure protections.

[84] *Dilworth*, 661 N.E.2d at 317.

[85] State v. Tinkham, 719 A.2d 580 (N.H. 1998); State v. Dalziel, 867 A.2d 1167 (N.J. 2005); State v. Biancamano, 666 A.2d 199 (N.J. Super. Ct. App. Div. 1995), *overruled on other grounds*, State v. Dalziel, 867 A.2d 1167 (N.J. 2005); *In re* Harold S., 731 A.2d 265 (R.I. 1999).

required, or as a police officer, in which case it is.[86] Part IV will examine these cases in greater detail.

Given how the courts have framed the issues, most of the discussion in the decisions has focused on two factual issues: first, who began the investigation—the school officials or the police; and second, who conducted the investigation.[87] Whether these facts make any difference to the student is highly dubious, but that has nonetheless been the focus of courts.

Although the rubric above appears to be neat on the surface, different courts have looked at relatively similar fact patterns and arrived at different conclusions. This has muddied the waters considerably. In particular, the definition of which SRO actions are "at the behest of" the school is unclear.[88] Some courts have stretched this definition beyond recognition.

For example, in *State v. Biancamano*, the defendant ran a significant drug operation.[89] Biancamano approached a fellow student, J.Z., to assist him with his sale of LSD.[90] They hid the drugs in a pen for distribution within the school.[91] Two other students, A.B. and T.T., were also involved in the operation.[92] Less than a week after J.Z. began running drugs for Biancamano, J.Z. was interviewed by William Cannici, the vice-principal, regarding drug sales.[93] Cannici found the LSD tablets hidden in the pen, after which J.Z. told Cannici he was running drugs for Biancamano.[94] Cannici questioned Biancamano but did not search him. Biancamano admitted to driving to school with A.B. that morning, supplying drugs to

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[86] *Snyder*, 597 N.E.2d 1363; *Tinkham*, 719 A.2d 580; *Biancamano*, 666 A.2d 199; *In re Harold S.*, 731 A.2d 265.

[87] *See Tinkham*, 719 A.2d at 583-84 (noting that the factual record did not include any evidence that the police directed the principal to interview the student); *see also Snyder*, 597 N.E.2d at 1364 (indicating that Snyder's conviction was based on marijuana seized by school officials); *In re Harold S.*, 731 A.2d at 266 (noting that although the police tipped the school to Harold S.'s involvement in a fight, since the interview in which the signed confession was obtained was conducted by a school official, the confession was usable evidence). *But see Biancamano*, 666 A.2d at 203 (holding, without addressing agency relationships, that "[s]chool officials are neither trained nor equipped to conduct police investigations . . . . [T]he need to question students to determine the existence of weapons, drugs, or potential violence in the school requires that latitude be given to school officials").

[88] New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

[89] 666 A.2d at 200 (observing that defendant told the assistant principal "he had given 100 'hits' to [his accomplice] over the previous two weeks" and that police found further contraband in his home).

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

J.Z., and meeting with T.T.[95] However, he claimed at trial that the admission to selling drugs was "sarcastic."[96]

Neither the vice-principal nor the assistant vice-principal searched the student while interviewing him.[97] Although the interview lasted for over an hour, the facts indicate that the defendant was free to leave.[98] There was no written confession, and the search of the defendant's home was not the result of his own interview, but that of his accomplice, A.B., who told Cannici where Biancamano had hidden his drugs.[99] The New Jersey Superior Court ruled that school officials are unqualified to conduct criminal investigations because they are "neither trained nor equipped to conduct police investigations."[100] In other words, they are not subject to *Miranda* requirements.[101]

In a different case, *State v. Tinkham*, the student was suspected of selling marijuana based on a report from another student who admitted buying drugs from the defendant.[102] The principal and assistant principal interviewed Tinkham, and then searched his book bag, pockets, socks, and shoes.[103] This search produced a cylindrical wooden object, which was turned over to police.[104] Eventually school officials compelled the student to confess to the police in writing.[105] The record suggested that it was standard practice for the principal to obtain confessions and then turn them over to police, as the principal had told police in advance of her intention to interrogate Tinkham.[106] Since nothing in the record contradicts the student's statement that his was a first-time offense, this suggests the principal turned over evidence of any and all drug offenses at the school, without ever exercising discretion.[107] The New Hampshire Supreme Court ruled that principal was "not a law enforcement officer."[108] Additionally,

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[95] *Id.*

[96] *Id.* at 202.

[97] *Id.*

[98] *Id.* at 200 (explaining that the vice-principal left the room briefly and that upon his return, "defendant had already retrieved his car keys from the top of Cannici's desk and left the building"). This did not factor in the court's decision, which decided that *Miranda* warnings were not required based on other factors.

[99] *Id.*

[100] *Id.* at 203.

[101] *Id.* (citing *Commonwealth v. Snyder*, 597 N.E.2d 1363 (1992)).

[102] 719 A.2d 580, 581 (N.H. 1998).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 582.

[106] *Id.* at 581.

[107] *Id.*

[108] *Id.* at 583.

under agency law, the court further ruled that the principal was not "an agent of the police."[109] The court considered irrelevant that "administrators had every intention of turning the marihuana over to the police."[110] The only important issue was that there was no evidence that "Wolfeboro police made any suggestions to [the principal] or directed her course of action."[111] With this analysis the court tried to fit the facts of the case squarely within the first category given in *Dilworth*, investigations initiated and conducted by school officials.[112]

As indicated by *Tinkham*, the question of agency between school officials and police is a frequent issue in these cases.[113] Two additional cases illustrate the lengths to which courts will rule in favor of school administrators' autonomy as to the issue of agency.

The first, *Commonwealth v. Snyder*, indicates a greater investigative sophistication on the part of school administrators than that for which courts had generally given them credit.[114] In *Snyder*, a student had reported that Snyder showed the student three bags of marijuana hidden in a video cassette inside his book bag.[115] Upon finding Snyder in the student center, school administrators decided that confrontation in that setting would limit their ability to discover the full extent of the drug trade.[116] Thus they waited until Snyder was in class and then searched his locker, where they found marijuana.[117] They interrogated him only after discovering the drugs.[118] Armed with this specific information regarding his drug dealings, eliciting a confession was relatively easy.[119] Despite the fact that it was standard practice for school officials to turn evidence over to police, which the court could have read to indicate that the school was performing a police function, the court said *Miranda* was not required when the school administrators interrogated Snyder.[120]

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[109] *Id.* at 583-84.

[110] *Id.* at 584.

[111] *Id.*

[112] 661 N.E.2d 310, 317 (Ill. 1996).

[113] *See* Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992).

[114] *Id.*; *see* State v. Biancamano, 666 A.2d 199, 203 (N.J. Super. Ct. App. Div. 1995) (describing court's opinions of school administrators' powers of investigation).

[115] *Snyder*, 597 N.E.2d at 1364.

[116] *Id.* at 1365.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1369 ("The fact that the school administrators had every intention of turning the marihuana over to the police does not make them agents or instrumentalities of the police in questioning Snyder.").

In the second case, *In re Harold S.*, the facts seem to describe a clear case of school authorities acting as agents of the police, yet the Supreme Court of Rhode Island thought differently.[121] The police approached the principal before school and "informed [the principal] that a fight had occurred after school the previous day" and gave him the identities of the "two students who allegedly were involved in the attack."[122] Harold S., a middle school student, was accused of beating a fellow student.[123] The victim accused Harold S., though he admitted he could not tell who had hit him.[124] There were other witnesses that testified that Harold S. and an accomplice had attacked the victim.[125] After the police made the principal aware of the assault, the principal interviewed Harold S.[126] The interview eventually yielded a written confession, which the principal turned over to the police "upon their request," as was his usual practice.[127] Despite this apparent agency relationship, the court ruled "the principal was not acting as an agent of the police when he questioned respondent."[128]

Several factors could indicate agency in this case. The police approached the principal and notified him of the defendants' alleged conduct.[129] Further, the police were furnished with the written confession "upon their request."[130] Finally, it was standard practice for the school to "obtain statements from . . . the alleged assailant" and turn them over to police when requested.[131] These three facts seem to indicate that police and the school administrators were working closely together both generally and specifically in this case. Yet, since "the officer was not present" during the principal's meeting with the student, and the officer had not specifically asked the principal "to speak with [the] respondent," the principal was not acting as an agent of the police.[132]

Given the level of cooperation that courts allow between police and school administrators without finding agency and without imposing

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[121] 731 A.2d 265 (R.I. 1999).
[122] *Id.* at 266.
[123] *Id.*
[124] *Id.* at 265.
[125] *Id.* at 266.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 267-68.
[129] *Id.* at 266.
[130] *Id.*
[131] *Id.* at 267.
[132] *Id.*

Miranda requirements, it is clear that significant latitude is available for police officers working for schools.[133]

B. SEARCH AND SEIZURE CASES

Search and seizure cases are nearly always analyzed under *New Jersey v. T.L.O.*, in which the Supreme Court stated that when schools have acted on their own initiative, they need only meet a standard of "reasonable suspicion" to conduct a search.[134] T.L.O. was a high school student suspected of smoking.[135] Rather than stating that she was not smoking at the time, T.L.O asserted that she did not smoke.[136] This claim prompted the school administrator to search her purse.[137] He found cigarettes when he opened her purse, and based upon this evidence that she had lied, he conducted a more thorough search of her purse.[138] In the process, evidence of marijuana use was discovered, and as a result of this discovery, criminal charges were brought.[139] This is a key fact because there was no police involvement until after the fact, and the original investigation was not criminal in nature—the student was old enough to legally smoke and possess cigarettes in New Jersey at the time.[140] However, she was violating a school rule by smoking on campus.[141] Nonetheless, many, if not all, courts have applied this decision to cases in which the school administration, resource officers, and police clearly looked for criminal violations from the beginning.[142]

There are several other important holdings in *T.L.O.* The Court established that the Fourth Amendment's prohibition against unreasonable

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[133] Although the issue of agency relationships between school administrators is outside the purview of this Comment, it is worth mentioning that the Supreme Court has ruled that agency exists in similar relationships outside of schools. For example, in *Ferguson v. Charleston*, the Court ruled that a hospital drug testing program for pregnant women which turned over results to the police without consent was unconstitutional. 532 U.S. 67 (2001). The Court has upheld drug testing in a school context. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). However, there were no criminal sanctions, only athletes were tested, the consequence of a failed test was an inability to participate in athletics, and even this sanction could be avoided with participation in a drug rehabilitation program. *Id.* at 651. For a convincing argument that school officials should required to administer *Miranda* warnings to students, see Keans, *supra* note 77.

[134] 469 U.S. 325, 342 (1985).

[135] *Id.* at 328.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 328-29.

[140] *See id.* at 344.

[141] *Id.* at 331. Possession of cigarettes was not a violation of school rules.

[142] *See, e.g.*, *infra* Part III.A (discussing People v. Dilworth, 661 N.E.2d 310 (Ill. 1996)).

searches and seizures applies to those "conducted by public school officials."[143] The Court noted that it had previously held other civil authorities, such as firemen and Occupational Safety and Health Act inspectors, to similar standards.[144] Additionally, the Court disapproved of the *in loco parentis* analysis that other courts had used for school-based issues, noting that "[s]uch reasoning is in tension with contemporary reality and the teachings of this Court."[145] Thus, it held that "school officials act as representatives of the State."[146] Lastly, the Court also recognized that students have a legitimate expectation of privacy in schools, noting that although it may be difficult to maintain discipline in schools, "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy."[147] The Court went on in detail regarding the many personal, yet non-criminal items, such as wallets, purses, diaries, letters, grooming items, and others that students may need in school.[148]

The *T.L.O.* Court delineated the key principles that it found to be in tension with one another: a student's "legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place."[149] Both warrant requirements and probable cause standards were deemed inappropriate for school settings.[150] Instead, the standard established was "reasonableness," which is determined by a two-pronged test. Under this test, "first, one must consider whether

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[143] *T.L.O.*, 469 U.S. at 333.

[144] *Id.* at 335.

[145] *Id.* at 336.

[146] *Id.*

[147] *Id.* at 338.

[148] *Id.* at 339 ("Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities.").

[149] *Id.* at 340.

[150] *Id.* at 340-41. This is a false dichotomy. In fact, another solution is possible outside the realm of this Comment. Schools could be given wide authority to use a variety of means to achieve school discipline as long as criminal sanctions were not involved. After all, the key to keeping the school drug-free is to get the users and dealers out of the school, not to put them in prison. In fact, given the indiscriminate nature of zero-tolerance policies, those students who are making a "one-time" mistake will be just as likely to suffer severe criminal sanctions as the recalcitrant repeat offender. Whether this serves the best interests of educating all is a highly dubious presumption. The Court ruled the same in *Vernonia Sch. Dist. 47J v. Acton*, when it upheld drug testing for student athletes, in part because it was self-selecting group, and because no criminal sanctions were involved. 515 U.S. 646 (1995).

the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."[151] Finally, the Court in *T.L.O.* was careful to keep its ruling narrow, noting that it was only addressing search and seizure cases in which the evidence was "seized by a school official without the involvement of law enforcement officers."[152] Despite this limitation, many courts have been unafraid to apply *T.L.O.* to cases with significant police involvement.

Although the *Dilworth* court's case categories are helpful, most school search-and-seizure cases boil down to the issue of whether the school administration or the police department directed the investigation.[153] Two cases in which police tipped the school to the possibility of evidence of criminal conduct within the school illustrate the courts' struggle with this issue.[154] In *In re P.E.A.*, an officer alerted the principal that two students might have possessed marijuana.[155] The principal asked the officer to remain at school while he investigated.[156] After the principal and school security officer conducted a fruitless search of the two students in question, they asked them how they came to school.[157] One of the two students said that the other was driven to school by P.E.A.[158] They pulled P.E.A. out of class and confirmed that he drove to school.[159] They then took his keys, seized him physically, brought him to the parking lot, and searched his car over his objection.[160] The Supreme Court of Colorado held that since the officer "did not request or in any way participate in the searches or interrogations of the students," the search did not "establish that the principal and security officer acted as police agents."[161] The court therefore analyzed the search under the *T.L.O.* standard of reasonableness and determined that since P.E.A. drove one of the students implicated in the

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[151] *T.L.O.*, 469 U.S. at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)) (internal quotation marks and citation omitted).

[152] *Id.* at 331.

[153] 661 N.E.2d 310, 317 (Ill. 1996); *see supra* notes 80-86 and accompanying text.

[154] *In Re* P.E.A., 754 P.2d 382 (Colo. 1988) (allowing a search of a student's car by school officials based on a tip from police); F.P. v. State, 528 So. 2d 1253 (Fla. 1988) (holding that searches at the behest of police require normal Fourth Amendment protections).

[155] 754 P.2d at 384 (noting that neither of the students implicated was P.E.A.).

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* The school's policy was to contact parents prior to searching a car when students refused to consent to a search. The court did not comment on the lack of consent.

[161] *Id.* at 385.

officer's tip to school, there were reasonable grounds to search P.E.A.'s car.[162]

Importantly, the court found that no agency existed despite the fact that the officer in question supplied the information "with the intent of initiating the search."[163] It held so even though its own stated rationale for agency was that the "agency rule prevents police from circumventing the [F]ourth [A]mendment by having a private individual conduct a search or make a seizure that would be unlawful if performed by the police themselves."[164] It is hard to envision what the officer was doing other than "circumventing the [F]ourth [A]mendment" by having the school officials conduct the search.[165]

Conversely, under similar circumstances, the court in *F.P. v. State* ruled that the school officials were acting as agents of the police.[166] Once again, police had alerted school officials to a possible robbery.[167] The school official, an SRO, interviewed the student involved, who produced papers and car keys for a rental car that he planned to steal later.[168] The SRO then turned over the student to the officer.[169] This time, however, the court held that "the fact that [the SRO] acted at the behest of a police officer requires the State to prove either that appellant consented to the search or that there existed probable cause to believe that appellant had violated the law and had in his possession evidence of that violation."[170]

These cases are in direct opposition to each other on similar fact patterns. It is worth noting that both cases involved SROs, and therefore the bright-line rule suggested in this Comment—that all officers be considered police officers for the purpose of questioning and searches and seizures—would solve the dilemma in these cases.[171] In *P.E.A.*, the involvement of the SRO in the search process would have required probable cause for a search, putting the student on notice that he was under a criminal investigation and not merely a school disciplinary matter. In *F.P.*, the SRO clearly would have known that he needed to give a *Miranda* warning, rather than needing to guess as to whether he was an agent of the

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[162] *Id.* at 386.

[163] *Id.* at 385.

[164] *Id.* (citing People v. Chastain, 733 P.2d 1206, 1214 (Colo. 1987)).

[165] *Id.*

[166] 528 So. 2d. 1253 (Fla. 1988).

[167] *Id.* at 1254.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1255.

[171] *Id.* at 1254; *In re* P.E.A., 754 P.2d 382, 384 (Colo. 1988).

police; he thus would not have missed the opportunity to address a criminal problem within the school.

IV. THE STATUS OF OFFICERS IN CURRENT CASE LAW

The converse to the question of whether school officials are agents of the local police is the question of whether police officers can, or do, operate as school employees. Courts are split. This Part will survey the cases that address this question. Courts generally hold either (1) that the SROs are themselves school employees, and therefore are neither subject to the requirement to give *Miranda* warnings during interrogations, nor to the probable cause standard for searches and seizures, or (2) that SROs are police officers, and therefore subject to the same strictures as any officer would be.

Although it does not address the issue of SROs, since the *Dilworth* court relies on the Supreme Court's decision in *Vernonia School District 47J v. Acton*,[172] a brief outline of the case is helpful. In *Vernonia*, the Acton family challenged a drug testing program established for participants in athletics, after their seventh grade son was not allowed to participate on the football team because he and his parents refused to consent to the drug testing.[173] The Court held that the drug testing program was constitutional.[174] The most severe consequence for failed drug tests was a ban from future athletic participation.[175] In finding the program constitutional, the Court first reasoned that since participation in athletics is voluntary, student athletes "have reason to expect intrusions upon normal rights and privileges, including privacy."[176] Second, the Court thought the privacy invasion resulting from urinalysis was "not significant."[177] Third, the Court held that combating drug use was a compelling interest.[178] Significantly there were no criminal consequences to failed drug tests, tests only applied to students who chose to be involved in athletics, and the consequences were all relevant to that activity only.[179]

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[172] 515 U.S. 646 (1995).

[173] *Id.* at 652.

[174] *Id.* at 666 (Ginsburg, J., concurring).

[175] *Id.* at 650.

[176] *Id.* at 657.

[177] *Id.* at 660.

[178] *Id.* at 663.

[179] *Id.* at 666 (Ginsburg, J., concurring).

A. JURISDICTIONS THAT HOLD THAT SROS AND POLICE OFFICERS IN ARE OPERATING AS SCHOOL EMPLOYEES AND THEREFORE DO NOT NEED TO ISSUE *MIRANDA* WARNINGS

Several jurisdictions have ruled that SROs are school employees. For example, in *Farmer v. State*, the assistant principal, one Mr. Damron, found Farmer in the boys' room near a window, surrounded by twelve to fifteen boys.[180] Damron attempted to search Farmer, and a struggle ensued.[181] Although Damron thought he saw a marijuana cigarette in Farmer's pocket, when he searched the student in the principal's office, he found no marijuana.[182] The assistant principal then called a police officer to the school.[183] The officer, who did not believe there was probable cause for a marijuana arrest, recommended arrest for assault. The officer then conducted a strip search of Farmer and found two packages of hand-rolled cigarettes in Farmer's underwear.[184] The court ruled that the strip search was legal, despite the admitted lack of probable cause, since the officer was "present only because he was invited by school officials."[185] Therefore, the court held "the conclusion is irresistible that the officer was acting as an extension of an arm of school discipline at the time of the search."[186]

Two factors are worth noting in this decision. First, the officer was not an SRO, but instead an actual police officer on duty as an officer of the law. It is safe to assume, *a fortiori*, that this court would apply the same rationale to an SRO.[187] Second, the court did not have to rule on this issue at all, as it could have easily upheld the search on other grounds—either because probable cause did exist, or because the search occurred after the arrest for assault.[188] The court clearly wanted to be on the side of school discipline.

Illinois has addressed the issue of SROs specifically.[189] In *Dilworth*, the school in question was an alternative school for students with behavioral disorders.[190] At the request of teachers, Ruettiger, an SRO, searched a different student earlier for drugs, and found none.[191] Ruettiger then saw Dilworth with the other student, apparently mocking him, and holding a

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[180] 275 S.E.2d 774, 775 (Ga. 1980).
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.* at 776.
[186] *Id.*
[187] *Id.* at 775.
[188] *Id.* at 776. In fact, the court did rule on both of these issues as well. *Id.*
[189] People v. Dilworth, 661 N.E.2d 310 (Ill. 1996).
[190] *Id.* at 312.
[191] *Id.* at 313.

flashlight.[192] Ruettiger, who intuited that the drugs were hidden in the flashlight, immediately seized and searched it, finding cocaine.[193] In his testimony, Ruettiger stated he thought that flashlights were banned items at the school (under a policy banning anything which could be used as a weapon), although he conceded that it could not be considered "contraband *per se*."[194] The trial court denied the defendant's motion to suppress the evidence, but the Illinois Appellate Court overturned and granted the motion.[195]

Appealing to the Illinois Supreme Court, the State advanced two reasons for reversing the appellate decision: "(1) Ruettiger properly seized the flashlight as contraband because defendant's possession . . . violated the school's disciplinary guidelines; and (2) Ruettiger had reasonable suspicion, as well as probable cause if required, to seize and search the flashlight."[196] The court noted that the United States Supreme Court, in *T.L.O.*, had stated that reasonableness applies "to a search of a student 'by a teacher or other school official,'" but had not commented on the status of SROs within schools.[197] Examining post-*T.L.O.* decisions, the court found the weight of authority to be in favor of treating SROs at school employees.[198] The court characterized the search as a "liaison police officer conducting a search on his *own* initiative and authority."[199] However, as the search was "in furtherance of the school's attempt to maintain a proper educational environment," the court then held that "the reasonable suspicion standard applie[d]" and overturned the appellate decision.[200] The court noted that it was consistent with prior precedent; however, that precedent involved outside officers acting at the behest of the school.[201] Interestingly, the court

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[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 314.

[196] *Id.*

[197] *Id.* at 316 (internal citation omitted).

[198] *Id.* at 317 (citing *In re S.F.*, 607 A.2d 793, 794 (Pa. Super. Ct. 1992), and *Wilcher v. State*, 876 S.W.2d 466, 467 (Tex. Ct. App. 1994), as in favor of this treatment, but acknowledging that the court in *A.J.M. v. State*, 617 So. 2d 1137 (Fla. Dist. Ct. App. 1993), thought differently).

[199] *Id.* (emphasis added). The court could have held that this was merely an extension of the prior search, which was "at the behest of" the school officials. *Id.* at 316 (citing T.L.O, 469 U.S. 325, 341 n.7 (1985)).

[200] *Id.*

[201] *Id.* In *In re Boykin*, the Illinois Supreme Court upheld the "reasonableness" standard in the search of a student by outside police officers at the behest of the school administration. 237 N.E.2d 460, 464 (Ill. 1968).

does not ever state outright that SROs are school employees; it only criticizes the opinion that their only role is a law-and-order function.[202]

The court stated that its holding was consistent with the three-pronged test for reasonableness enunciated in *Vernonia*: "(1) the nature of the privacy interest upon which the search intrudes, (2) the character of the search, and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means for meeting it."[203] Regarding the first factor, the court notes that school children have a reduced privacy interest, because of "schools' custodial and tutelary responsibility for children."[204] Further, since Ruettiger "had an *individualized* suspicion" regarding Dilworth's flashlight, the search was "minimally intrusive."[205] Finally, "the State has a compelling interest in . . . maintaining its schools free from the ravages of drugs."[206] In rebuking the dissent, the Court claimed that the primary rationale for the *T.L.O.* and *Vernonia* decisions "was *to protect and maintain a proper educational environment for all students*," and therefore that the dissent had missed the main issue.[207] Yet, as the *Dilworth* court noted, the case law is hardly unanimous on this point.[208]

B. JURISDICTIONS THAT HOLD THAT OFFICERS ARE OFFICERS OF THE LAW EVEN IN SCHOOLS

Though the post-*T.L.O.* cases analyzed above nibbled at the edges of the issue, there is a pre-*T.L.O.* case that addresses SROs directly.[209] In *People v. Bowers*, an appellate court in New York held that the SRO was a "law enforcement officer and should not be equated with a teacher."[210] The defendant had been initially detained, in school, on suspicion of robbery,

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[202] *Dilworth*, 661 N.E.2d at 317 (noting that Ruettiger was "handling both criminal activity and disciplinary problems").

[203] *Id.* (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995)).

[204] *Id.* (quoting *Vernonia*, 515 U.S. at 656).

[205] *Id.*

[206] *Id.*

[207] *Id.* at 319. The dissent distinguished between officers employed by the police and those employed by the school district. *Id.* at 322 (Nickels, J., dissenting). Since Ruetigger was employed by the police, the dissent stated that probable cause must apply. *Id.* It is hardly apparent that students would have any idea which school officer is hired by police and which by the school district. For that reason, I agree with the majority that this is a distinction without meaning. *Id.* at 320 (majority opinion).

[208] *Id.* at 317 (citing *In re S.F.*, 607 A. 2d 793, 794 (Pa. 1992) and *Wilcher v. State*, 876 S.W.2d 466, 467 (Tex. Ct. App. 1993) for support, but acknowledging that the court disagreed in *A.J.M. v. State*, 617 So.2d 1137 (Fla. Dist. Ct. App. 1993)).

[209] People v. Bowers, 356 N.Y.S.2d 432 (App. Div. 1974).

[210] *Id.* at 435.

because his jacket matched the description given by the victim.[211] But the victim told the SRO that the defendant was not the perpetrator prior to any questioning regarding the theft.[212] As the student was dismissed from the school office, the SRO noticed a manila envelope in the student's pocket, requested to inspect the envelope, and found marijuana inside.[213]

The court held that the evidence was properly excluded, and in so doing noted that at minimum, the officer was a "governmental agent," having the "authority of a peace officer," and was responsible to the "Police Commissioner."[214] The court cited a prior New York appellate case, in which a security officer at a hospital was also required to act "only on probable cause."[215] In so doing, the court makes a powerful and persuasive argument:

> It is, in fact, cynical to hold that the Fourth Amendment protections apply to searches by police officers but not to other agents of the city who are required to perform like governmental functions and clothed with the color of authority to make arrests. The government may not appoint agents to perform governmental functions, as here, and at the same time claim that they are immune from constitutional restrictions placed upon governmental authority.[216]

C. JURISDICTIONS WITH AMBIGUOUS LAW ON THE STATUS OF SROS

Some jurisdictions have had cases with fact patterns conducive to deciding the status of SROs, but have either punted, or left opinions so muddled by multiple concurrences that the law remains unclear. The Florida court avoided the issue in *A.J.M.*, in which the SRO on staff at a Florida middle school, Officer William Massey, searched a group of students at the request of the principal.[217] A.J.M., who was in the office at the time of the request, jumped up and ran away from the office.[218] Massey caught him and found cocaine in his possession.[219] The court noted that under *T.L.O.*, "school officials do not need probable cause to justify a search"; rather, "reasonableness" is the appropriate standard.[220]

However, "the Supreme Court specifically noted that it was considering only those searches carried out by school officials acting alone

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[211] *Id.* at 433.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] A.J.M. v. State, 617 So.2d 1137, 1137 (Fla. Dist. Ct. App. 1993)
[218] *Id.* at 1137-38.
[219] *Id.* at 1138.
[220] *Id.*

and on their own authority" and it was not addressing searches "*in conjunction with* or at the behest of the police."[221] Under the Florida court's own precedent, "Where a law enforcement officer directs, participates[,] or acquiesces in a search conducted by private parties, that search must comport with usual constitutional standards."[222] Therefore, since the officer conducted the actual search, the "appropriate test" for the validity of the search was probable cause.[223] As there was no evidence regarding probable cause, it was remanded for the granting of the motion to suppress.[224]

While the court clearly treated Officer Massey as law enforcement, it did not address the question of why SROs should be considered law enforcement. On this issue, the court merely noted that "the state did not argue that the [SRO] was not an officer for the purpose of applying the probable cause standard."[225] Though the issue had been raised in a prior case, "it was not resolved since that was unnecessary in light of the court's holding."[226] What then to make of this holding? On the one hand, the court appears to be taking a pass on the issue. On the other hand, if the court felt the SRO were a school official needing only reasonable suspicion, it is not clear that the omission on the part of the state would prevent that.

Florida is a model of clarity, however, in comparison to the divided court in Pennsylvania.[227] The Pennsylvania criminal case involved vandalism to a classroom in which the perpetrator left a footprint indicating someone of "small stature."[228] The SROs chose to interrogate R.H. because he had class in that room, was of "small stature," and had a prior history of bad behavior.[229] Once the SROs located R.H., they asked for his shoe, matched it to the print, and refused to return the shoe while interrogating him for twenty-five minutes.[230] He was not given *Miranda* warnings, and during his interrogation, he confessed to the crime.[231] In his motion to suppress the evidence from his interrogation, R.H. claimed that "school

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[221] *Id.*

[222] *Id.* (quoting M.J. v. State, 399 So. 2d 996, 998 (Fla. Dist. Ct. App. 1981)).

[223] *Id.*

[224] *Id.*

[225] *Id.* n.1.

[226] *Id.*

[227] *See In re* R.H., 791 A.2d 331 (Pa. 2002) (plurality opinion).

[228] *Id.* at 332.

[229] *Id.*

[230] *Id.* Of course, a *Miranda* warning is only required when there is a "custodial interrogation." *Id.* at 332 n.1 (citation omitted). The court makes much of describing the holding of the shoe as a "custodial interrogation," *id.* at 333-34, but that issue is outside the scope of this Comment.

[231] *Id.* at 332.

police are constitutionally indistinguishable from municipal police because they are permitted to exercise the same powers as the municipal police . . . ."[232]

After hearing the appeal, the seven members of the Supreme Court of Pennsylvania issued five opinions, none of which garnered even two votes.[233] The motion to suppress garnered a plurality, but there was not even a plurality on the issue of whether an SRO should be considered an officer of the law.[234] The lead opinion, authored by Justice Nigro, stated that although "school police officers . . . were employees of the school district, they were . . . explicitly authorized to exercise the same powers as municipal police on school property."[235] Further, they were in uniform with badges.[236] Finally, the interrogation led to criminal charge—"not [merely] punishment by school officials pursuant to school rules."[237] Therefore, Justice Nigro stated that the SROs were "were 'law enforcement officers' within the purview of *Miranda*."[238]

The first concurrence, by Justice Newman, objected to the "creation of a *per se* rule requiring *Miranda* warnings whenever a student is questioned by police on school grounds."[239] Rather, the determination of whether *Miranda* warnings were necessary would be made through a balancing test to determine whether "the constitutional interests of the student outweigh the interest of the school in solving the crime."[240] This test would have five factors: (1) the student's age, (2) the student's ability to understand *Miranda* warnings, (3) the seriousness of the offense, (4) the prospect of criminal proceedings, and (5) the coerciveness of the environment during questioning.[241] This calculation would, in some cases, even require school principals and teachers to Mirandize students in investigations initiated by the school.[242]

The second concurrence, written by Justice Saylor, also expressed misgivings about the *per se* rule announced in the lead opinion.[243]

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[232] *Id.* at 333.

[233] *Id.* at 335 (noting that the other two justices did not participate in the decision).

[234] *See id.* For a more thorough dissection of these opinions, see Holland, *supra* note 77, at 45.

[235] *In re R.H.*, 791 A.2d at 334.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.* at 346 (Newman, J., concurring).

[240] *Id.* at 348.

[241] *Id.*

[242] *See id.* at 348-49. As a former middle school dean, I can only say that the job is hard enough as it is, without adding a five-factor legal test to disciplinary procedures.

[243] *Id.* at 349 (Saylor, J., concurring).

However, Justice Saylor opined that the involvement of "uniformed school police officers" creates a "significant change in dynamics in encounters" with students.[244] Under an analysis of the "totality" of the particular facts in this case, *Miranda* warnings were required.[245] However, Justice Saylor gave no guidelines for determining which factors are more important, or even which factors must be considered in analyzing specific cases.[246]

Both dissents argued "that there is no distinction between school police officers and other school staff for *Miranda* purposes."[247] Their dispute was over the issue of whether a custodial interrogation occurred, which the second dissent decided to take up,[248] even though it was not an issue before the court.[249]

V. THE CLARIFICATION OF THE ROLE OF SCHOOL SECURITY OFFICERS ON CAMPUS WILL BRING CLARITY TO SCHOOL EVIDENTIARY QUESTIONS

A. THE PROPOSED NEW RULE

Fundamentally, the question in the background of all of these issues is whether the actors, be they school officials or school security officers, act as school employees or as police officers. These questions would be resolved with a bright-line rule establishing that police officers are police officers at all times, whether acting at the behest of the police department or the school, and whether they are SROs or outside police officers on campus for a specific crime. Therefore, officers and SROs would always have to follow standard police protocol for interrogations and searches. This rule has the benefit of clarity for all involved.

Officers will benefit because their role within the school, and the standard of whether they must give *Miranda* warnings to students, or if they can pursue searches based merely on reasonable suspicion, will be clear. Being held to a consistent standard will help officers make the type of split-second decisions often required in-school disciplinary actions.

School officials will also benefit from clear guidelines. There would be no reason to involve SROs in ordinary disciplinary matters under such a scheme. With clear roles, administrators would have the ability to demonstrate discretion for marginal behavior, treating it as a criminal matter only when necessary.

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[244] *Id.* at 350.

[245] *Id.*

[246] *See id.* at 349-50.

[247] *Id.* at 335 (Cappy, J., dissenting); *see id.* at 341 (Castille, J., dissenting).

[248] *See id.* at 337 (Cappy, J., dissenting).

[249] *See id.* (noting that both parties agreed that custodial interrogation took place).

Finally, students will benefit both directly and indirectly. Students will benefit directly from the clarity of the rule because they will know that when they speak to an officer within school, they must treat that conversation the same as they would at a police station. It should not be forgotten that the very demographic that is directly affected by this confusing jumble of evidentiary law is the least sophisticated demographic that interacts with police on a regular basis. This sad irony is reflected in a number of the cases above, in which students freely confessed during in-school interrogations only to face significant legal consequences as a result.

Students may benefit indirectly if a bright-line between schools and police causes school administrators to think carefully before involving the police in the disciplining of minor infractions. This may help restore proper balance to school discipline procedures, so that only truly criminal behavior is treated criminally. None of this would impact the ability of schools to respond swiftly and decisively to disciplinary matters; school administrators would not have these constraints, and therefore could continue to rely on reasonable suspicion standards.

B. LEGAL SUPPORT FOR A BRIGHT-LINE RULE

As noted above in several of the decisions discussed, the Court in *T.L.O.* was careful to note that it was considering "only searches carried out by school authorities acting alone and on their own authority."[250] To try and graft *T.L.O.* onto analysis of the role of SROs is inappropriate. Therefore, this issue is best analyzed *de novo*. Several cases support the logic of treating these officers as SROs.

First, there are a number of cases in which the Court has required governmental actors who were not police to follow Fourth Amendment search and seizure protocols. These are enumerated in the *T.L.O.* decision:

> Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967), Occupational Safety and Health Act inspectors, see *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312-313 (1978), and even firemen entering privately owned premises to battle a fire, see *Michigan* v. *Tyler*, 436 U.S. 499, 506 (1978), are all subject to the restraints imposed by the Fourth Amendment.[251]

Given the remainder of the *T.L.O.* analysis, it seems that school officials themselves are only exempt from these requirements because of the countervailing policy of a school's "legitimate need to maintain an environment in which learning can take place[.]"[252]

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[250] New Jersey v. T.L.O., 469 U.S. 325, 341 n.7 (1985).

[251] *Id.* at 335.

[252] *Id.* at 340.

Further, the warrantless searches upheld in *Vernonia* had no criminal sanctions.[253] This limited application and the tailored nature of the search (only athletes, a self-selecting group, were subject) were the reasons the Court upheld the practice.[254] As the Court stated in *Tinker v. Des Moines Independent Community School District*, students do not lose their constitutional rights when they walk through "the schoolhouse gate."[255]

Opponents may argue that the interest in maintaining safe schools is important enough that all government officials acting in schools should be able to operate on reasonable suspicion: administrators, teachers, and police. There are two objections to this. First, it is not clear that this policy makes schools materially safer, and the burden ought to be on those who want to infringe on the rights of students to show that the infringement is achieving some higher goal.[256] Second, the Court has recently disallowed intrusive searches in which a similar policy goal was at stake.[257] In *Ferguson v. City of Charleston*, the hospital instituted a drug testing program due to the prevalence of cocaine use among pregnant mothers at their hospital.[258] These results were then turned over to the police, who used them to coerce the mothers into treatment.[259] What bothered the Court most is that the policy "was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police."[260] The hospital attempted to argue that the real purpose was to direct women to treatment and save their fetuses from harm when they used cocaine.[261] That is a persuasive goal, but the problem was that the plan really accomplished something else.

That is precisely the issue with SROs. They come with an admirable goal—to help maintain a safe and secure learning environment. However, in reality they merely help grease the wheels of the criminal justice system, even when it comes at the expense of a child.

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[253] *See generally* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). There were no criminal sanctions even though the behavior discovered was, in fact, criminal. This is a rare instance in recent cases in which schools have tried to educate and provide resources for students using drugs, rather than treating it purely as a law and order issue.

[254] *Id.* at 662.

[255] 393 U.S. 503, 506 (1969).

[256] *See generally* SKIBA, *supra* note 18, at 7-10 (discussing the effectiveness of zero-tolerance policies).

[257] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[258] *Id.* at 70.

[259] *Id.* at 71-72.

[260] *Id.* at 86.

[261] *Id.* at 81.

VI. CONCLUSION

The last twenty years have been characterized by an increase in harsh discipline measures in schools, such as suspensions and expulsions, zero-tolerance policies, increased police presence, and even criminal treatment of actions that used to be handled as school disciplinary matters only. These policy decisions have increased the frequency of juvenile interaction with the law, creating the school-to-prison pipeline. Though the factors are many, one key piece of the puzzle is the ambiguous status of police officers in schools, particularly school resource officers. The time has come to treat police interaction with students uniformly, whether in school or out, and whether the officer is acting on police initiative, or at the behest of schools. This bright line rule has the benefit of clarity for all stakeholders, students, administrators, police, and parents, and will therefore have the effect of increased fairness in school disciplinary enforcement.