FROM THE CLASSROOM TO THE COURTROOM: REASSESSING FOURTH AMENDMENT STANDARDS IN PUBLIC SCHOOL SEARCHES INVOLVING LAW ENFORCEMENT AUTHORITIES

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I. INTRODUCTION

The past several years have witnessed an increased and heightened law enforcement presence in and on the grounds of our nation's public schools, as well as a related coalescence amongst school officials and law enforcement authorities. These measures constitute key elements of the intensified focus within the past decade on school safety issues and are the legacy of tragic and highly publicized eruptions of violence on school grounds.[1] As a result of these episodes, as well as lesser known

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1. *See, e.g.*, Reece L. Peterson et al., *School Violence Prevention: Current Status and Policy Recommendations*, 23 LAW & POL'Y 345, 345 (2001) (stating that well-known incidents have caused educators to enact programs seeking to deter and prevent violence in schools); Nancy D. Brener, et al., *Recent Trends in Violence-Related Behaviors Among High School Students in the United States*, 282 JAMA 440, 440 (1999) (stating that "recent multiple-victim, school-associated violent deaths have focused national attention on what can be done to prevent violence in schools"). Perhaps the most well-known of these incidents occurred at Columbine High School in Littleton, Colorado, where two students killed fourteen other students and two teachers. *See* Mark Obmascik, *High School Massacre Columbine Bloodbath Leaves up to 25 Dead*, DENVER POST, Apr. 21, 1999, at A01; James Barron, *Terror in Littleton: The Dead*, N.Y. TIMES, Apr. 22, 1999, at A26; BOWLING FOR COLUMBINE (Dog Eat Dog Films 2002).

incidents, public schools across the country have adopted assorted security measures[2] to enhance the safety and integrity of the school setting.

Law enforcement personnel are stationed in schools through a variety of programs and arrangements between school officials and law enforcement authorities. For instance, some schools participate in the School Resource Officer program, a national program that places police officers in schools to perform various duties, including traditional law enforcement functions.[3] Independent of this program, officers are placed in some other schools through liaison programs between public schools and local police departments. Perhaps the most formal of these programs exists in New York City. The New York City Police Department has been primarily responsible for school security since 1998, when it assumed control from the New York City Board of Education.[4] Lastly, outside of physically placing officers in public schools, some states,[5] cities and school districts[6] have forged interdependent relationships between school officials and local police departments.

While issues emanating from the various security measures merit extensive analysis,[7] this Article will focus on the role of law enforcement personnel[8] in public

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2. *See, e.g.*, GORDON A. CREWS & JEFFREY A. TIPTON, KOCH CRIME INST., A COMPARISON OF PUBLIC SCHOOL AND PRISON SECURITY MEASURES: TOO MUCH OF A GOOD THING? (Aug. 2002) (stating that schools have increased physical security following highly publicized tragedies such as Columbine), *available at* http://www.kci.org/publication/articles/school_security_measures.htm. Such measures include the placement of metal detectors in certain public schools as well as the implementation of rigorous search protocols, including strip searches, locker searches and drug testing. All of these measures have been vigorously debated, and some have resulted in lawsuits. *See, e.g.*, Tamar Lewin, *Drug Dogs Sniff Even 6-Year Olds; Parents Sue*, N.Y. TIMES, July 26, 2002, at A19 (reporting lawsuit filed against a South Dakota school board and police department stemming from sniff searches conducted on all students by a police canine).

3. The School Resource Officer program is explained in more detail *infra* Part III.

4. *See* Randal C. Archibold, *Schools in Deal to Let Police Run Security*, N.Y. TIMES, Aug. 29, 1998, at B1.

5. *See generally* Ronald Susswein, *The New Jersey School Search Policy Manual: Striking the Balance of Students' Rights of Privacy and Security After the Columbine Tragedy*, 34 NEW ENG. L. REV. 527 (2000) (describing cooperative statewide effort of New Jersey school officials and law enforcement authorities to address school safety issues).

6. *See, e.g.*, *In re* Randy G., 26 Cal. 4th 556, 563 (2001) (stating that California permits each local school district to establish a police or security department to enforce the rules governing student conduct) (citing CAL. EDUC. CODE § 38000 (2001)).

7. Commentators have written about various search measures implemented in school settings. *See, e.g.*, Rebecca N. Cordero, Comment, *No Expectation of Privacy: Should School Officials Be Able to Search Students' Lockers Without Any Suspicion of Wrong Doing? A Study of In Re* Patrick Y. *and Its Effect on Maryland Public School Students*, 31 U. BALT. L. REV. 305 (2002) (criticizing Court of Appeals of Maryland decision holding that school officials may conduct suspicionless searches of school lockers, and arguing that school administrators should possess reasonable suspicion before conducting such searches). *See generally* George M. Dery, III, *Are Politicians More Deserving of Privacy than Schoolchildren?: How* Chandler v. Miller *Exposed the Absurdities of the Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73 (1998); Sunil H. Mansukhani, *School Searches After* New Jersey v. T.L.O.*: Are there Any Limits*, 34 U. LOUISVILLE J. FAM. L. 345 (1995–96); Michael A. Sprow, *The High Price of Safety: May Public Schools Institute a Policy*

schools, both as it relates to the protections afforded by the Fourth Amendment,[9] as well as to broader implications that transcend constitutional protections. The reasons for this focus are four-fold: First, the goals that underlay the placement of law enforcement officers in public schools have not been clearly articulated. Therefore, many courts tend to interchange the roles of law enforcement officers and school officials when analyzing Fourth Amendment issues resulting from searches conducted in public schools or on school grounds. Second, in large part due to this role transference, Fourth Amendment jurisprudence pertaining to law enforcement involvement in these searches has *undervalued* the manner and extent to which law enforcement personnel are involved in student searches. Third, the blending of these roles and the resultant case law are particularly potent because the placement of law enforcement personnel in public schools has contributed to the increased use of the juvenile and criminal justice systems to handle problems and issues that had once been resolved through school disciplinary processes. Fourth, increasingly interdependent relationships between school officials and law enforcement authorities, coupled with the proliferation of zero tolerance policies[10] in public schools, has led to the increased criminalization of youth behavior.

No court has addressed the various converging issues discussed in this Article—the deepening interconnection between school officials and law enforcement officials, the proliferation of zero tolerance policies and the effects of these policies on behavioral interpretations—when analyzing the Fourth Amendment issues stemming from a particular search. This Article aims to mesh the longstanding principles of the Fourth Amendment with the increased law enforcement presence in many of our nation's public schools, 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, some of which had previously been handled through school disciplinary processes.

Part II of this Article analyzes the constitutional underpinnings of the Fourth Amendment's application to public school student searches through an explication of *New Jersey v. T.L.O.*,[11] which established that school officials must possess reasonable suspicion to search students, but left open a number of questions pertaining to the application of the Fourth Amendment in public schools, including the level of suspicion that school officials must meet when they act "in conjunction with or at the

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of Frisking Students as They Enter the Building?, 54 BAYLOR L. REV. 133 (2002); Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens*, 1999 BYU EDUC. & L.J. 25 (1999).

8. For purposes of this Article, law enforcement personnel are comprised of security personnel who are directly employed by, or under the auspices of, state, city, county or municipal law enforcement agencies. Such personnel do not include employees, such as security guards, who are employed directly by, and therefore report solely to, their respective school districts.

9. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

10. Zero tolerance polices are discussed *infra* Part IV-B-2.

11. 469 U.S. 325 (1985).

behest of law enforcement agencies."[12] Part III describes the increased interdependence between school officials and law enforcement authorities in the years following *T.L.O.*, and examines lower federal and state court cases that have explored the relationships between law enforcement personnel and school officials in determining the legality of searches that have led to criminal prosecutions. Part IV critiques the standards these courts utilize to assess the extent to which law enforcement personnel are involved in student searches. It also explores the policy implications of these decisions in light of flourishing zero tolerance policies and the disproportionate effect these various implications have had on African-American and Latino/a students. Part V suggests some Fourth Amendment standards to employ when law enforcement authorities participate in school searches, either through their actual physical involvement or through policies which transfer discretion from school officials to law enforcement authorities by mandating that the former report indicia of wide-ranging criminal activity to the latter, who then have the discretion to implement the criminal justice system's processes. It will also anticipate and respond to potential critiques of the proposed standards.

The Article concludes that the current standards which govern the Fourth Amendment's application in public school searches need to be revamped in light of the increased interdependency[13] between school officials and law enforcement authorities in the years following *New Jersey v. T.L.O.* This convergence has greatly altered the methodologies and philosophies of school discipline processes. Most significantly, it has led to increased use of the juvenile and criminal justice systems to monitor and punish a broadened array of student conduct. As a result, there is a widening gulf between the more expansive use of law enforcement personnel in school discipline, along with the broadened categories of behaviors that could potentially introduce students to the criminal justice system, and the narrow (and narrowing) protections afforded students under the Fourth Amendment.

Therefore, this Article recommends that the more protective probable cause standard govern whenever law enforcement authorities are involved in student searches, whether through their physical presence during the search or through policies which require school officials to turn over evidence of *any* criminal violation to the authorities. In addition, the probable cause standard should govern those situations where school officials conduct searches on their own for the purpose of discovering evidence of criminal activity. Conversely, the reasonable suspicion standard should apply in those instances where a school official, without law enforcement involvement, believes a student to have violated a school rule that does not impose independent criminal liability.[14]

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12. *Id.* at 342 n.7.

13. The various adjectives used herein to describe the merged relationships between law enforcement authorities and school officials have related meanings, as this Article attempts to explain the range of cooperation between these entities and how the *range* of cooperation in various scenarios may result in different Fourth Amendment analyses.

14. As set forth *infra* Part V, the reasonable suspicion standard would not prevent school officials from turning over to law enforcement authorities evidence of criminal activity that was discovered inadvertently during a search seeking evidence of a school rule violation.

II. THE GENESIS—*NEW JERSEY V. T.L.O.*

The Supreme Court first pronounced school administrators to be state actors in *West Virginia State Board of Education v. Barnette*.[15] Not until over forty years later, in *New Jersey v. T.L.O.*,[16] did the Court consider whether school officials' status as state actors carried over to the Fourth Amendment, and therefore whether the Fourth Amendment both shaped and constrained their ability to search public school students.[17] During the interim, the Supreme Court extended to students various constitutional rights, most notably freedom of speech[18] and the due process rights to notice of charges and a hearing when faced with a "short" suspension from school.[19]

In *T.L.O.*, a teacher at a New Jersey high school claimed to have found two female students, one of whom was T.L.O., smoking in a bathroom.[20] Because smoking in the bathroom violated a school rule, the students were brought to the principal's office, where they met with an assistant vice-principal.[21] In response to the assistant vice-principal's questioning, the student who was with T.L.O. admitted to smoking.[22] However, T.L.O. denied smoking in the bathroom and, in fact, denied that she smoked altogether. The assistant vice-principal then searched T.L.O.'s purse and found a pack of cigarettes, as well as cigarette rolling papers. Believing the rolling papers to be associated with marijuana use, he conducted a more thorough search of the entire purse. The extensive search uncovered various indicia of both drug usage and selling, including marijuana, a pipe, numerous empty plastic bags, a substantial number of one-dollar bills, an index card revealing the names of students who apparently owed T.L.O. money, and two letters that implicated T.L.O. in marijuana sales.[23]

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15. 319 U.S. 624, 637, 641 (1943) (striking down, as violative of the First Amendment, a West Virginia State Board of Education resolution requiring all teachers and students to salute the American flag).

16. 469 U.S. 325.

17. For an articulation of the history of search and seizure law in public schools, see Stefkovich & Miller, *supra* note 7, at 26–27 (stating that neither courts nor society considered school searches to be an issue until the 1960s, when more harmful contraband began to be seized during the searches). For a discussion of lower court cases that preceded *T.L.O.*, see Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU EDUC. & L.J. 71, 93–95 (1999); Dale Edward F.T. Zane, Note, *School Searches Under the Fourth Amendment:* New Jersey v. T.L.O., 72 CORNELL L. REV. 368, 376–80 (1987).

18. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

19. Goss v. Lopez, 419 U.S. 565, 581 (1975). The Court stated that suspensions longer than ten days or expulsions "may require more formal procedures." *Id.* at 585.

20. *T.L.O.*, 469 U.S. at 328. The brief factual recitation herein is extracted directly from the Supreme Court's opinion in *T.L.O.* Accordingly, it does not reflect all of the arguments and strategies presented during the various proceedings, nor does it fully consider the full breadth of the stories and histories which led to the litigation. *See, e.g.*, Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1733–34 (1993) (explaining the gulf between legal interpretation and social reality, partly by noting that facts as interpreted and memorialized by appellate courts often differ from the actual experiences of the parties).

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

22. *Id.*

23. *Id.*

The assistant vice-principal turned this evidence over to law enforcement authorities. T.L.O. subsequently confessed that she sold marijuana at the school[24] and was prosecuted in juvenile court.[25] There, T.L.O. moved to suppress both the evidence found in her purse, claiming that it was seized in violation of the Fourth Amendment, as well as her confession, claiming that it was tainted by the illegal search.[26]

The Supreme Court, in the context of the facts presented, "address[ed] only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case."[27] Before reaching those issues, however, the Court first had to determine whether the Fourth Amendment even applied to searches conducted by public school officials.[28] The Court concluded that it did, and further held that the Fourth Amendment's prohibitions against unreasonable searches and seizures applied to the states through the Fourteenth Amendment in this context,[29] and that the Fourteenth Amendment protected the rights of students from the unlawful actions of public school officials.[30]

Next, to determine what Fourth Amendment standard school officials must meet to lawfully search students, the Court weighed the students' privacy interests against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[31] The Court found that the unique public school setting called for relaxation of the search standards to which public

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24. *Id.* at 328–29.

25. *Id.* at 329.

26. *Id.* The Juvenile Court denied T.L.O.'s motion to suppress, finding that the school official's search was reasonable because it was justified by his well-founded suspicion that T.L.O. was smoking. *Id.*

27. *Id.* at 327. The Court originally granted certiorari to determine the applicability of the exclusionary rule in juvenile court proceedings as a remedy for searches conducted by public school authorities in violation of the Fourth Amendment. *Id.* at 327, 332. The case was first argued addressing that particular issue. However, the Court then experienced "doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities." *Id.* at 332.

28. *Id.* at 333. The State of New Jersey claimed that public school officials did not fall within the constraints of the Fourth Amendment; rather, the state argued, the constraints applied only to searches and seizures conducted by law enforcement authorities. *Id.* at 334. In addition, the Court noted that some lower courts exempted school officials from the Fourth Amendment by declaring that school officials act in the place of parents—*in loco parentis*—in their relations with students, rather than as state actors. *Id.* at 336. The Court rejected this rationale, noting that school officials are subject to other constitutional commands, such as the First Amendment, *id.* (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)), and the Fourteenth Amendment's Due Process Clause. *Id.* (citing Goss v. Lopez, 419 U.S. 565 (1975)). Accordingly, the Court declared, school officials must also be deemed state actors in the Fourth Amendment context. *Id.* at 336–37.

29. *Id.* at 334 (citing Elkins v. United States, 364 U.S. 206, 213 (1960)).

30. *Id.* (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

31. *Id.* at 339.

authorities are normally subject. Accordingly, the Court deemed the Fourth Amendment's warrant requirement "unsuit[able] to the school environment."[32]

With respect to the level of suspicion necessary to search students, the Court stated that probable cause[33] is not an "irreducible requirement" of a legal search.[34] Rather, the Court explained, the core of the Fourth Amendment requires that searches be reasonable. Accordingly, the Court balanced the privacy interests of students with the need for school officials to maintain order, and held that searches conducted by these officials need not be based on probable cause; rather, the searches must depend only "on the reasonableness, under all the circumstances, of the search."[35] It then

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32. *Id.* at 340. While dissenting from other portions of the majority's opinion, Justice Brennan concurred that school administrators "when not acting as agents of law enforcement authorities, generally may conduct a search of their students' belongings without first obtaining a warrant." *Id.* at 355–56 (Brennan, J., concurring in part, dissenting in part). However, Brennan disagreed with the majority's reliance on a balancing test to reach this result. Rather, Brennan stated that an exception to the warrant requirement could be justified only by "some *special* governmental interest beyond the need to apprehend lawbreakers." *Id.* at 356 (emphasis added). Brennan opined that such an interest existed in the school context, as school administrators would be unable to fulfill their obligations to teach students and to protect their safety if they had to adhere to the warrant requirement. *Id.*

33. As a general rule, probable cause is the level of suspicion law enforcement authorities must have before conducting full blown searches. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 10 (1968).

34. *T.L.O.*, 469 U.S. at 340. The Court cited several cases where it previously upheld searches and seizures in various contexts that were not based on probable cause. *Id.* at 341 (citing *Terry*, 392 U.S. 1; United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); Delaware v. Prouse, 440 U.S. 648, 654–55 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

35. *Id.* at 341. Justice Blackmun concurred with the majority's reasonableness standard, but disagreed with the majority's use of a balancing test, describing it as "unnecessary in this case." *Id.* at 352 (Blackmun, J., concurring). Rather, Blackmun reasoned that an exception to the Fourth Amendment's warrant and probable cause requirements was justified in this context because of the existence of "special needs, beyond the normal need for law enforcement." *Id.* at 351. He opined that the public school setting "presents a special need for flexibility justifying a departure from the balance struck by the Framers." *Id.* at 352. In this setting, Blackmun continued, school administrators must act immediately in various situations to both "maintain an environment conducive to learning, [and] to protect the very safety of students and school personnel." *Id.* Blackmun stated that such immediate action would be impossible if teachers were first required to obtain a warrant or wait until probable cause was established. *Id.* He then opined that teachers are neither "train[ed] nor . . . experience[d] in the complexities of probable cause" and therefore lack sufficient understanding to quickly determine whether or not probable cause exists. *Id.*

Justice Blackmun's *T.L.O.* concurrence is considered to be the first articulation of the special needs doctrine. *See* Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001); Michael S. Vaughn & Rolando V. del Carmen, *"Special Needs" in Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. L.J. 203, 209 (1993). Commentators have criticized the Court's application of the reasonableness standard to school searches conducted by school officials, and expressed concerned about reliance on the special needs doctrine. *See, e.g.*, Mansukhani, *supra* note 7, at 357 (warning that reliance on special needs could result in limitless searches because "there is no unifying principle encompassing these 'special needs'"); Zane, *supra* note 17, at

stated that reasonableness must be determined by a two-part test: First, the action must have been "'justified at the inception.'"[36] Second, the search must have been "'reasonably related in scope to the circumstances which justified [it] in the first place.'"[37] The Court applied this test to declare the official's search reasonable for Fourth Amendment purposes.

In articulating this reasonableness standard, the *T.L.O.* majority left open a number of questions related to the Fourth Amendment in the context of public school searches.[38] For the purposes of this Article, the most important of the open questions is: What is the appropriate standard for evaluating the legality of searches performed by school officials "in conjunction with or at the behest of law enforcement agencies?"[39] As the search in *T.L.O.* involved a school administrator who acted alone and on his own authority, the Court "expressed no opinion on th[is] question."[40]

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387 (opining that the reasonableness standard undercuts the stringent level of suspicion necessary to justify a search, and will therefore allow more searches of innocent people). *But see* Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 834 (1992) (supporting lower search standard by distinguishing between adult searches, which usually occur in the criminal context, and school searches, which do not). The special needs doctrine has assumed heightened significance in the years following *T.L.O*, as the Supreme Court adopted the concept shortly after *T.L.O. See* O'Connor v. Ortega, 480 U.S. 709, 720 (1987) (plurality opinion) (adopting the special needs exception); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (applying special needs exception to uphold warrantless search of probationer's home by probation officer). The special needs doctrine is addressed in more detail *infra* Part III-A.

36. *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20). The Court stated that searches of students by school officials will be justified at the inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 342.

37. *Id.* at 341 (quoting *Terry*, 392 U.S. at 20). The Court stated that this prong is met "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the transaction." *Id.* at 342.

38. The Court specifically did not address the following questions: Whether the exclusionary rule is applicable to unlawful searches conducted by school authorities, *id.* at 333 n.7; whether a student has a legitimate expectation of privacy in storage spaces, such as lockers or desks, *id.* at 338 n.5; and whether individualized suspicion is an "essential element" of the reasonableness standard in the context of searches by school authorities. *Id.* at 342 n.8. In addition to these specific questions left unaddressed, one commentator has noted that while *T.L.O.* provided school officials' great flexibility to search students' belongings, "it did not directly deal with the question of when school officials can search the students themselves." JAMIN B. RASKIN, WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS 133 (2000).

39. *T.L.O.*, 469 U.S. at 342 n.7.

40. *Id.*

III. THE EVOLUTION OF THE *T.L.O.* STANDARD IN THE POST-*T.L.O.* WORLD OF INCREASED LAW ENFORCEMENT PRESENCE ON SCHOOL GROUNDS

A. Changes in the Institutional Landscape after T.L.O.: The Increased Law Enforcement Presence in Public Schools

In the years following *T.L.O.*, various constituencies including, *inter alia*, school administrators, parents and legislators have expressed deepening concerns about school safety.[41] Many of these concerns stem directly from particular violent episodes that have occurred on school grounds. As a result of these acts, and lesser known and perhaps more localized violent and non-violent incidents, various public school systems have implemented heightened security protocols to enhance the safety of their students and administrators.[42] Such measures include the placement of metal detectors in certain public schools,[43] as well as the implementation of stringent—and

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41. *See, e.g.*, Nick Chiles, *Teachers Union Urges More Metal Detectors*, NEWSDAY (New York, NY), Dec. 7, 1989, at 34; Carlos V. Lazano, *Burbank Weighs $100,000 School Security System*, L.A. TIMES, Dec. 7, 1989, at B3; Felicia R. Lee, *When Violence and Terror Strike Outside the Schools*, N.Y. TIMES, Nov. 14, 1989, at B1; Richard N. Ostling, *Shootouts in the Schools*, TIME, Nov. 20 1989, at 116; Clarence Page, *Student Rights and Kids Killing Kids*, CHI. TRIB., May 3, 1987, at 3; Jane Perlez, *New York Schools Consider the Use of Metal Detectors*, N.Y. TIMES, May 4, 1988, at B1.

42. *See, e.g.*, Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1045 (2001) (tracing increased security measures in schools to "public outrage" about school violence); Timothy L. Jacobs, *School Violence: An Incurable Social Ill that Should Not Lead to the Unconstitutional Compromise of Students' Rights*, 38 DUQ. L. REV. 617, 618 (2000) (predicting the implementation of "heightened school security, routine searches, and new legislative 'solutions'" to attempt to stem tragic incidents); Susswein, *supra* note 5, at 527–28 (stating that incidents such as Columbine and other school shootings were the impetus of new security measures).

43. *See, e.g.*, Eugene C. Bjorklun, *Using Metal Detectors in the Public Schools: Some Legal Issues*, 111 EDUC. LAW REP. 1, 3 (1996); Lisa Suhay, *A Closed Door Policy*, N.Y. TIMES, Aug. 29, 1999, at 7 (describing the proliferation of various security measures, including metal detectors, in New Jersey schools and reporting that all public high schools in Newark had metal detectors). The use of metal detectors in schools has been the subject of some debate, as commentators have disagreed about the constitutionality of using these devices to search students. *See* Michael Ferraccio, *Metal Detectors in the Public Schools: Fourth Amendment Concerns*, 28 J.L. & EDUC. 209, 224–29 (1999) (arguing that using metal detectors to conduct suspicionless searches violate students' Fourth Amendment rights); Robert S. Johnson, *Metal Detector Searches: An Effective Means to Help Keep Weapons Out of Schools*, 29 J.L. & EDUC. 197, 202–03 (2000) (responding to Ferraccio and arguing that metal detector searches of students are constitutional) (citing People v. Dukes, 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992); *In re* F.B., 658 A.2d 1378 (Pa. 1995); People v. Pruitt, 662 N.E.2d 540 (Ill. App. Ct. 1996); State v. J.A., 679 So. 2d 316 (Fla. Ct. App. 1996); *In re* Latasha W., 70 Cal. Rptr. 2d 886 (Cal. Ct. App. 1998)).

somewhat controversial—search mechanisms, including strip searches and drug tests.[44]

Increased safety concerns have also caused many schools to station law enforcement personnel in their hallways.[45] In many other schools that already had such security, well publicized violent episodes have led to an increased and

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44. Rosemary Spellman, Comment, *Strip Search of Juveniles and the Fourth Amendment: A Delicate Balance of Protection and Privacy*, 22 J. JUV. L. 159, 160 (2001–02) (explaining strip searches are based on concerns about drug use and school violence); Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 923 (1997) (stating that officials perform strip searches for drugs or allegedly stolen property).

45. *See, e.g.*, NAT'L CTR. FOR EDUC., U.S. DEP'TS OF EDUC. & JUSTICE, STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY 2002, NCES 2003-009/NCJ 196753, at 135 app. A. (2002) [hereinafter INDICATORS OF SCHOOL CRIME AND SAFETY] (stating that many public schools have enacted numerous measures to stem violence and ensure safety, including stationing police officers or other law enforcement personnel at the school), *available at* http://nces.ed.gov/pubs2003/schoolcrime/index.asp; Barbara E. Smith & Sharon Goretsky Elstein, *Effective Ways to Reduce School Victimization: Practical and Legal Concerns*, 14 CHILD. LEGAL RTS. J. 22, 26 (1993) (noting that numerous schools have coordinated with law enforcement to reduce prevalence of drugs and crime); Gail Russell Chaddock, *Schools, Guns, and Troubled Kids*, CHRISTIAN SCI. MONITOR, May 26, 1998, at 7 (reporting that Virginia's Fairfax County has uniformed police officers in every high school and several middle schools in response to violent episodes at "other rural schools"); *Clinton Wants More Police Assigned to School Beats*, WASH. POST, Jun. 17, 1998, at A12 (reporting that President Clinton, in reaction to recent school shooting incidents, ordered Cabinet to place more police officers in schools); CTR. FOR THE PREVENTION OF SCH. VIOLENCE, RESEARCH BULLETIN VOL.1, NO.3, THE SCHOOL AS "THE BEAT": LAW ENFORCEMENT OFFICERS IN SCHOOLS (Feb. 1998) (noting the "increased assignment of law enforcement officers to cover schools full time as law enforcement agencies and schools coordinate their efforts in proactive ways to address concerns about juvenile crime and violence"), *available at* http://www.ncdjjdp.org/cpsv/Acrobatfiles/ Res_Bull_national.pdf. Of course, several school systems stationed police officers long before these particular concerns arose. *See, e.g.*, Andre Jackson, *From Within, From Without*, *in* NOT GUILTY: TWELVE BLACK MEN SPEAK OUT ON LAW, JUSTICE, AND LIFE 116 (Jabari Asim ed., 2001) (author recounts that his high school in St. Louis housed a police substation when he was a student in 1975); JOANNE MCDANIEL, SCHOOL RESOURCE OFFICERS: WHAT WE KNOW, WHAT WE THINK WE KNOW, WHAT WE NEED TO KNOW 4 (tracing history of police officer involvement in Flint, Michigan, schools in the 1950s), *available at* http://www.ncdjjdp.org/ cpsv/Acrobatfiles/whatweknowsp01.pdf.

Commentators disagree about the extent of school violence, but nonetheless attribute various heightened security measures, including police presence, to concern about such violence, whether accurate or exaggerated. *Compare* Andrea G. Bough, *Searches and Seizures in Schools: Should Reasonable Suspicion or Probable Cause Apply to School Resource/Liaison Officers?*, 67 UMKC L. REV. 543, 544 (1999) (noting various measures schools have enacted in response to "increase in violent crime," including the placement of police officers in the schools), *and* Mary P. Daviet, *Police Officers in Public Schools: What are the Rules?*, 27 COLO. LAW. 79 (Nov. 1998) (attributing increased police presence in public schools to increased school crime and violence), *with* Irwin A. Hyman & Pamela A. Snook, *Dangerous Schools and What You Can Do About Them*, 81 PHI DELTA KAPPAN 489 (March 2000) (stating that schools have increasingly enacted law enforcement measures to reduce violence "in response to misperceptions of the real extent of school violence").

heightened law enforcement presence.[46] For some other public schools which previously had no such presence, plans have been formulated to add law enforcement personnel.[47]

Law enforcement officers are stationed in public schools through various partnership programs between the schools and law enforcement agencies. For instance, in some school districts, officers are assigned to schools via liaison programs between those schools and local police departments. These programs exist at both local[48] and state[49] levels. Other school districts participate in the School Resource Officer program, a federal program overseen by the Department of Justice's Office of Community Oriented Policing Services.[50] This program places police officers in schools to perform numerous roles, including some that extend beyond traditional law

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46. *See, e.g.*, Andrea Schoellkopf, *APS Police Might Get Guns*, ALBUQUERQUE J., Apr. 25, 2001, at A1 (reporting that in response to recent school shootings in California, Albuquerque Public Schools Superintendent wants to arm school police officers with stun guns and permit access to shotguns); ELIZABETH DONAHUE, ET AL., JUSTICE POLICY INST., SCHOOL HOUSE HYPE: SCHOOL SHOOTINGS AND THE REAL RISKS KIDS FACE IN AMERICA (1998) [hereinafter SCHOOL HOUSE HYPE], (reporting that in response to high profile school shootings, politicians proposed, *inter alia*, increased law enforcement presence in schools), *available at* http://www.justicepolicy.org/article.php?id=42.

47. *See, e.g.*, Doane Hulick, *City Grapples with Whether to Have Police in Schools*, PROVIDENCE J., Apr. 27, 2001, at 1C (describing proposal to station police officers in Providence public schools); Michael Perlstein, *11 N.O. Schools Will Get Police Officers*, TIMES-PICAYUNE (New Orleans), Nov. 21, 2000, at 1 (reporting plan to assign police officers to five high schools and six junior high and middle schools in New Orleans to reduce violent incidents).

48. *See, e.g.*, Fla. Stat. § 1006.12(1) (2003) ("District school boards may establish school resource officer programs, through a cooperative agreement with law enforcement agencies . . . ."); S.C. CODE ANN. § 5-7-12(a) (Law. Co-op. 2002) (authorizing municipality or county to designate school resource officers to work within its school system); Catrine Johansson, *The Extended Hands of Police Services*, ORANGE COUNTY REG., Mar. 21, 2002 (describing liaison program in Laguna, California).

49. For example, in New Jersey, the Department of Law & Public Safety and the Department of Education entered into an agreement in 1988 for local law enforcement and education officials across the state to work together to address drug usage by school-aged children. *See* DIV. OF CRIMINAL JUSTICE, N.J. DEP'T OF LAW & PUBLIC SAFETY, A UNIFORM STATE MEMORANDUM OF AGREEMENT BETWEEN EDUCATION AND LAW ENFORCEMENT OFFICIALS 1 (Jul. 23, 1999) [hereinafter UNIFORM STATE MEMORANDUM], *available at* http://www.state.nj.us/lps/dcj/pdfs/agree.pdf. In 1992, the agreement was revised to respond to violent episodes that occurred in schools across the country and to address issues related to weapons possession on school property, and which also called for greater cooperation between law enforcement agencies and education officials. *Id.* As part of these efforts, the Attorney General's office created the Safe Schools Resource Officer Program, which aspired to place uniformed police officers in schools to deter "drug use and sales and other forms of criminal behavior in schools" and to "help further to enhance the working relationship between education and law enforcement officials." *Id.* at 5.

50. A description of this branch of the Department of Justice can be found at http://www.cops.usdoj.gov.

enforcement duties.[51] However, while these officers have many roles, their primary function is to further law enforcement goals.[52]

Probably the most formal partnership between public schools and law enforcement exists in New York City. In December, 1998, the New York City Police Department assumed responsibility for school security from the New York City Board of Education.[53] As part of the transition, the police department formed the School Safety Division, which is the branch of the police department that now implements, oversees, and is primarily responsible for school security.[54]

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51. In addition to traditional law enforcement responsibilities, these officers serve other functions such as teaching crime prevention and substance abuse classes and counseling troubled students. *See* Bough, *supra* note 45, at 545 (explaining that school resource officers serve as teachers, counselors and law enforcement officers); Press Release, Office of Cmty. Oriented Policing Servs., COPS Office Announces $52.7 Million in Grants to Hire New Police Officers in America's Schools (Mar. 19, 2002), *available at* http://www.cops.usdoj.gov/Default.asp?Item=544. In addition, the program sets goals outside of the traditional law enforcement context, such as establishing rapport between officers and students and dispelling negative stereotypes about law enforcement officers. *See* Gabriella Burman, *High School Confidential: On-site Police, Like Franklin's Officer Bell, Add a Safety and Mentoring Dimension to School Learning*, BALTIMORE JEWISH TIMES, March 24, 2000, at 20. There are also nationwide programs that have police officers in schools solely to teach courses to students, such as the Drug Abuse Resistance Education Program (DARE) and the Gang Resistance Education and Training Program (GREAT). *See* Kevin McKenzie, *Effort Foils Drugs, Say Kids, Cops Who Dare*, COM. APPEAL, Dec. 26, 2002, at A1 (explaining the DARE program as a seventeen week course that is taught in approximately 80% of school districts).

52. *See* KENNETH S. TRUMP, NAT'L ASS'N SCH. RES. OFFICERS, 2001 NASRO SCHOOL RESOURCE OFFICER SURVEY (Oct. 5, 2001), *available at* http://www.schoolsecurity.org/resources/2001NASROsurvey.pdf. *See also* Ken McCarthy, *Full Time Cops in Our Schools: Well Intentioned But a Very Bad Idea* (stating that school resource officers are sent to urban schools "with a very clearly stated law enforcement mission: to patrol, to investigate, to apprehend, and to process criminals"), *at* http://brasscheck.com/cops/.

53. *See* Lynette Holloway, *School Safety Officers Bridle at Transfer to Police Control*, N.Y. TIMES, Jan. 3, 1999, § 1. The transfer of responsibility to the New York City Police Department occurred under Rudolph Giuliani's mayoralty. Years prior to the transfer, at the very beginning of his mayoralty, Giuliani pledged to increase school security by having police officers patrol school perimeters and hallways. *See* Sam Dillon, *On the Barricades Against Violence in the Schools: As Fears Over Security Grow, New York School Safety Force Struggles to Keep Up*, N.Y. TIMES, Dec. 24, 1993, at B1. The transfer of responsibility to the police department was not reached without rancor, particularly as the then-schools' chancellor initially opposed it. *See* Lynette Holloway, *New Boss for School Guards, Same Problems*, N.Y. TIMES, Nov. 17, 1999, at B15. In addition, the transfer was not met without its detractors, as advocates raised a host of constitutional concerns. *See, e.g.*, Statement of Norman Siegel, Citing Constitutional Concerns, NYCLU Opposes Police Presence in New York's Public Schools (Sept. 16, 1998), *available at* http://www.aclu.org/news/n09198a.html (raising Fourth Amendment, First Amendment and Due Process concerns and warning that "[e]vents that were previously handled in the context of the school disciplinary system may be escalated to the level of a 'law enforcement' problem by mere presence of police-controlled security").

54. The School Safety Division operates under the auspices of the Patrol Services Bureau, *see* JOINT COMM. ON SCH. SAFETY, FIRST ANNUAL REPORT 3 (Nov. 2000) [hereinafter JOINT COMM. ON SCH. SAFETY], and oversees the officers who patrol New York City's public

The scope of powers afforded police officers in these different contexts throughout the country vary among jurisdictions.[55] Nonetheless, the various measures have fostered more cooperative, formalized and interdependent relationships between these particular schools and law enforcement agencies.[56] As a result of these formalized relationships, as well as the heightened concern about school violence, school officials in many jurisdictions more readily report the activities of their students to local law enforcement agencies.[57] While school officials in many states have long been required to report certain *criminal* activity to the police departments,[58]

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schools. The officers are called school safety agents. The agents do not carry guns, but have arrest powers. *See* Susan Edelman & Naomi Toy, *NYPD Officially Takes Charge of School Safety*, N.Y. POST, Dec. 22, 1998, at 22; Nancie L. Katz, *Cop-School Plan Set*, DAILY NEWS (New York), Nov. 13, 1998, at 8; Kathleen Kenna, *Security Agents and Fear Pace School Corridors*, TORONTO STAR, Sept. 11, 1999. New York City's current mayor, Michael R. Bloomberg, created the Office of School Safety and Planning, which supplements the School Safety Division by enacting safety plans and disciplinary procedures for students who disrupt schools with poor behavior. *See* Jennifer Steinhauer, *When it Comes to School Discipline, Bloomberg's Motto is Safety First*, N.Y. TIMES, Sept. 18, 2002, at B3.

55. *See, e.g.*, VERA INST. OF JUSTICE, APPROACHES TO SCHOOL SAFETY IN AMERICA'S LARGEST CITIES (Aug. 1999) (describing respective powers and limitations of school police officers in Chicago, Houston, Los Angeles, New York City and Philadelphia), *available at* http://www.vera.org/publication_pdf/apprchs_school_safety.pdf.

56. For example, in New Jersey, school and governmental officials have addressed the need for law enforcement and school officials to work together state-wide, in contrast to most other states, where these formal relationships have been arranged at the city or county levels. In 2000, then-Governor Christine Whitman convened a roundtable on school violence, during which the State Attorney General encouraged school officials and law enforcement agencies to work with each other to foster school safety. *See* Susswein, *supra* note 5, at 531–32. Subsequently, the Attorney General and the State Commissioner of Education created a Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials that outlined how police and school officials should work together. *Id.* at 532–33. Each school district was required to implement policies based on the Memorandum of Agreement. *Id.* at 532. For example, the Memorandum suggested "[t]he prompt reporting of suspected incidents of planned or threatened violence will permit appropriate intervention by law enforcement or judicial authorities, even when the threat technically does not constitute a criminal act." *Id.* at 533 (citing UNIFORM STATE MEMORANDUM, *supra* note 49).

57. *See, e.g.*, SUSAN SANDLER, TURNING *TO* EACH OTHER, NOT *ON* EACH OTHER: HOW SCHOOL COMMUNITIES PREVENT RACISM IN SCHOOL DISCIPLINE 4 (Justice Matters Inst. Discipline Taskforce ed., 2000) [hereinafter TURNING *TO* EACH OTHER] (stating that school officials increasingly rely on police officials to handle school discipline matters), *available at* http://www.arc.org/gripp/conference/papers/justice_matters.pdf.

58. The federal government requires states to report incidents in order to receive funding under the Safe and Drug-Free Schools and Communities Act. *See* 20 U.S.C. § 7112 (2002). Many states have enacted reporting requirements. *See* OFFICE FOR VICTIMS OF CRIMES, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, LEGAL SERIES BULLETIN NO. 2, REPORTING SCHOOL VIOLENCE, NCJ-189191, at 2 (Jan. 2002) [hereinafter OVC BULLETIN] (citing ALA. CODE § 16-6B-7 (2001); CAL. PENAL CODE §§ 628–628.6 (Deering 2001); DEL. CODE ANN. tit. 14, § 4112 (2000); KAN. STAT. ANN. § 72-89b03 (2000); K.Y. REV. STAT. ANN. § 158.444 (Michie 2001); LA. REV. STAT. ANN. § 17:13.1 (West 2000); MICH. COMP. LAWS ANN. § 380.1310a (West 2000); MINN. STAT. § 121A.06 (2000) (limited to reports of dangerous weapon incidents in school zones); N.J. STAT. ANN. §§ 18A:17-46, -48 (West 2001);

many jurisdictions have adopted broader reporting obligations.[59] Accordingly, school officials in various locales, for a host of reasons, now report a broader array of student conduct to law enforcement authorities, including conduct that is technically criminal but had traditionally been handled through school disciplinary processes.[60]

B. Changes in the Legal Landscape: Lower Courts' Treatment of School Searches Involving Law Enforcement Authorities

In light of the more formalized relationships that have been forged between public schools and law enforcement authorities in the years following *T.L.O.*, lower courts have confronted Fourth Amendment challenges by students charged with criminal offenses emanating from school searches by or involving law enforcement authorities. As explained above, the Supreme Court in *T.L.O.* did not consider the level of suspicion necessary when school officials act in "conjunction with or at the

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N.M. STAT. ANN. § 22-1-7 (Michie 2000) (limited to violence on school employees and vandalism to school property); N.C. GEN. STAT. § 115C-12 (2000); PA. STAT. ANN. tit. 24 § 13-1303-A (West 2000); S.C. CODE ANN. §§ 59-63-310 to 340 (Law. Co-op. 2000); TENN. CODE ANN. § 49-6-4216 (2001); VA. CODE ANN. § 22.1-280.1 (Michie 2000); WASH. REV. CODE § 43.70.545 (2001)), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/ ncj189191.pdf . Some states require that specific offenses be reported to police. For example, in Arkansas, a school must notify police when "any person has committed or has threatened to commit an act of violence or any crime involving a deadly weapon on school property or under school supervision." ARK. CODE ANN. § 6-17-113 (Michie 2003). In Nebraska, the principal or a designee "shall notify as soon as possible the appropriate law enforcement authorities . . . of any act of the student described in section 79-267 which the principal or designee knows or suspects is a violation of the . . . criminal code." NEB. REV. STAT. § 79-293 (2003). The enumerated acts include conduct that "constitutes a substantial interference with school purposes," NEB. REV. STAT. § 79-267(1) (2003); possessing any object that is "ordinarily or generally considered a weapon," NEB. REV. STAT. § 79-267(5); and "[e]ngaging in any other activity forbidden by [Nebraska] laws . . . which . . . constitutes a danger to other students or interferes with school purposes." NEB. REV. STAT. § 79-267(9).

59. *See, e.g.*, JOINT COMM. ON SCH. SAFETY, *supra* note 54, at 28 (in New York City schools, the "principal or designee must report all safety-related incidents to school safety agents").

60. Conversely, law enforcement agencies in many jurisdictions are now required to disclose criminal or juvenile delinquency dispositions of students to the particular schools in which they are enrolled. OVC BULLETIN, *supra* note 58, at 3 (citing CAL. PENAL CODE § 291.1 (Deering 2001), CAL. WELF. & INST. CODE § 828.1 (Deering 2001); COLO. REV. STAT. § 13-1-130 (2000); FLA. STAT. § 230.335 (2000); 105 ILL. COMP. STAT. § 5/10-20.14 (2001); MD. CODE ANN., EDUC. § 7-303 (2001); MICH. COMP. LAWS ANN. § 380.1535a (West 2000); NEV. REV. STAT. §§ 62.465, 200.278 (2001); UTAH CODE ANN. § 53-10-211 (2000); VA. CODE ANN. § 22.1-280.1 (Michie 2000); WASH. REV. CODE ANN. § 43.43.845 (West 2001); WIS. STAT. § 973.135 (2000)). *See* SCHOOL HOUSE HYPE, *supra* note 46 (noting that several states now require courts, law enforcement officers and/or prosecutors to notify school officials of students who are suspected or charged with, and/or found guilty of, particular offenses).

behest of law enforcement agencies"[61] because the school administrator acted alone in searching T.L.O.'s belongings.[62]

Since *T.L.O.* left this question open, lower courts in subsequent years have attempted to articulate Fourth Amendment standards to apply when both school officials and law enforcement officers are involved in particular searches. For instance, several lower courts have addressed the Fourth Amendment standards officers must follow in scenarios where they do not act alone in searching students, but rather either assist school officials or are assisted by those officials. However, these issues are particularly cumbersome in the school context because school officials and law enforcement authorities, as a general rule, must meet different levels of suspicion to search their respective constituents. As established in *T.L.O.*, school officials must possess reasonable suspicion to search students.[63] Conversely, law enforcement officers in the non-school context must, as a general rule, possess probable cause to search the citizenry.[64] Several commentators have observed that law

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61. New Jersey v. T.L.O., 469 U.S. 325, 342 n.7 (1985).

62. However, the Court, while leaving the question open, cited to *Picha v. Wieglos*, 410 F. Supp. 1214 (1976). *See T.L.O.*, 469 U.S. at 342 n.7. In *Picha*, an Illinois District Court held that a school search involving a police officer must meet the probable cause standard. *Picha*, 410 F.Supp. at 1219, 1221.

63. *T.L.O.*, 469 U.S. at 346.

64. Defining reasonable suspicion and probable cause has been challenging, even for the Supreme Court. *See* Ornelas v. United States, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."). However, the Court has described probable cause as "a flexible, common-sense standard [that] merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime." Texas v. Brown, 460 U.S. 730, 742 (1983) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). The Court has explained that reasonable suspicion exists "when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." United States v. Knights, 534 U.S. 112, 121 (2001) (citation omitted). For an example of a situation where the Court declared that the facts which led to a search would most probably not constitute probable cause, but did constitute reasonable suspicion, see *Griffin v. Wisconsin*, 483 U.S. 868, 878 (1987) ("To take the facts of the present case, it is most unlikely that the unauthenticated tip of a police officer—bearing, as far as the record shows, no indication whether its basis was firsthand knowledge or, if not, whether the firsthand source was reliable, and merely stating that Griffin 'had or might have' guns in his residence, not that he certainly had them—would meet the ordinary requirement of probable cause.").

However, despite the difficulties of articulating the conceptual distinctions between probable cause and reasonable suspicion, the practical differences are quite clear. In *Alabama v. White*, the Supreme Court explained that "[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." 496 U.S. 325, 330 (1990). One commentator offers a very simple, yet accurate, observation regarding the difference between these two legal concepts: "[B]ecause reasonable suspicion requires less certainty than probable cause, it will allow more searches of innocent people." Zane, *supra* note 17, at 387. *See* Stefkovich & Miller, *supra* note 7, at 38 (stating that reasonable suspicion affords students

enforcement officers who initiate searches of public school students or act alone when conducting those searches must possess probable cause.[65] These different standards raise numerous delicate issues in those schools with a law enforcement presence or where school officials have formalized relationships with law enforcement officials, particularly because the legality of a particular search can often turn on whether there was police involvement in the search, as well as the level and extent of the involvement.[66]

Given the increased law enforcement presence in our nation's public schools, some lower federal courts and several state courts have addressed these Fourth Amendment issues in the context of suppression motions brought by students, both juveniles and adults, who have been criminally charged for various offenses arising from incidents in schools. However, several of these courts have struggled with the underlying issues, perhaps because the *T.L.O.* Court provided no guidance on these questions, or perhaps because of other extra-legal factors related to Fourth Amendment interpretation.[67]

Quite predictably, courts have inconsistently weighed the two predominant factors for assessing these particular Fourth Amendment claims: The officer's role or function in the particular school and/or the specific search, and the entity to which the officer was ultimately beholden. However, irrespective of these inconsistencies, courts have swept other situational factors into their analyses and have then used the reasonable suspicion standard to uphold searches that have involved law enforcement officials. As a result, courts only require the more stringent probable cause standard in fairly narrow circumstances.[68] Both because of the tensions inherent in these relevant factors, as well as the inconsistent manner in which courts weigh these factors, the

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"fewer protections than are normally afforded to citizens under the stricter probable cause standard").

65. *See, e.g.*, Dery, *supra* note 7; Mansukhani, *supra* note 7; Sprow, *supra* note 7; Stefkovich & Miller, *supra* note 7; Beci, *supra* note 35.

66. *See, e.g.*, Charles W. Avery & Robert J. Simpson, *Search and Seizure: A Risk Assessment Model for Public School Officials*, 16 J.L. & EDUC. 403, 417 (1987) ("The moment in time the police become involved and the extent and purpose of their participation are important factors in determining the Fourth Amendment standard to which the courts will hold school officials.").

67. For instance, one commentator has opined that because the Fourth Amendment seeks to balance the rights of accused individuals with the protection of society its interpretation "is inevitably a political task." Robert Berkley Harper, *Has the Replacement of 'Probable Cause' with 'Reasonable Suspicion' Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13, 14 (1988).

68. Essentially, courts are more apt to require probable cause when an outside police officer conducts the search, or when a police officer's ultimately responsibility flows to a law enforcement agency, the purpose of the search is to uncover criminal activity, and the officer has essentially initiated the search outside the influence of school officials. *See, e.g.*, F.P. v. State, 528 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1988); State v. D.S., 685 So. 2d 41, 43 (Fla. Dist. Ct. App.1996); *In re* Josue T., 989 P.2d 431, 433 (N.M. Ct. App. 1999); *In re* D.D., 554 S.E.2d 346, 352, 353 (N.C. Ct. App. 2001); Commonwealth v. J.B., 719 A.2d 1058, 1065 (Pa. Super. Ct. 1998); *In re* Angelia D.B., 564 N.W.2d 682, 687 (Wis. 1997).

case law does not establish clear parameters to guide school officials and law enforcement authorities.[69]

In *People v. Dilworth*,[70] the Illinois Supreme Court recognized three categories of school searches that involve police officers: "(1) those where school officials initiate a search 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 search."[71] Since *T.L.O.*, several courts have addressed Fourth Amendment issues arising from each of these categories. However, the case law illustrates that none of these categories, standing alone, correlates with the search standards courts deem applicable. Rather, courts bring situational factors into these categories to determine the suspicion level against which to measure the legality of the particular search.

1. Ultimate Responsibility and Comparative Purposes/Roles

Several courts have grappled with the basic issue of whether law enforcement officers assigned to schools were considered "school officials," and therefore limited only by the reasonable suspicion requirement, or whether they were ultimately beholden to law enforcement authorities, and therefore constrained by the more stringent probable cause requirement. Some courts have assumed that law enforcement officers assigned to schools automatically fall into the former category. For example, *Commonwealth v. J.B.*[72] declared that "a reasonable suspicion standard applies when school officials, including teachers, teachers' aides, school administrators, school police officers and local police school liaisons officers, conduct a search acting on their own authority."[73] Other courts have distinguished between *school* police officers, who are employed by and responsible to the school district, and *police liaison* officers, who are employed by an outside police department and assigned to a school,[74] and have measured searches conducted by officers in the former category by the reasonable suspicion standard.[75] Courts have also looked to the

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69. This lack of clarity is also true for police officers placed in schools through the School Resource Officer Program. *See* Bough, *supra* note 45, at 544 (noting the lack of clarity in case law as to whether school resource officers should be held to the probable cause standard of police officers or the reasonableness standard of school administrators).

70. 661 N.E.2d 310 (Ill. 1996), *cert denied* 517 U.S. 1197 (1996).

71. *Id.* at 317.

72. 719 A.2d 1058 (Pa. Super. Ct. 1998).

73. *Id.* at 1065.

74. *See Dilworth*, 661 N.E.2d at 322–23 (Nickels, J., dissenting). Courts have also distinguished between school security guards and police officers, and "the key question is often whether security guards are acting as school officials or as law enforcement officers." Stefkovich & Miller, *supra* note 7, at 61.

75. *See, e.g.*, State v. D.S., 685 So. 2d 41, 43 (Fla. Dist. Ct. App. 1997) ("We specifically hold that a search conducted by a *school* police officer only requires *reasonable suspicion* in order to legally support the search, 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 who is employed by a municipal or county governmental entity unrelated to the school district or its employees and officials.") (emphasis added); S.A. v. State, 654 N.E.2d 791, 795 (Ind. Ct. App. 1995) (declaring reasonable suspicion standard applicable to search by

respective *purposes* and *roles* of school officials and police officers to determine the applicable level of suspicion.[76]

However, even where the officers assigned to the school are ultimately responsible to a law enforcement agency, some courts have declared them to be more aligned with school officials, and therefore allowed to search students based on reasonable suspicion. For instance, *In re Ana E.*,[77] involved a search in a New York City school by a school safety officer.[78] The officer testified that she performed her duties under the supervision of the New York City Police Department.[79] Given this relationship, the respondent argued that probable cause should have been the standard against which the legality of the officer's search was measured. The Court rejected this argument, in part because the interaction was traced to the principal's request for safety officer intervention, but also because the court declared that "the school safety officers work at the school and are part of the school community."[80]

2. Acting Alone

Moreover, some courts have measured the actions of police officers acting alone in school searches against the less stringent reasonable suspicion standard. For instance, *People v. Dilworth* involved a search conducted by a liaison officer who was

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a trained police officer who was employed by the Indianapolis Public Schools Police Department); Wilcher v. Texas, 876 S.W.2d 466, 468–69 (Tex. Ct. App. 1994) (upholding search by police officer employed by the Houston Independent School District based on reasonable suspicion); *In re* S.F., 607 A.2d 793, 796 (Pa. Super. Ct. 1992) (upholding search by plainclothes police officer employed by the School District of Philadelphia based on reasonable suspicion).

76. *See, e.g.*, State v. Tywayne H., 933 P.2d 251, 255 (N.M. Ct. App. 1997) (noting the "sharp distinction between the purpose of a search by a school official and a search by a police officer," and explaining that "[t]he nature of a *T.L.O.* search by a school authority is to maintain order and discipline in the school," while "[t]he nature of a search by a police officer is to obtain evidence for criminal prosecutions"). *See also* Jacobs, *supra* note 42, at 635 (explaining that the determination of whether school security officers are considered police or school officials dictates the applicable Fourth Amendment standard, and stating that "when acting akin to school officials in a security capacity, *police* and security officers are usually held to the same lowered standard as school officials" (citing *S.A.*, 654 N.E.2d at 795)) (emphasis added).

77. No. D-10378/01, 2002 N.Y. Misc. LEXIS 53, at *1 (N.Y. Fam. Ct. Jan. 14, 2002).

78. The officer testified that she searched the respondent's bag at the request of another school safety officer, who had initially been called in by the principal. The officer then asked the student for permission to search the bag, to which the student replied "yes." The subsequent search uncovered a knife. *Id.* at *4.

79. *Id.*

80. *Id.* at *10. *Ana E.* illustrates that New York courts have analyzed these issues differently in the Pre-*T.L.O.* and Post-*T.L.O.* eras. Prior to *T.L.O.*, the New York Court of Appeals, in *People v. Bowers*, considered the legality of a school search conducted by a security officer. 356 N.Y.S.2d 432 (1974). The *Bowers* court held the officer to the probable cause standard, stating that because the officer fell under the authority of the police commissioner, the officer was to be considered a police officer and not a school official. *Id.* at 435. For a critique of *Bowers*, see Jacobs, *supra* note 42, at 634.

a detective employed by the city and assigned full-time to an alternative school.[81] The officer's "primary purpose at the school was to prevent criminal activity."[82] The legal issue arose when the officer came upon a student who had a flashlight in his hand. The officer seized the flashlight, suspecting that it contained drugs.[83] The officer then dislodged the top of the flashlight and discovered a bag that contained what later proved to be cocaine.[84]

The Illinois Supreme Court, after setting out the facts leading up to and including the search, characterized the encounter "as involving a liaison police officer conducting a search on *his own initiative and authority*, in furtherance of the school's attempt to maintain a proper educational environment."[85] The Court then held that reasonable suspicion, rather than probable cause, was the legal standard the officer needed to conduct the search.[86] In so holding, the Court relied on, *inter alia*, *Vernonia School District 47J v. Acton*[87] for the proposition that "students within the school environment have a lesser expectation of privacy than members of the population generally."[88] The Court then weighed those lesser privacy expectations against the school's "compelling interest in maintaining a proper educational environment for all its students."[89]

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81. People v. Dilworth, 661 N.E.2d 310, 313 (Ill. 1996).

82. *Id.*

83. *Id.* The officer apparently formed this belief in response to information the officer received from two teachers the day before the search that another student may have been selling drugs at the school. The officer searched that student the day after receiving that information, but the search did not uncover any drugs. *Id.* Shortly thereafter, the officer saw that student and the defendant talking and laughing at their adjacent lockers. The officer, believing that these two students were "'pla[ying him] for a fool,'" noticed the flashlight in the defendant's hand and immediately believed that it might have contained drugs. *Id.*

84. *Id.* The student was tried as an adult. *Id.* at 314.

85. *Id.* at 317 (emphasis added).

86. *Id.* at 317, 318. *Dilworth* was a four-to-three decision. The dissent believed that the police officer should have been held to the probable cause standard since his "self-stated primary duty [was] to investigate and prevent criminal activity." *Id.* at 321 (Nickels, J., dissenting). The dissent rejected the majority's rationale that the officer, for Fourth Amendment purposes, was a school official rather than a police officer. *Id.* at 321–22.

87. 515 U.S. 646 (1995). In *Acton*, the Supreme Court addressed whether random urinalysis drug testing of all student athletes violated the Fourth and Fourteenth Amendments. The Court observed that Fourth Amendment analysis in the public school context "cannot disregard the schools' custodial and tutelary responsibilities for children." *Id.* at 656. The Court stated that, given the number of medical examinations performed on students, they enjoy lesser expectations of privacy than the general population. *Id.* at 656–57 (citation omitted). The Court then observed that student athletes enjoy even lesser expectations of privacy in light of the communal aspects of participation. *Id.* at 657. The Court balanced the level of intrusion against the government interest—deterring drug use—and upheld the testing program. *Id.* at 662–63, 664–65.

88. *Dilworth*, 661 N.E.2d at 318.

89. *Id.* at 319.

3. Purpose of the Search

Another factor courts consider when determining the appropriate level of suspicion required for a school search involving a law enforcement officer is the underlying *purpose* of the search. If the purpose is to uncover evidence that violates a school rule, courts often measure the legality of the search against the reasonable suspicion standard.[90] However, if the purpose is to uncover evidence pertaining to a potential criminal violation,[91] courts will often require that the searching officer possess probable cause,[92] assuming that the officer acted alone or at least not at the behest of school officials.

4. Level and Extent of Law Enforcement Involvement

Courts also evaluate the *level* and *extent* of the officer's involvement in the search.[93] As part of this analysis, courts consider whether the officer initiated the search and, if so, the role the officer played during the search. Courts are incrementally more likely to utilize the probable cause standard as the officer's level of participation in the search increases.[94] Conversely, when the officer's participation in the encounter is considered by courts to be "minimal" or "marginal," the reasonable suspicion standard will often apply.[95] In determining whether participation is

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90. *See* Stefkovich & Miller, *supra* note 7, at 46; *see also* 4 WAYNE LAFAVE, SEARCH & SEIZURE § 10.11(b), at 832 (3d ed. 1996) (stating that "[l]ower courts have held or suggested that the usual probable cause test obtains if the police are involved in the search in a *significant* way") (emphasis added); Gartner, *supra* note 44, at 936–37 (stating that lesser Fourth Amendment protections are afforded students when the primary purpose of the search is to maintain order and discipline, rather than to seek to discover evidence of a criminal violation).

91. Criminal and school rule violations are by no means mutually exclusive. A student who engages in criminal behavior also violates school rules. However, school rule violations do not always constitute criminal violations.

92. *See* Stefkovich & Miller, *supra* note 7.

93. *See* Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990's and Beyond*, 25 URB. LAW. 117, 148 (1993) (stating that most courts since *T.L.O.* "have ruled that police involvement *per se* does not alter the nature of the school search or the application of the *T.L.O.* reasonable suspicion standard").

94. *See* Stefkovich & Miller, *supra* note 7, at 45. Courts are also more likely to apply the probable cause standard when *outside* police officers initiate the search on school grounds. *See, e.g.*, F.P. v. State, 528 So. 2d 1253, 1255 (Fla. Dist. Ct. App. 1988) (probable cause to search required where outside police officer investigating a car theft at a school informed the School Resource Officer about a potential suspect, as the resource officer acted "at the behest of" the police officer); State v. Tywayne H., 933 P.2d 251, 253–54 (N.M. Ct. App. 1997) (holding *T.L.O.* inapplicable and that probable cause to search is required where local, uniformed police officers providing security at high school prom initiated pat-down searches of two students, both of whom entered through an unauthorized entrance and one of whom smelled of alcohol); *In re* Thomas B.D., 486 S.E.2d 498, 500 (1997) (because police acted alone and on their own authority by bringing student to the school and searching him there, "the reasonable suspicion standard set forth in *T.L.O.* is simply inapplicable").

95. *See, e.g.*, Martens v. Dist. No. 22, 620 F. Supp. 29, 31 (N.D. Ill. 1985) (in a civil action, court granted defendant school district's summary judgment motion, holding that probable cause was not required where a sheriff's deputy, who was at the school on an

considered to be "minimal," courts consider who initiated the search, the stage at which the law enforcement officer became involved in the search, as well as the actions the law enforcement officer took throughout the search.[96]

A somewhat related situation is when law enforcement officers conduct searches at the request of school officials. In this scenario, some courts have distinguished school officials who act "in conjunction with" law enforcement agencies from those who act "at the behest of" said agencies, declaring that school officials and police officers acting in the former capacity must meet only the reasonable suspicion standard.[97]

5. Safety Concerns

In addition, safety concerns factor into court determinations of whether school officials act in "conjunction with" law enforcement authorities.[98] Courts allow school officials "a certain degree of flexibility"[99] to seek the assistance of law enforcement officers when faced with potentially dangerous encounters, without

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unrelated matter, did not assist in developing the facts that motivated the search and had not directed that the student be searched, even though the officer encouraged the student to cooperate with the search); State v. N.G.B., 806 So. 2d. 567, 568 (Fla. Dist. Ct. App. 2002) (holding that reasonable suspicion was the standard by which to measure a school resource officer's search even though the officer was "not a school official" and was employed by a law enforcement agency because a teacher, after initiating an investigation as to the source of marijuana found on a classroom floor, asked the officer to assist in searching a student for drugs).

96. *See, e.g.*, *In re* D.D., 554 S.E.2d 346 (N.C. Ct. App. 2001) (police officer involvement considered to be minimal where the principal called the officers for assistance, but the officers had not initiated or directed the investigation).

97. For example, in *People v. Butler*, two school safety officers employed by the New York City Police Department approached the respondent, who was wearing a bandana around his head and wrist in violation of school rules, and asked him to remove the bandana and to produce identification. 725 N.Y.S.2d 534, 536 (N.Y. Sup. Ct. 2001). Because the respondent did not produce identification, the officers brought him to the Dean's office. *Id.* at 536–37. After questioning the respondent, the Dean asked the safety officers to search him and then left the office. *Id.* at 537. The search yielded a handgun. The Court held the reasonable suspicion standard applicable to school safety officers acting at the request of a school official. *Id.* at 540. *See* Shade v. City of Farmington, 309 F.3d 1054, 1060 (8th Cir. 2002) (searches conducted of students off school grounds by school liaison officers held to the reasonable suspicion standard as the searches resulted from school officials' concerns that the presence of a knife presented a safety issue).

98. Courts have noted that school officials have the responsibility to protect students and teachers from threats to their safety. *See, e.g.*, *In re* Alexander B., 220 Cal. App. 3d 1572, 1577 (Cal. Ct. App. 1990) ("All students and staff of public . . . schools have the inalienable right to attend campuses which are safe, secure and peaceful.") (quoting CAL. CONST. art. I, § 28(c)); *In re* Angelia D.B., 564 N.W.2d 682, 689 (Wis. 1997) ("School officials not only educate students . . . but they have a responsibility to protect those students and their teachers from behavior that threatens their safety and the integrity of the learning process.").

99. *Angelia D.B.*, 564 N.W.2d at 690 (quoting New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)).

sacrificing the more lenient and flexible reasonable suspicion standard.[100] For instance, *In re Angelia D.B.* involved a high school student who informed the assistant principal that he saw a knife in another student's backpack earlier that day.[101] He also told the assistant principal that the student might have access to a gun.[102] The assistant principal called the school liaison officer, who was a city police officer, and the officer ultimately conducted a pat search of the student and found no weapon.[103] The student was then brought to the police liaison office, where another police officer was present.[104] A subsequent and more thorough search revealed a knife in the student's waistband. She was then arrested.[105] The Wisconsin Supreme Court upheld the search, holding that "the *T.L.O.* reasonable grounds standard, and not probable cause, [applies] to a search conducted by a school liaison officer at the request of and in conjunction with school officials."[106] The Court reasoned that an alternative conclusion might cause school officials, who lack the expertise to pat-search for or

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100. *See, e.g.*, *Alexander B.*, 220 Cal. App. 3d. at 1578 (upholding police search on reasonable suspicion grounds when dean directed officer to search a group of students after receiving a report that one of them had a weapon); J.A.R. v. State, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997) (upholding search conducted by deputy sheriff that yielded a gun, stating that the "fact that [a] school official prudently asked a law enforcement officer to assist in the search does not increase the level of suspicion needed to perform a pat-down search of [the] student"); *see also* Robert L. Martin, *Search and Seizure in Florida Schools: The Effect of Police Involvement*, 72 FLA. B. J. 52 (May 1998) (opining that school officials are now confronted with dangerous situations that they are not trained to handle, and should therefore be able to rely on law enforcement assistance without sacrificing the reasonableness standard).

101. *Angelia D.B.*, 564 N.W.2d at 684.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 690. The New Mexico Court of Appeals has similarly held that full time police officers assigned to public schools as resource officers may search students upon reasonable suspicion if they are conducted "at the request of a school official." *In re* Josue T., 989 P.2d 431, 433 (N.M. Ct. App. 1999). In *Josue T.*, a school official began questioning a student to determine if he possessed marijuana. *Id.* at 434. The official believed the student to smell of burnt marijuana and decided to search the student. The school resource officer joined the official and went to the office where the search was to occur. The student kept both hands in his pants pockets, and both the school officer and the police officer noticed a bulge in the front pocket of the student's pants. The school official subsequently told the student to empty his pockets, but the student did not remove his hand from one of his pockets. At this point the school official believed there to be a "'safety issue'" and asked the police officer to search the student. *Id.* The officer ultimately retrieved a gun from the student's pocket. The Court of Appeals upheld the search based on the reasonable suspicion standard, stating that the police officer "merely assisted the school official . . . at the school official's request, to protect student welfare in the educational milieu." *Id.* at 437. The Court reasoned that requiring probable cause in this situation,

> "might serve to encourage teachers and school officials, who generally are untrained in proper pat down procedures or in neutralizing dangerous weapons, to conduct a search of a student suspected of carrying a dangerous weapon on school grounds without the assistance of a school liaison officer or other law enforcement official."

Id. (quoting *Angelia D.B.*, 564 N.W.2d at 690).

neutralize dangerous weapons, to search students suspected of possessing dangerous weapons without the aid of a liaison officer.[107]

6. Information Providers

Lastly, courts have considered instances when law enforcement officers—either assigned to the schools or not—have provided information to school officials, but then did not physically participate in the search. Determinations of the appropriate suspicion level in these instances usually turn on the particular court's opinion as to whether the school official acted as an agent of the law enforcement officer.[108] In making this assessment, courts look to the "totality of the circumstances,"[109] which includes the purpose for conducting the search,[110] who initiated the search,[111] as well as whether—and to what extent—law enforcement authorities participated in or approved the search.[112]

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107. *Angelia D.B.*, 564 N.W.2d at 690; *see* J.A.R. v. State, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997). The *J.A.R.* court stated:

> It would be foolhardy and dangerous to hold that a teacher or school administrator, who often is untrained in firearms, can search a child reasonably suspected of carrying a gun or other dangerous weapon at school only if the teacher or administrator does not involve the school's trained resource officer or some other police officer.

Id.

108. The agency doctrine applies when non-law enforcement officers conduct searches, as courts seek to determine whether "in light of all the circumstances, the party conducting the search or seizure must be regarded as an instrument or agent of the state." Thomas M. Finnegan, *Scope of the Fourth Amendment*, 74 GEO. L.J. 499, 501 (1986) (citing People v. Wolder, 84 Cal. Rptr. 788 (Cal. Ct. App. 1970); United States v. Miller, 688 F.2d 652 (9th Cir. 1982); United States v. Howard, 752 F.2d 220 (6th Cir. 1985), *cert. denied*, Shelton v. United States, 472 U.S. 1029 (1985); Stapleton v. Superior Court, 447 P.2d 967 (Cal. 1969); Lustig v. United States, 338 U.S. 74 (1949); United States v. Bennett, 729 F.2d 923 (2d Cir. 1984), *cert. denied*, 469 U.S. 1075 (1984); United States v. Jacobsen, 466 U.S. 109 (1984); Illinois v. Andreas, 463 U.S. 765 (1983); Knoll Assocs., Inc. v. Federal Trade Comm'n, 397 F.2d 530 (7th Cir. 1968); Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982)).

109. *In re* D.E.M., 727 A.2d 570, 573 (Pa. Super. Ct. 1999) (citing Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); *In re* P.E.A., 754 P.2d 382, 385 (Colo. 1988)).

110. *See, e.g.*, State v. V.C., 600 So. 2d 1280, 1281 (Fla. Dist. Ct. App. 1992) (assistant principal did not act as agent of law enforcement as his "primary function when dealing with disciplinary problems was to act as a fact-finder for the school system").

111. *See, e.g.*, Cason v. Cook, 810 F.2d 188, 191–92 (8th Cir. 1987) (upholding search on reasonableness grounds where school official questioned and initially searched students suspected of stealing, and where liaison officer's "involvement was limited to a pat-down search" and "to briefly interviewing" the students ultimately found to have stolen the property); State v. N.G.B., 806 So. 2d 567, 568–69 (Fla. Dist. Ct. App. 2002) (upholding law enforcement officer's search of student on reasonable suspicion grounds that revealed marijuana as the assistant principal initiated the investigation and "enlisted" the officer's assistance).

112. *See, e.g.*, *D.E.M.*, 727 A.2d at 574 (stating that because police officers were "not even on school property [during the search] there is no evidence that the police coerced, dominated, or directed the actions of the school officials," and, therefore, the schools officials

Most courts that have assessed the constitutionality of these particular school searches have recognized both the probable cause and reasonable suspicion standards as parts of their Fourth Amendment analyses. However, courts have found various ways to submerge law enforcement participation in these searches, whether through implementing a "totality of the circumstances" approach that examines and weighs numerous factors, or by finding other rationales for minimizing law enforcement participation in the searches vis-à-vis school officials or school policies, such as determining the underlying purpose of the search or subordinating the officer's role. Accordingly, courts have upheld these searches under the lower reasonable suspicion standard and have glossed over the possibility of actually applying the probable cause standard, except in extreme situations. Of course, there can be several explanations for why particular courts tilt toward the reasonable suspicion standard. However, as with all Fourth Amendment issues, analyzing the constitutionality of searches involve a legal, factual and political calculus.[113] In fact, the extra-legal factors embedded in these particular analyses—concerns about school safety, juvenile crime and community responsibility—in large part constitute the Fourth Amendment equation.

IV. ASSESSING THE LOWER COURTS' POST-*T.L.O.* JURISPRUDENCE IN LIGHT OF DOCTRINAL AND POLICY CONSIDERATIONS

A. Problematic Consequences for Fourth Amendment Doctrine: The Resuscitation of the Silver Platter Doctrine

Court decisions regarding school searches conducted either in part by law enforcement personnel or in their presence are widely inconsistent and turn upon a host of factors. However, it is firmly established that school administrators who search students based on individualized factors must have reasonable suspicion to do so.[114] It is also a longstanding principle of constitutional law that law enforcement officers, as a general rule, must meet the higher probable cause standard to search the citizenry.[115]

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did not act as agents of law enforcement); R.L. v. State, 738 So. 2d 507 (Fla. Dist. Ct. App. 1999) (school official did not act as agent of law enforcement when school police officer passed information along to the official).

113. *See* Harper, *supra* note 67, at 14 (stating that Fourth Amendment interpretation is "inevitably a political task"). For an example of the political volatility surrounding Fourth Amendment interpretation, see Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 249 n.20 (2000) (describing political fallout following Judge Harold Baer's decision to suppress a large quantity of drugs recovered by police officers, after which he ultimately reopened the suppression hearing and reversed his decision).

114. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985). In other contexts, such as drug testing, school officials are permitted to randomly search certain student populations without individualized suspicion. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002) (upholding policy of drug testing all middle and high school students participating in any extracurricular activities); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662 (1995) (upholding drug testing of student athletes).

115. Some scholars believe that the Fourth Amendment is guided by reasonableness, rather than the probable cause and warrant requirements. *E.g.*, Akhil R. Amar, *Fourth Amendment, First Principles*, 107 HARV. L. REV. 757 (1994).

One potential issue that emanates from these distinct legal standards surfaces when the level of suspicion in particular instances meets the reasonableness standard, thereby allowing school officials to conduct the search, but does not meet the higher probable cause standard, thereby preventing law enforcement officers from conducting the search. In this scenario, assuming that the line between school officials and law enforcement officers is clearly demarcated, the danger exists that the school official would conduct the search on behalf of the officer, and that the officer would then benefit from the fruits of the search.[116]

Legally, police officers in public schools should not be permitted to dodge the probable cause requirement by encouraging school officials to conduct searches pursuant to the reasonableness standard.[117] This shifting of responsibility would be analogous to the silver platter doctrine,[118] pursuant to which federal law enforcement authorities employed state law enforcement authorities to conduct searches when the former did not have the requisite level of suspicion.[119] Federal authorities engaged in this practice because, pursuant to *Wolf v. Colorado*,[120] the exclusionary rule applied only to unconstitutional searches conducted by federal authorities, and was not applicable through the Fourteenth Amendment to state authorities.[121] Accordingly, after *Wolf*, the admissibility of unconstitutionally seized evidence hinged on whether the evidence was originally gathered by state or federal authorities, with the evidence being admissible if gathered by the former and inadmissible if gathered by the latter.[122] In addition, while states had the authority to employ the exclusionary rule as

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116. *See* Patrick K. Perrin, *Fourth Amendment Protection in the School Environment: The Colorado Supreme Court's Application of the Reasonable Suspicion Standard in* State v. P.E.A., 61 U. COLO. L. REV. 153, 173–74 (1990) (warning that "police may encourage school officials to conduct searches where probable cause does not exist and where police could not legally conduct the search themselves").

117. *See, e.g.*, Stefkovich & Miller, *supra* note 7, at 39–40 (stating that police officers cannot use school officials to search students "and then ask the officials to hand them the evidence on a 'silver platter'"); UNIFORM STATE MEMORANDUM, *supra* note 49, at 25 (stating that in New Jersey, "[n]o law enforcement officer will direct, solicit, encourage or otherwise actively participate in any specific search conducted by a school official . . . acting on his or her own authority in accordance with the rules and procedures governing law enforcement searches").

118. This phrase has been traced to the plurality opinion in *Lustig v. United States*, 338 U.S. 74, 79 (1949). *See* Elkins v. United States, 364 U.S. 206, 208 n.2 (1960).

119. *See* Akhil Reed Amar & Jonathan L. Marcos, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 12 (1995) (describing the silver platter doctrine).

120. 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367, U.S. 643, 655–56 (1961).

121. *Id.* at 33. However, while the Court in *Wolf* limited the exclusionary rule to those searches conducted by federal authorities, it extended the general Fourth Amendment prohibition against unreasonable searches enforceable against the states through the Due Process Clause. *Id.* at 27–28. This part of the Court's holding overruled *Weeks v. United States*, which limited the general prohibition to searches conducted by federal authorities. 232 U.S. 383, 398 (1914).

122. Tom Quiqley, Comment, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285, 286 (1988). As a result, when the government sought to introduce evidence in a federal criminal prosecution that had been illegally seized by state authorities, "the question inevitably

a matter of state legislation or decisional law, some did[123] and several did not.[124] As a result of this anomaly, federal law enforcement officers sometimes requested state officers to conduct searches in instances where probable cause did not exist, and the state officers in turn handed the fruits of those searches over to the federal officers. The federal authorities then used those fruits for purposes of arrest and prosecution.

The Supreme Court abolished the silver platter doctrine in *Elkins v. United States*,[125] extending the exclusionary rule to evidence obtained by state officers in those instances where it would have been illegal for federal officers to do the same, and therefore would have been inadmissible in a *federal* criminal trial.[126] However, the existence of different constitutional standards of suspicion required for school officials and law enforcement authorities creates the dangers that are akin to those that existed prior to *Elkins*. These different standards encourage law enforcement officers to persuade school officials to conduct searches on their behalf when the level of suspicion does not rise to probable cause, relying on the lower reasonableness standard as a bootstrap.[127]

However, while this danger seems apparent, it has been ignored by most courts that have analyzed the legality of school searches. For instance, *In re P.E.A.*[128] involved a police officer who went to a junior high school to investigate a theft. While the officer was at that school, a student told him that two other students brought marijuana to a local high school that morning to sell to their schoolmates.[129] Acting on this information, the officer proceeded to the high school and informed the assistant principal of the purported plan.[130] The officer remained at the school while the assistant principal investigated his report. During this investigation, a school security

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arose whether there had been such participation by federal agents in the search and seizure as to make applicable the exclusionary rule of Weeks." *Elkins*, 364 U.S. at 211 (citations omitted).

123. *Mapp*, 367 U.S. at 651 (citing *Elkins*, 364 U.S. at 224 app.).

124. *See Elkins*, 364 U.S. at 224 app. tbl.1.

125. *Id.*

126. *Id.* at 224. One year after *Elkins*, the Supreme Court overruled *Wolf v. Colorado*, extending the exclusionary rule to evidence seized unconstitutionally by state officers, and therefore declaring such evidence inadmissible in state criminal proceedings. *Mapp*, 367 U.S. at 655–56.

127. *See, e.g.*, Mansukhani, *supra* note 7, at 366 (opining that the different suspicion standards present risks that police officers will have school officials conduct searches when the student's conduct does not rise to probable cause); Perrin, *supra* note 116, at 173–74 (likening the risks created by the different search standards to the silver platter doctrine and arguing that "[p]olice should not be allowed to search students, directly or indirectly, based on less than probable cause"). One commentator has suggested that the higher level of suspicion required of police officers encourages officers to "'merely convince a school principal that a search is needed,'" thereby allowing the school official to conduct the search under the lower standard. KERN ALEXANDER & M. DAVID ALEXANDER, THE LAW OF SCHOOLS, STUDENTS AND TEACHERS IN A NUTSHELL § 7.6, at 141 (1984), *quoted in* LAWRENCE F. ROSSOW & JACQUELINE F. STEFKOVICH, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 47 (2d ed. 1995).

128. 754 P.2d 382 (1988).

129. *Id.* at 384.

130. The prosecution conceded that this information did not provide the officer with probable cause to arrest the two students. *Id.*

officer—who had been summoned by the principal—searched P.E.A.[131] and found nothing. In response to questioning, P.E.A eventually told the assistant principal that he drove to school. The security officer then took P.E.A.'s car keys and proceeded to the student parking lot. On the way there, P.E.A. told the security officer of an illegal substance that was in the car, but stated that it belonged to one of the other students who rode with him to school. The security officer then searched the car and found marijuana.[132] P.E.A. was arrested and delinquency charges were subsequently filed.

The Colorado Supreme Court analyzed the Fourth Amendment issues under the agency doctrine[133] and held that the assistant principal and the school security officer did not act as agents of the police officer.[134] The Court reasoned that while the police officer remained on school grounds during the investigation, he "did not *request* or in any way participate in the searches or interrogations of the students."[135] Rather, the police officer's "supplying information to the [assistant] principal with the intent of initiating the search and his presence on school premises during the investigation d[id] not establish that the principal and security officer acted as police agents."[136]

In reaching its decision, the Colorado Supreme Court minimized the police officer's role in the encounter, and therefore failed to consider how the different levels of suspicion required of police officers and school officials could have influenced, if not dictated, the officer's actions. While the Court noted that the police officer did not specifically *request that* a search be conducted, a contextual analysis would consider as relevant the following: 1) the officer had information; 2) that the two students planned to sell marijuana *at the* high school; 3) the information did not rise to probable cause;[137] 4) the officer went to the high school; 5) reported the information to the assistant principal of the school; and 5) remained at the school while the reported information was being investigated. A thorough *contextual* analysis would have led to the plausible conclusion that the police officer through his actions, if not his words, *expected* the school officials to investigate these two students and that, as part of that investigation, the school officials would search those students. The analysis would have also recognized that the officer, by remaining at the school throughout the entirety of the investigation, *expected to receive* the fruits of the school official's search. Moreover, the analysis would have weighed the fact that the officer, by remaining at the school during the pendency of the investigation, created the expectation among school officials that they would turn over the fruits of any search to him. Therefore, looking together at all of the interlocking facts could have led the court to conclude that this particular search was conducted at the behest of the police

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131. The two students who purportedly brought the marijuana to the high school informed the security officer that P.E.A. drove them to school. *Id.*

132. The police officer was not present during any questioning or the various searches. *Id.*

133. The trial court suppressed the evidence, finding, *inter alia*, that the school officials acted as agents of the police and therefore needed probable cause. *Id.* at 385.

134. *Id.*

135. *Id.* (emphasis added).

136. *Id.* (citation omitted).

137. *See id.* at 384 (noting that the prosecution "conceded" that the information provided to the police officer did not constitute probable cause).

officer, and that the school officials were essentially acting on his behalf. Accordingly, these facts could have led the court to hold the resulting search to the probable cause standard.

Conversely, at least one court has recognized that police officers in public schools sometimes rely on school officials to conduct searches because of the lower requirement of suspicion that school officials enjoy. In *State v. Heirtzler*,[138] a police officer was assigned as a school resource officer to a New Hampshire high school to investigate criminal activity.[139] At all times, the officer acted under the control of the police department.[140] The officer and the school officials reached an agreement whereby the latter would investigate "the less serious potential criminal matters, including searches."[141] If the potential criminal matter were more serious, the officer would investigate and conduct any required search.[142] However, pursuant to this agreement, the police officer assessed the initial information regarding any less serious potential criminal matter and, if he concluded that he lacked probable cause, declared it a "school issue" and gave the information to the school officials.[143] He would then be contacted if the school officials seized contraband, such as drugs, from the particular student searched. The officer admitted that he and the school officials had a "'silent understanding'" that his passing information along to school officials when he did not have the required level of suspicion "was a technique used to gather evidence otherwise inaccessible to him due to constitutional restraints."[144]

The defendant asserted that the school officials who searched him did so as agents of the assigned officer and that their actions therefore had to comport with those required of police officers.[145] The New Hampshire Supreme Court analyzed this claim under the state's agency rule and declared that "[w]hether formal or *informal*, the agreement [between a private party and the government] must 'evince an understanding that the third party will be acting on the government's behalf *or for the*

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138. 789 A.2d 634 (N.H. 2001).

139. In *Heirtzler*, the defendant was a New Hampshire high school student who had been charged with possession and distribution of a controlled drug. A teacher observed him pass a folded piece of tinfoil to another student. *Id.* at 637. That student removed an item from the tinfoil and passed the tinfoil back to the defendant. *Id.* The teacher informed the school resource officer of her observations, and the officer determined that he did not have enough information to warrant further action. *Id.* However, the officer relayed the information to an assistant principal who, along with another assistant principal, questioned and searched the defendant. *Id.* Upon finding what appeared to be LSD, the assistant principal turned the case over to the school resource officer. *Id.* The lower court granted the defendant's motion to suppress the evidence. *Id.* at 636.

140. *Id.*

141. *Id.*

142. The officer testified that more serious searches involved instances where safety was at issue, most notably cases potentially involving weapons such as knives or guns. *Id.* at 637.

143. *Id.*

144. *Id.*

145. *Id.* at 637–38.

government's benefit.'"[146] The Court then stated that the determination of an agency relationship depends on the "totality of the circumstances."[147]

The Court then distinguished between the school officials' administrative duties, pursuant to which they are allowed a more flexible level of suspicion to perform searches for purposes of "foster[ing] a safe and healthy educational environment,"[148] and instances when "school officials agree to take on the mantle of criminal investigation and enforcement."[149] In the latter instance, school officials "assume an understanding of constitutional criminal law equal to that of a law enforcement officer."[150] Accordingly, the Court declared that school officials in the latter situation are held to the higher probable cause standard.

Heirtzler involved a situation where the police officer explicitly conceded that his duties required him to report suspicious criminal activity to school officials when he did not possess the level of suspicion required to act further, with the clear understanding that the officials would act on the information pursuant to their lower level of required suspicion. In many other instances, however, the agreement or understanding between law enforcement personnel and school officials is likely to be more subtle and courts must rely on multiple factors to conclude either that police officers acted pursuant to school authority, rather than law enforcement authority, or that the school officials did not act as agents of law enforcement.

Some commentators and courts have delineated separate and distinct roles for school officials and law enforcement authorities, and have relied on these respective distinct contexts and functions to justify the lower search standards applicable to school officials.[151] Accordingly, courts have largely delineated separate and distinct roles for school officials and law enforcement authorities, and have relied on these

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146. *Id.* at 639 (quoting State v. Bruneau, 552 A.2d 585, 588 (N.H. 1988)) (emphasis added).

147. *Id.*

148. *Id.* at 640 (citation omitted).

149. *Id.*

150. *Id.*

151. *See, e.g.*, Beci, *supra* note 35, at 834 (inferring that the Court in *T.L.O.* interpreted the Constitution as affording greater protection to adult criminal suspects from searches than to school children because "adult searches usually arise in the criminal context, which school searches generally do not"). Justice Powell, in his *T.L.O.* concurrence, highlighted this distinction as he wrote that:

> Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils.

New Jersey v. T.L.O., 469 U.S. 325, 349–50 (1985) (Powell, J., concurring). This distinction between school authorities and law enforcement officers has also been recognized in at least one other context relevant to the Fourth Amendment. *See* Thompson v. Carthage Sch. Dist., 87 F.3d 979, 981 (8th Cir. 1996) (declaring the exclusionary rule inapplicable to school disciplinary proceedings because school officials, unlike law enforcement officers, "do not have an adversarial relationship with students").

respectively distinct roles and functions to justify the lower search standard applicable to school officials. The vast majority of courts that have considered these particular Fourth Amendment issues have wholly ignored the larger context within which many of these searches now occur. Judicial failure to assess claims within a more accurate social, and therefore legal, framework has been explored in various contexts, including Fourth Amendment analyses.[152] Commentators have noted that courts often either fail to consider the full factual and contextual backgrounds of particular cases, or de-emphasize the complete context within which disputes have arisen.[153] For instance, one commentator observed that courts tend to interpret litigants' experiences based on their (the courts') "understanding and interpretation of law."[154] As a result, appellate opinions often do not present fully accurate depictions of the facts from the parties' perspectives because it is "only [those] characteristics and experiences that have relevance to the law as presented by the court [which] are chosen as the facts of the case."[155]

Likewise, in the school context courts have virtually ignored the deepening interdependency and interconnectedness between school officials and law enforcement authorities, which has led to broader reporting requirements by school officials to law enforcement authorities. However, given these developments, the relational dynamics between law enforcement authorities and school officials have shifted to such an extent that it is no longer possible to distinguish clearly between the law enforcement and public school contexts.[156] Indeed, the increased placement of law

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152. *See generally* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (explaining how the Supreme Court's construction of race in the Fourth Amendment context legitimizes and reproduces inequality in policing). *See also* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 309 (criticizing recent Supreme Court decisions in Fourth Amendment traffic stop cases as failing to recognize that "car stops and similar police actions may raise special concerns for Americans who are not white"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 967–75, 978–79 (1999) (setting forth Supreme Court decisions in which Court failed to mention race in its factual presentations).

153. *See, e.g.*, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM 89 (1997) (describing how the author uses as a teaching tool an instance where a court failed to set forth pertinent "narrative facts," which therefore resulted in a distorted and decontextualized opinion, to illustrate to students "the power of narrative and the capacity of courts to achieve a desired outcome by manipulating the terms of narrative").

154. Shalleck, *supra* note 20, at 1735. Shalleck offered these observations as part of a more general critique of the law school classroom discourse that is driven by the traditional case-method approach, as this discourse fails to "acknowledg[e] that almost certainly the actual experiences of each of the parties differ from the facts recorded by the appellate court." *Id.* at 1733–34.

155. *Id.* at 1735.

156. As a result, the relationships between school officials and students have drifted away from the "commonality of interests" that Justice Powell described in *T.L.O.* and have moved closer towards an adversarial reality. *T.L.O.*, 469 U.S. at 350. As set forth below, there is a disconnection between the shift towards these adversarial relationships and the lesser Fourth Amendment protections afforded to students in the school context. There are noteworthy parallels between this dichotomy and those that exist in the theoretically quasi-adversarial juvenile court setting. In the juvenile court context, *In re Gault* formalized

enforcement officers—or other officers under the direct control of law enforcement authorities—in public schools, along with the broader reporting requirements imposed upon school officials, has in many ways melded the criminal justice system with school disciplinary processes, at least in those schools that have implemented these measures.

These interdependent relationships render it necessary to revisit the Fourth Amendment protections afforded to school children and to reconsider the level of suspicion school officials should possess before searching students, as well as the rights that students should possess when subjected to searches.[157] It is also important to consider what effect, if any, law enforcement involvement has on the constitutionality of student searches, as well as, on a more rudimentary level, how law enforcement involvement should even be defined in this context. It is only within this

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processes by extending certain due process rights—rights to notice of charges, counsel, confrontation and cross examination of witnesses and the privilege against self-incrimination—to juvenile proceedings. 387 U.S. 1 (1967). Since *Gault*, juvenile court systems have moved farther away from the original rehabilitative model and have become more punitive. *See, e.g.*, BARRY C. FELD, BAD KIDS: RACE AND TRANSFORMATION OF THE JUVENILE COURT 3 (1999) ("[J]udicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down second-class criminal court for young people."); Sara E. Knopf, Note, *Overturning* McKeiver v. Pennsylvania*: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2174–76 (1999) (arguing that since *Gault* the juvenile courts have become more punitive, and thus almost indistinguishable from the criminal system). However, juveniles are still afforded less constitutional rights than those afforded to adults in the adult criminal justice system, even though the consequences of delinquency findings can, in many instances, be equally severe. *See, e.g.*, Mary Berkheiser, *The Fiction of Juvenile Right to Counsel*: *Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 645–49 (2002) (highlighting the various collateral consequences attendant to delinquency adjudications); Randy Hertz & Martin Guggenheim, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 593 (1998) (criticizing the denial of the right to a jury trial in juvenile court). Moreover, commentators have noted that systematic constraints often disable those rights, most notably the right to counsel, extended to juveniles in *Gault. See, e.g.*, Richard C. Boldt, *Rehabilitative Treatment and the Drug Court Movement*, 76 WASH. U. L. Q. 1205, 1275 & n.403 (1999) (citing data showing that many children are unrepresented in juvenile court and that those with attorneys often receive deficient representation); Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 191, 214 (1997) (noting the "[l]ack of resources and power allocated to defense counsel for children, as well as continuing reluctance on the part of judges to fully implement due process protections"). Accordingly, there is a stark discrepancy between the increased adversarial nature of juvenile court and the diminished constitutional rights afforded to juveniles in this setting. As a result, children who are prosecuted in juvenile court "receive[] the worst of both worlds: . . . get[ting] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Gault*, 387 U.S. at 19, (quoting Kent v. United States, 383 U.S. 541, 556 (1966)).

157. *See, e.g.*, Jacobs, *supra* note 42, at 629–30 (opining that "searches conducted by or in the presence of law enforcement officials merit close consideration as more and more police are assigned to active roles in schools").

broader context that these *complete* narratives can be properly defined and interpreted.[158]

The end result of these relationships is that these school officials now act pursuant to policies—explicit or implicit—both "[i]n conjunction with"[159] and, perhaps more importantly, "at the behest of law enforcement agencies."[160] As noted above, while the Supreme Court in *T.L.O.* did not address this issue, several lower courts have attempted to do so. In fact, courts recognize that when school officials truly act as agents of law enforcement authorities, probable cause is the level of suspicion required to uphold the legality of the searches.[161] However, courts and most commentators fail to consider many of the underlying factors necessary to assess accurately the relationships between school and law enforcement authorities. As a result, their constrained views of these relationships do not consider the underlying contexts within which they form and mature.

Because of their narrow constructs, most courts and several commentators would require that, for probable cause to be the level of suspicion against which a school search involving law enforcement authorities should be measured, law enforcement personnel must *initiate* the search.[162] This, in turn, mandates that officers

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158. Anthony G. Amsterdam and Jerome Bruner observe that "[t]o the extent that law is fact-contingent, it is inescapably rooted in narrative." ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 111 (2000). For a thorough explanation of narrative, including its relationship to legal proceedings and the law more generally, see *id.* at 110–42.

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

160. *Id.*

161. *See id.* at 355–56 (Brennan, J., concurring in part, dissenting in part) ("I agree that school teachers or principals, when not acting as agents of law enforcement authorities, generally may conduct a search of their students' belongings without first obtaining a warrant."); *see also In re* P.E.A., 754 P.2d 382 (Colo. 1988); Cason v. Cook, 810 F.2d 188 (8th Cir. 1987); State v. Heirtzler, 789 A.2d 634 (N.H. 2001); Mansukhani, *supra* note 7; Perrin, *supra* note 116; Stefkovich & Miller, *supra* note 7; Finnegan, *supra* note 108, at 501 (citing People v. Wolder, 84 Cal. Rptr. 788 (Cal. Ct. App. 1970); United States v. Miller, 688 F.2d 652 (9th Cir. 1982); United States v. Howard, 752 F.2d 220 (6th Cir.), *cert. denied*, Shelton v. United States, 472 U.S. 1029 (1985); Stapleton v. Superior Court, 447 P.2d 967 (Cal. 1969); Lustig v. United States, 338 U.S. 74 (1949); United States v. Bennett, 729 F.2d 923 (2d Cir.), *cert. denied*, 469 U.S. 1075 (1984); United States v. Jacobsen, 466 U.S. 109 (1984); Illinois v. Andreas, 463 U.S. 765 (1983); Knoll Assocs., Inc. v. Federal Trade Comm'n, 397 F.2d 530 (7th Cir. 1968); Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982)).

162. *See, e.g.*, State v. N.G.B., 806 So. 2d 567, 568 (Fla. Dist. Ct. App. 2002) (finding that reasonable suspicion was the proper standard where the vice principal initiated the search by the police officer); State v. Heirtzler, 789 A.2d 634 (N.H. 2001); *In re* D.D., 554 S.E.2d 346, 352–53 (N.C. Ct. App. 2001) (noting that traditional probable cause standard governs when school official searches at the behest of outside law enforcement officers); F.S.E. v. State, 993 P.2d 771 (Okla. Crim. App. 1999) (holding school officials to the reasonable suspicion standard so long as the search is not conducted at the behest of police); F.P. v. State, 528 So. 2d 1253, 1255 (Fla. Dist. Ct. App. 1988) (search of student by school resource officer resulting from investigation by Tallahassee Police Department must be based on probable cause unless student consented to the search).

actually be present *and* actively involved in the search.[163] The problem is that these standards fail to gauge completely the entangled relationships between school officials and law enforcement authorities that have formed from the escalated use of law enforcement measures to enforce school rules,[164] as well as the concomitant increased reliance on the criminal justice system to punish student violators.

In light of the entangled interdependency that now exists between school officials and law enforcement personnel, strict reliance on the physical presence of law enforcement officers as the *sine qua non* for their involvement in school searches is misplaced. Indeed, the physical presence of law enforcement officers should not always be the indispensable requirement that must be proved for probable cause to be the standard by which the legality of the search is to be assessed. Rather, school officials can act "in conjunction with or at the behest of law enforcement agencies," and law enforcement authorities can be actively involved in school searches, even when law enforcement personnel are not physically present during the search.

Outside the school context, the Supreme Court has recognized that the physical presence of law enforcement officers is not necessarily a prerequisite for law enforcement involvement in searches by state actors. In *Ferguson v. City of Charleston*,[165] the Court struck down a South Carolina policy that permitted staff members at a state hospital in Charleston to screen expectant mothers for drugs without their consent, and allowed police officers to arrest those mothers who had tested positive and who had either refused drug treatment or had not successfully completed drug treatment.[166] The Fourth Circuit deemed such searches reasonable as a

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163. Even commentators who have observed the heightened law enforcement presence in public schools have argued either that probable cause should be required when police officers are significantly involved in searches, or that courts should at least examine these encounters more closely, have equated "involvement" with either police presence or *actual* participation in the *particular* investigation, such as providing tips to school officials. *See* Laura Beresh-Taylor, Comment, *Preventing Violence in Ohio's Schools*, 33 AKRON L. REV. 311, 328–29, & n.86 (2000) (while observing that law enforcement officers who conduct school searches must follow the standards that govern all police searches, author states that law enforcement officers become involved in these searches "when they give tips to school officials or school security guards, investigate criminal acts that were initiated outside of the school, or when schools hire police or request police assistance") (citing Stefkovich & Miller, *supra* note 7, at 33); Jacobs, *supra* note 42, at 629–30 (while stating that courts should more closely examine searches when law enforcement officers "are in any manner involved," seemingly limits those situations to when searches are "conducted by or in the presence of" said officers); Stefkovich & Miller, *supra* note 7, at 33 (listing six ways that police officers become involved in public school searches, all of which require active participation either through providing tips to school officials or actual presence during the search).

164. One commentator has opined that courts should scrutinize searches "conducted by or in the presence of" law enforcement officers more closely given increased numbers of officers "assigned to active roles in schools." Jacobs, *supra* note 42, at 629–30.

165. 532 U.S. 67 (2001).

166. The Petitioners were ten women who received obstetrical care at the hospital and had been arrested pursuant to the policy. *Id.* at 73. The Respondents were the City of Charleston, law enforcement officials who helped develop and implement the policy, and representatives of the public hospital. *Id.* The policy was developed by the city prosecutor and included procedures that hospital staff were required to follow with regard to identifying

matter of law, and relied on the proposition, first articulated by Justice Blackmun in *T.L.O.*,[167] that special needs may, in certain circumstances, justify a search policy designed to further non-law enforcement ends.[168] The purported non-law enforcement ends in *Ferguson* were the protection of the mother and child's health and to get the mother into drug treatment.[169]

However, the Supreme Court rejected this special needs rationale, stating that while one purpose might have been to protect the mother and child's health, "the immediate objective of these searches was to generate evidence *for law enforcement purposes*."[170] The Court distinguished between state hospital workers who acted alone and who *discovered* incriminating evidence, and the policy at issue in *Ferguson*, where state hospital employees worked in conjunction with law enforcement authorities to intentionally obtain such evidence. In fact, the Court specifically noted how the *T.L.O.* Court distinguished between searches "'carried out by school authorities acting alone and on their own authority'" and those conducted "'in conjunction with or at the behest of law enforcement agencies.'"[171] Accordingly, the hospital employees in *Ferguson* essentially acted as agents of the law enforcement authorities, and were considered to be an integral component of a greater law enforcement purpose.

The Court also clarified the concept of special needs.[172] It stated that it had never upheld a claim that the collection of evidence for criminal law enforcement

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suspected drug users as well as instructions regarding the obtaining and retention of evidence. *Id.* at 71–72. The original policy required the hospital to report any mother to law enforcement authorities immediately if she tested positive after labor, and she would be promptly arrested. *Id.* at 72. If the expectant mother tested positive during pregnancy, the hospital was required to contact law enforcement authorities if the expectant mother tested positive a second time or missed an appointment with a drug counselor. *Id.* However, the policy had been modified so that any patient who tested positive, whether during pregnancy or after labor, could avoid arrest by consenting to drug treatment. *Id*.

167. *See id.* at 74 n.7 (stating that the phrase "special needs" first appeared in Justice Blackmun's *T.L.O.* concurrence).

168. *Id.* at 75. Respondents' two defenses at trial were that the petitioners consented to the searches and that, even without consent, the searches were reasonable as a matter of law "because they were justified by special non-law enforcement purposes." *Id.* at 73. The District Court rejected the latter defense as it found that the tests were not conducted for non-law enforcement purposes. *Id.* at 73–74.

169. *Id.* at 81.

170. *Id.* at 83 (emphasis in original). The Court noted the interdependency between the state hospital workers and law enforcement authorities. For instance, the policy included police operational guidelines on evidentiary issues such as chain of custody. *Id.* at 82. Moreover, the Court noted that city prosecutors and police had extensive involvement with the policy's administration. *Id.*

171. *Id.* at 79 n.15 (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

172. *But see* Steven R. Probst, Comment, Ferguson v. City of Charleston*: Slowly Returning the "Special Needs" Doctrine to Its Roots*, 36 VAL. U. L. REV. 285, 304 (2001) (opining that *Ferguson* will not offer guidance to lower courts given its unique factual background and the Court's failure to address inconsistencies related to the special needs exception).

purposes fit within the special needs analysis and exception.[173] As a result, the Court held that because law enforcement officials were involved at every stage of the policy, and that the immediate objective of the policy was to gather evidence for law enforcement purposes, those searches did not fit within the special needs exception.[174] Therefore, the regular requirements of the Fourth Amendment must have been met for the searches to have properly served a law enforcement purpose.[175]

As with the state hospital in *Ferguson*, certain public schools—namely, those where security is *overseen* by law enforcement authorities; those that have a law enforcement presence in their hallways; and those where officials are required to refer all incidents and crimes to law enforcement agencies—have become institutional arms of law enforcement.[176] These school administrators have, in effect, become agents of

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173. *Ferguson*, 532 U.S. at 83 n.20. In fact, the Court has specifically invalidated search schemes whose primary purpose was to uncover evidence of criminal activity. *See* Indianapolis v. Edmond, 531 U.S. 32, 41 (2000) (striking down a vehicle checkpoint as violative of the Fourth Amendment as its primary purpose was to uncover narcotics).

174. The Court recognized that situations exist where state hospital employees are legally required "to provide law enforcement officials with evidence of criminal conduct *acquired in the course of routine treatment.*" *Ferguson*, 532 U.S. at 78 n.13 (citation omitted) (emphasis added). However, the Court distinguished between situations where hospital staff may acquire incriminating evidence "during the course of treatment to which the patient had consented," and instances where hospital staff "would intentionally set out to obtain evidence from their patients for law enforcement purposes." *Id.*

175. The Court then remanded the matter to the Fourth Circuit to determine the applicability of the consent exception to the Fourth Amendment. *Id.* at 77, 91 (Kennedy, J., concurring*)*. On remand, the Fourth Circuit "examin[ed] . . . the evidence pertaining to each Appellant to determine whether a rational jury could have found that that Appellant consented to the taking and testing of her urine by agents of law enforcement for the purpose of obtaining evidence of criminal activity." Ferguson v. City of Charleston, 308 F.3d 380, 398 (4th Cir. 2002). The Court, conducting a *de novo* review, found that only two of the appellants had knowledge of the policy, and therefore the appellants neither expressly nor impliedly consented to the searches. *Id.* at 402–03. The Court then determined that, in light of the medical distress the appellants had been experiencing when producing the urine samples, none of them, including the two who had knowledge of the law enforcement involvement, acted voluntarily when searched. *Id.* at 404. Accordingly, the Court held that these appellants suffered Fourth Amendment violations. However, the Court excluded from this holding one appellant, who it determined suffered no violation, as well as another appellant who presented a standing issue. Therefore, the Court remanded the matter to the District Court to resolve the standing issue as to that appellant, as well to determine the remaining appellants' damages. *Id*.

For discussions of various aspects of *Ferguson*, see generally Lucinda Clements, Ferguson v. City of Charleston*: Gatekeeper of the Fourth Amendment's "Special Needs" Exception*, 24 CAMPBELL L. REV. 263 (2002); Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After* Ferguson v. City of Charleston, 47 VILL. L. REV. 299 (2002); Barbara J. Prince, *The Special Needs Exception to the Fourth Amendment and How it Applies to Government Drug Testing of Pregnant Women: The Supreme Court Clarifies Where the Lines are Drawn in* Ferguson v. City of Charleston, 35 CREIGHTON L. REV. 857 (2002); Jill E. Rhodes, *A Decision Without a Solution:* Ferguson v. City of Charleston, 53 S.C. L. REV. 717 (2002).

176. Justice Kennedy, in his concurring opinion in *Ferguson*, wrote that the state hospital "acted, in some respects as an institutional arm of law enforcement." *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring).

law enforcement authorities as their searches seek to gather evidence related to criminal activity and as law enforcement authorities have the discretion to introduce the school children to the criminal justice system and, as a result, the very real—and sometimes permanent—consequences that follow.[177] Perhaps most importantly, *Ferguson* illustrates that the *physical* presence of law enforcement officers is not necessary to declare a state actor or agent to be acting in conjunction with law enforcement.

In fact, at least one circuit has applied the *Ferguson* rationale in declaring that social workers' investigations into physical or sexual abuse did not fit into the special needs exception because the investigations were connected to general law enforcement purposes.[178] The Court observed that state law required the social workers to notify law enforcement authorities of any child abuse reports they received,[179] which therefore "deeply involv[ed]" law enforcement authorities in their investigations.[180] Accordingly, the Court held that social workers "must demonstrate probable cause and obtain a court order, obtain parental consent, or act under exigent circumstances to justify the visual body cavity search of a juvenile."[181]

It logically follows from *Ferguson* that *active* involvement of law enforcement authorities is not so narrowly construed as to require their physical participation in the particular search. Nor does it require the officers to actually initiate the search. For instance, it could include an officer who is present during the search, who searches at the instruction or request of a school official, who seeks assistance from a school official in carrying out the search, or who receives evidence of criminal activity discovered and seized by a school official. Thus, if the *purpose* of the search is to uncover evidence of criminal activity, and the *policy* is to provide to law enforcement authorities all such evidence, then law enforcement authorities are intertwined not only with the policy, but also with the agents, such as school officials, who carry out the policy.

In addition, because of the formalized relationships between school officials and law enforcement authorities, as well as the increased use of the criminal justice system to handle school disciplinary issues, the special needs exception to the traditional requirements of the Fourth Amendment cannot be used to justify these searches. Indeed, Justice Blackmun articulated this exception in the context of a search that sought to uncover evidence of a rule violation—smoking cigarettes in

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177. For discussions about the potential consequences flowing from introductions to the juvenile and/or criminal justice systems, see Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & POL'Y 177 (1996); Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189 (1998); John Johnson Kerbs, *(Un)equal Justice: Juvenile Court Abolition and African Americans*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 109 (1999); Stephen Wizner, *On Youth Crime and the Juvenile Court*, 36 B.C. L. REV. 1025 (1995).

178. Roe v. Texas Dep't of Protective & Regulatory Servs., 299 F.3d 395, 406–07 (5th Cir. 2002).

179. *Id.* at 407 (citing TEX. FAM. CODE ANN. § 261.105(b) (West Supp. 2002)).

180. *Id.*

181. *Id.* at 407–08.

school—and not criminal activity.[182] As both the majority[183] and concurrence[184] explained in *Ferguson*, the special needs exception applies only to those searches which are conducted for reasons unrelated to law enforcement.[185] Indeed, in its decisions upholding searches based on the special needs exception, the Supreme Court has articulated non law-enforcement purposes for the searches,[186] even though it

182. New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) (Blackmun, J., concurring) ("The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement.") In *T.L.O.* it was in the context of a search for evidence (cigarettes) of a school rule violation (smoking) that led to the discovery of evidence of a criminal violation. *Id.* at 328.

183. Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001) (explaining that other Supreme Court decisions have concluded that, "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification") (citations omitted).

184. Justice Kennedy noted that the policy had some purposes unrelated to law enforcement, including the protection of the mother and child's health, but found that "it had as well a penal character with a far greater connection to law enforcement than other searches sustained under our special needs rationale." *Id.* at 88–89 (Kennedy, J., concurring).

185. Justice Scalia, in dissent, took issue with the majority's enunciation of the special needs exception, opining that the existence of a law enforcement purpose does not nullify the special needs doctrine. *See id.* at 97–103 (Scalia, J., dissenting).

186. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002) (upholding policy conditioning the participation of all middle and high school students in any extracurricular activities on their consenting to drug testing, as the special need is to curtail health and safety risks related to drug usage, and as the test results are not revealed to law enforcement authorities); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648, 662 (1995) (upholding drug testing of student athletes as special need to diminish risk of psychological and physical harm to student athletes, and as test results are not turned over to law enforcement authorities); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620–21 (1989) (upholding drug testing of railway conductors as special needs to prevent accidents due to drug or alcohol usage and to regulate safety); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) (upholding drug testing of customs officials as goal was to root out employees who were not fit because of drug use for promotion to sensitive positions requiring the handling of drugs and weapons and as program was "not designed to serve the ordinary needs of law enforcement . . .[since] [t]est results [were] not [to] be used in a criminal prosecution of the employee without the employee's consent"); O'Connor v. Ortega, 480 U.S. 709 (1987) (upholding random searches of public employee work spaces as there is special government need for efficient and properly run workplaces).

For general critiques of the special needs exception, see Andrea Lewis, Comment, *Drug Testing: Can Privacy Interests Be Protected Under the "Special Needs" Doctrine?*, 56 BROOK. L. REV. 1013, 1034 (1990) (arguing that special needs doctrine would limit the probable cause standard to instances when police search for evidence "in an overtly criminal context," and warning that the balance test accompanying the special needs analysis would spill over to the criminal context "because the line between what is purely civil in nature and what is purely criminal in nature is easily blurred"); Mansukhani, *supra* note 7, at 357 (stating that special needs can become "virtually unlimited"); Probst, *supra* note 172, at 304 (criticizing the Supreme Court's special needs decisions for their inconsistencies and failure to guide lower courts); Jennifer E. Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW.

sometimes left open the question of whether the evidence seized pursuant to an administrative scheme could be used in criminal prosecutions without invalidating the scheme.[187]

B. Problematic Policy Implications of the Lower Courts' Post-T.L.O. Jurisprudence

The lower courts' Fourth Amendment jurisprudence exacerbates numerous problems stemming from the increased law enforcement presence in public schools, mainly because the courts fail to consider the practical consequences of minimizing the law enforcement role in these searches. Moreover, legislatures, local governments and school officials have essentially ignored both the practical and broader policy implications of the greater dependence on law enforcement authorities to handle disciplinary matters. Such implications relate to criminalization policies, race and poverty, and the capacities of both the juvenile and criminal justice systems to process and monitor the influx of cases resulting from these collaborative efforts.

1. The Police/Public School Collaboration

Both the placement of law enforcement officers in schools and the more formalized interdependent relationships between schools and law enforcement authorities have engendered strenuous debate. One justification for stationing officers in schools is that this measure is necessary to curb both violence on school grounds and to remove the various weapons that many students bring to school.[188] Moreover,

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U. L. REV. 811, 836–41 (2001) (opining that special needs doctrine is incomprehensible and recommending that it be discarded); Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment, An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R-C.L. L. REV. 529, 544 (1997) (opining that none of the Supreme Court's proffered reasons for the special needs exception justifies deviation from the Fourth Amendment's warrant and probable cause requirements). *See generally* Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295 (1992). Other commentators have praised the special needs exception, and one commentator has argued that the doctrine should be extended. *See generally* Shannon D. Landreth, Note, *An Extension of the Special Needs Doctrine to Permit Drug Testing of Curfew Violators*, 2001 U. ILL. L. REV. 1247 (arguing that the special needs exception should be extended to allow, for the purposes of rehabilitation and treatment, drug testing of minors who voluntarily violate curfew ordinances).

187. For instance, in *Skinner*, the Court noted that the Federal Railway Authority conducted toxicological tests, "not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" 489 U.S. at 620–21 (quoting 49 C.F.R. § 219.1(a) (1987)). The Court further declared that nothing in the record indicated the test results were either released, or intended to be released, to law enforcement authorities. *Id.* at 621 n.5. Accordingly, the Court rejected respondent's contention that the results might be made available to law enforcement authorities and limited its review to the scheme's administrative purpose. The Court "le[ft] for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program." *Id.*

188. *See, e.g.*, UNIFORM STATE MEMORANDUM, *supra* note 49, at 5.

law enforcement officers stationed in many public schools—including those schools that participate in the school resource officer program—have diverse responsibilities outside of the traditional law enforcement role, and that their presence could foster greater trust and understanding between children and law enforcement authorities.[189] Broader cooperation between law enforcement authorities and school officials could stimulate creative dispositional possibilities for students who are adjudicated delinquent for relatively low-level offenses.[190]

Conversely, some commentators—while not specifically discussing law enforcement presence in public schools—assert that school violence has decreased over the last several years.[191] They argue that violent episodes in schools are relatively rare events,[192] and that fears of widespread school violence are therefore exaggerated.[193] Accordingly, one could argue, at least generally, that law enforcement

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189. *See, e.g.*, Jamie Stockwell, *Each High School to Have Police Officer: Parents React Favorably to Move for Added Security*, WASH. POST, Aug. 24, 2000, at M3 (describing plan to station police officers at each high school in Prince George's County, Maryland and quoting a parent who favors the plan because students would have opportunities to meet police officers in non-adversarial situations); Cynthia Price, *Vanquishing Problems in Schools*, COMMUNITY POLICING EXCHANGE, Sept.–Oct. 1999 (stating that the placement of police officers in middle and high schools in Richmond, Virginia, has improved relations between students and police officers), *available at* http://www.communitypolicing.org/publications/exchange/ e28_99/e28price.htm; UNIFORM STATE MEMORANDUM, *supra* note 49, at 5 (stating that the uniformed police officers have the "opportunity to interact with children in positive and constructive way [sic]").

190. In New Jersey, the Attorney General's Law Enforcement Working Group, which developed a Safe Schools Resource Officer Program has also developed, in conjunction with the Administrative Office of the Courts, a voluntary program which allows schools to serve as community service sites. Students can therefore fulfill court-imposed community service obligations under the supervision of school staff. Schools have the option to participate in this program, and those that do "can help to give Family Part judges more disposition options and 'intermediate' sanctions to address certain types of delinquent behavior." *See* UNIFORM STATE MEMORANDUM, *supra* note 49, at 5.

191. *See, e.g.*, Margaret Graham Tebo, *Zero Tolerance, Zero Sense*, A.B.A. J., Apr. 2000, at 40 (citing statistics showing that various school crimes have decreased since 1990). Studies and statistical evidence support the assertion that school violence, particularly violence that results in death or serious physical injury, has decreased. *See* OVC BULLETIN, *supra* note 58, at 1 (reporting decline in school crime and stating that violent school crime is "relatively rare"); Mark Anderson, et al., *School-Associated Violent Deaths in the United States, 1994–1999*, 286 JAMA 2695 (2001) (finding that school-associated violent deaths have decreased significantly since 1992–93), *available at* http://www.cdc.gov/ncipc/schoolviolencejoc11149.pdf.

192. In fact, commentators have observed that the overwhelming majority of school crime is non-violent. *See, e.g.*, SCHOOL HOUSE HYPE, *supra* note 46 (calling school shootings "atypical events").

193. *See, e.g.*, Reece L. Peterson et al., *School Violence Prevention: Current Status and Policy Recommendations*, 23 LAW & POL'Y 345, 346 (2001) (citing study following the Columbine shootings which concluded that while the odds of a student dying at a school in 1998–99 were about one in two million, seventy-one percent of respondents "believed that a school shooting was 'likely' to occur in their community"); Victoria J. Dodd, *Student Rights: Can We Create Violence-Free Schools That Are Still Free*, 34 NEW ENG. L. REV. 623, 625

presence in public schools is an overly broad response to relatively isolated, albeit extreme, violent incidents.[194] In addition, critics opine that while certain security measures are necessary to ensure the safety of students and school employees, the placement of law enforcement officers in schools is a drastic step that could lead to various abuses.[195]

Commentators also warn that law enforcement presence in public schools, particularly when combined with zero tolerance policies,[196] creates an acute risk of utilizing the criminal justice system to handle incidents and behaviors that had been previously dealt with through school disciplinary processes.[197] Such policies disproportionately affect lower-income students and students of color,[198] because the majority of schools that have adopted these security measures are located in urban and poorer communities,[199] and because both the juvenile and criminal justice systems disproportionately punish those who are economically disadvantaged and of color.[200]

(2000) (analyzing studies indicating decrease in weapons possession and fights and opining that "an extreme fear of school violence may be viewed as a phobia, rather than as a realistic fear"). Some commentators have ascribed the misperceptions about school violence to the media. *See* Richard E. Redding & Sarah M. Shalf, *The Legal Context of School Violence: The Effectiveness of Federal, State, and Local Law Enforcement Efforts to Reduce Gun Violence in Schools*, 23 LAW & POL'Y 297, 298 (2001) ("[A] misperception that there is an epidemic in school violence has been created, due in part to the enormous amount of media attention that focuses on recent high-profile school shooting incidents."); James Forman, Jr., *Overkill on Schools*, WASH. POST, Apr. 23, 2001, at A15 (criticizing manner and extent to which media has covered school shooting incidents).

194. Similar arguments that governmental responses to isolated tragic incidents are overbroad and disproportionate have been made in various other contexts. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 54 (2002) (stating that dramatic changes in child welfare agency practice that affect the lives of thousands of children can often be traced to an instance of child abuse that received vast media attention); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003) (explaining the phenomenon of "moral panic," the elements of which involve "an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community" (citation omitted)).

195. *See* Statement of Norman Siegel, *supra* note 53.

196. Zero tolerance polices are discussed *infra* Part IV-B-2.

197. *See, e.g.*, McCarthy, *supra* note 52 (stating that placing police officers in schools creates risk of criminalizing incidents such as schoolyard fights).

198. *See, e.g.*, Adamma Ince, *Preppin' for Prison: Cops in Schools Teach a Generation to Live in Jail*, VILLAGE VOICE, June 2001, at 19 (stating that while parents and community leaders residing in the suburban communities where the most devastating acts of student violence have occurred have resisted security measures such as police presence and metal detectors, New York City schools, where children of color comprise 85% of the student body, has seen these measures "become daily routine"), *available at* http://www.villagevoice.com/issues/0124/ince.php.

199. Statistics illustrate the correlation between the existence and extent of law enforcement presence and the level of minority student enrollment. Overall, during the 1996–97 school year, six percent of all public schools reported stationing police or other law enforcement employees thirty or more hours per week. INDICATORS OF SCHOOL CRIME AND

2. The Police/Public School Collaboration: The Convergence of School Discipline and the Criminal Justice System

Law enforcement officers possess vast discretion when confronting and interpreting the behavior of the citizenry.[201] While officers do not decide whether individuals are formally charged,[202] they serve as "gatekeepers" to both the juvenile justice system and the adult system,[203] as their initial decisions determine whether someone is introduced or reintroduced to the criminal justice system.[204]

As a result of their increased interconnectedness with school administrators, police officers have brought their "gatekeeping" function, discretionary powers, as well as the revolving door of the criminal justice system into the hallways of our nation's public schools. Accordingly, these relationships have greatly altered the nature and scope of school disciplinary processes.

The primary purpose of utilizing law enforcement officers in public schools and formalizing the relationships between law enforcement authorities and public

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SAFETY, *supra* note 45, at 136 app. A. One percent of all public schools stationed these employees for ten to twenty-nine hours per week and three percent for one to nine hours. *Id.* Seventy-eight percent of schools reported having no law enforcement employees. *Id.* However, during this same school year, one percent of schools that had a minority enrollment of less than five percent stationed police officers at least thirty hours per week. *Id.* at 140 tbl.A4. Six percent of schools with a minority enrollment of five to nineteen percent stationed police officers at least thirty hours per week. *Id.* Seven percent of schools with a minority enrollment of twenty to forty-nine percent stationed police officers at least thirty hours per week. *Id.* Lastly, thirteen percent of schools with a minority enrollment of fifty percent or more stationed police officers at least thirty hours per week. *Id.*

200. These concerns arise from perceived historic and current mistreatment, locally and nationally. *See, e.g.*, Ince, *supra* note 198 (reporting the concern that Black and Hispanic families in New York City have with police presence in public schools because of the "NYPD's historic use of discriminatory and aggressive tactics against minorities"); Frederick L. Merkerson, III, *Guns In Our Schools? Community Input Sought on Plan to Arm IPS Police*, INDIANAPOLIS RECORDER, Aug. 25, 2000, at A1 (reporting the concern among many African-Americans in Indianapolis about plan to arm approximately ninety police officers who patrol the Indianapolis public schools, where African-Americans comprise an estimated 60% of the student population, stems from "the overexertion of authority against African-Americans across the country").

201. *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 30 (2002) (describing traffic stops, consent searches, and stops and frisks as "high-discretion tactics" that police officers "can employ virtually at whim whenever a person seems suspicious for any reason at all"); Margaret Anne Hoehl, Note, *Usual Suspects Beware: "Walk, Don't Run" Through Dangerous Neighborhoods*, 35 U. RICH. L. REV. 111, 135–36 (2001) (opining that recent Supreme Court jurisprudence has broadened officers' abilities to stop individuals based on suspicious or evasive behaviors).

202. *See, e.g.*, Angela J. Davis, *Incarceration and the Imbalance of Power*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 63 (Marc Mauer & Meda Chesney-Lind eds., 2002) (stating that prosecutors make the ultimate charging decisions with an "almost unlimited amount of discretion").

203. Stephanie M. Myers, *Police: Handling of Juveniles*, *in* 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1073 (Joshua Dressler ed., 2d ed. 2002).

204. *See id.* (noting that police officers initiate the criminal justice process).

schools is to minimize student conduct that disrupts or threatens the safety of other students, faculty and administrators. While officers in public schools can and do perform various roles, just as they do when policing larger communities, their primary function is to protect and ensure the safety of school personnel and students. Accordingly, officers implement measures they believe to be conducive to fulfilling their roles, including, if necessary, resorting to their traditional law enforcement role and utilizing the mechanisms of the criminal justice system.

The increased interdependency between schools officials and law enforcement authorities has led to more expansive definitions and interpretations of criminal behavior among school children. As a result, students are now brought into the "myriad recesses of the criminal justice system"[205] for certain behaviors that would have once resulted in less severe consequences.[206]

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205. Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1490 (2002).

206. *See, e.g.*, Michael Easterbrook, *Taking Aim at Violence*, PSYCHOLOGY TODAY, July 1999, *reprinted in* 72 SCHOOL VIOLENCE 165, 172 (2000) (opining that "[a]s schools begin to resemble police precincts, school officials are abdicating their duty to counsel and discipline unruly students and letting cops down the hall handle the classroom disruptions, bullying and schoolyard fights").

This introduction to the criminal justice system is not limited to formal arrest. For instance, in New York City, where the New York City Police Department has been chiefly responsible for school security since 1998, students can be introduced to the criminal justice system through juvenile reports, the issuance of summons or formal arrests. *See* JOINT COMM. ON SCH. SAFETY, *supra* note 54. Summonses can be issued to students who are at least sixteen years of age and whose behavior falls below the threshold necessary for a formal arrest. *Id.* at 33 n.5 (citing NPYD Patrol Guide, Proc. No. 209-01). Although summonses can be issued at either the school or police precinct, the student's appearance in court is still required. *Id.* Juvenile reports, as opposed to summonses, are written for students who are at least seven and less than sixteen years old and who commit "'an act that would constitute a crime if committed by an adult, . . . [or] commits a petty violation.'" *Id.* at 33 n.6 (quoting NYPD Patrol Guide, Proc. No. 215-08). The reports do not initiate a criminal proceeding, but rather are filed at the local police precinct and may be considered if the student gets into further trouble. *Id.* at 33–34 n.6. The reports remain on file until the child reaches seventeen years of age, at which point they must be destroyed. *Id.* at 34 n.6. The former schools' chancellor opined that the recent emphasis of reporting school incidents to the police has resulted in certain "'developmentally appropriate' behavior being unnecessarily reported." Edward Wyatt, *Support, and Caution, for a School Crime-Report Law*, N.Y. TIMES, June 5, 2001, at B4. Specifically, the chancellor stated that some first and second grade students had juvenile reports based solely on incidents of fighting with classmates. *Id.*

An initial study comparing the rates of arrests, summonses and juvenile reports between the two-month periods of September and October, 1998—the last year that the Board of Education was responsible for school security—and September and October, 1999—the first year that the New York City Police Department was responsible for school security—found that while the number of arrests dropped 23%, *see* JOINT COMM. ON SCH. SAFETY, *supra* note 54, at 35, 48, the number of police summonses issued to students increased 101%, *see id.* at 35, 50, and the number of juvenile reports issued increased 12%. *Id.* at 35, 53. The initial decrease in arrests may have been attributed to the fact that the Board of Education and the New York City Police Department utilized different definitions of an "arrest." *Id.* at 35–36. The Board

This increased use of the criminal justice system is exacerbated by the proliferation of zero tolerance policies. These policies, which have blossomed over the past decade, have been described as "administrative rules intended to address specific problems associated with school safety and discipline."[207] The infusion of both these zero tolerance policies and the increased law enforcement presence in public schools has criminalized a wide range of student behavior, some of which had previously been monitored through school disciplinary processes.

Nationally, zero tolerance policies in public schools are widely considered to have found their origins in the Gun Free Schools Act of 1994.[208] This act was implemented in response to heightened awareness and fear of school violence involving weapons.[209] The Act requires each state receiving federal funding pursuant

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defined arrest more broadly than the Police Department and, as a result, "some events that the Board recorded as arrests are now counted as summonses or juvenile reports." *Id.* at 36.

More recent statistics that compare crime in New York City schools between July 1, 2001, and March 20, 2002, with the same period in the previous year show an increase in certain crimes, as reports of sex offenses increased 7%, reports of weapons offenses increased 11% and reports of misdemeanor assaults, which include fistfights, increased 34%. *See* Al Baker, *Crime is Up in City Schools, Mostly in Assault Category*, N.Y. TIMES, March 26, 2002, at B3. Specifically with regard to sex offenses, statistics released on July 3, 2002, illustrate that New York City public schools averaged two reported sex offenses per day between July 1, 2001, and June 30, 2002. Joe Williams, *2 Sex Crimes a Day at City Schools*, DAILY NEWS (New York), July 4, 2002, at 6. This increase could perhaps be attributed in part to the broader standards that the New York City Public Schools now employ regarding sex offenses. In 2001, school principals in New York City reported suspected sex crimes to the New York City Police Department in record numbers, "often for minor incidents that used to warrant a call to parents." Alison Gendar, *Principals' Calls Swamp NYPD: Report of Sex Crimes Sky Rocket*, DAILY NEWS (New York), July 2, 2001, at 8. The principals reported that they initiated these reports out of fear, and that they were constrained to initiate some of these reports, because of the then-schools' chancellor's order to report all potential crimes to the New York City Police Department. *Id.*

207. TOBIN MCANDREWS, EDUC. RES. INFO. CTR. (ERIC), ZERO TOLERANCE POLICIES, ERIC DIGEST NO.146 (2001) (citations omitted), *available at* http://www.ed.gov/databases/ ERIC_Digests/ed451579.html.

208. 20 U.S.C.A. § 7151 (West 2003). *See* Beresh-Taylor, *supra* note 163, at 323; Dodd, *supra* note 193, at 625; REBECCA GORDON ET AL., APPLIED RESEARCH CTR., FACING THE CONSEQUENCES: AN EXAMINATION OF RACIAL DISCRIMINATION IN U.S. PUBLIC SCHOOLS (2000) [hereinafter FACING THE CONSEQUENCES], *available at* http://www.arc.org/downloads/ARC_ FTC.pdf; Elizabeth Amon, *School Rules Blues*, NAT'L L.J., Jun. 25, 2001, § C, at A1. While zero tolerance in the public school context on a national level is considered to have stemmed from the Gun Free Schools Act, zero tolerance policies at the state level in public schools began in the late 1980s in response to drugs, gang-related activity and weapons. RUSSELL J. SKIBA, INDIANA EDUC. POLICY CTR., POLICY RESEARCH REPT. NO. SRS2, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 2 (Aug. 2000) [hereinafter ZERO TOLERANCE, ZERO EVIDENCE], *available at* http://www.indiana.edu/~safeschl/ztze.pdf. The zero tolerance concept has been traced to federal drug policy in the 1980s and one commentator has observed that the concept intends to "send[] a message that certain behaviors will not be tolerated, by punishing all offenses severely, no matter how minor." *Id.*

209. *See* Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 132 (1999).

to the Elementary and Secondary Education Act[210] to have a law "requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school."[211] The Act also requires the local education agency to enact a policy mandating the referral of any student found to have a firearm in any of its schools to the juvenile justice or criminal justice system.[212]

The Gun Free Schools Act focused on firearms.[213] However, several states and schools have adopted more expansive definitions of weapons.[214] These expansive definitions allow students to be severely disciplined—through suspension, expulsion, arrest and/or prosecution—for possessing items, or "weapons," that once would have either resulted in less severe punishment or even no punishment at all.[215]

In addition to expanding the types of weapons that could lead to disciplinary action against students, zero tolerance policies ushered in expanded categories of *conduct* not contemplated by the Gun Free Schools Act.[216] A vast literature chronicles

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210. P.L. 89-10 (1965) (current version at 20 U.S.C. § 6301 (2002)).

211. 20 U.S.C.A. § 7151(b)(1). The Act allows for an exception to this mandatory expulsion requirement, as "such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing." *Id.* As a result, some commentators have observed that the Act is not a strict zero tolerance statute, but rather allows administrators some discretion. *See, e.g.*, FACING THE CONSEQUENCES, *supra* note 208.

212. 20 U.S.C.A. § 7151(h)(1).

213. In its definitional section, the Act states that the term 'firearm' is defined as it is in 921(a) of Title 18. 20 U.S.C.A. § 7151(b)(3). There, firearm is defined as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C.A. § 921(a)(3) (West 2003).

214. *See* ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (June 2000) [hereinafter OPPORTUNITIES SUSPENDED] (reporting that items such as paper clips, nail files and scissors have been construed to be weapons), *available at* http://www.civilrightsproject.harvard.edu/research/discipline/call_opport.php; Joan M. Wasser, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 750 n.14 (1999) (citing state statutes that provide definitions of weapons more expansive than those set forth in the Gun Free Schools Act).

215. *See* MCANDREWS, *supra* note 207; FACING THE CONSEQUENCES, *supra* note 208, at 10; ZERO TOLERANCE, ZERO EVIDENCE, *supra* note 208; OPPORTUNITIES SUSPENDED, *supra* note 214; *see also* BOWLING FOR COLUMBINE, *supra* note 1 (discussing zero tolerance policies).

216. *See* Insley, *supra* note 42, at 1071 (stating that while Gun Free Schools Act requires that students who possess certain weapons be referred to law enforcement officials, "most referrals are made for minor incidents of fighting that pose no real threat to the type of school-wide safety . . . portrayed by the media"). One commentator has noted that zero tolerance polices have broadened the types of conduct that are considered to undermine school safety, as "[k]ids whose misbehaviors in the past would have brought oral reprimands from a teacher or perhaps a trip to the principal's office are now being labeled a threat to school safety." Tebo, *supra* note 191, at 41.

the wide range of behaviors that have brought punitive sanctions upon students, including introduction to the criminal justice system.[217] Critics assert that while zero tolerance policies were originally aimed to rid schools of dangerous weapons, they have reached past their intended purpose to criminalize student behavior which poses no threat to physical well-being or safety.[218] As a result, many incidents that were not previously considered to be crimes, such as schoolyard fights[219] and perceived threats[220] can now be and, in fact, often are.[221]

An accurate assessment of the practical effects of heightened law enforcement presence in public schools, either through physical presence within the schools or more stringent reporting requirements that coordinate law enforcement authorities and school officials, requires consideration of the relationship between

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217. *See, e.g.*, OPPORTUNITIES SUSPENDED, *supra* note 214 (recounting an incident from Mississippi where five African-American males were arrested for felony assault following a playful peanut-throwing fight on a school bus during which the bus driver was accidentally hit by a peanut, and stating that charges were ultimately dismissed, the students dropped out of school because they had lost their bus privileges and lacked the transportation necessary for the thirty mile commute); Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools*, 5 PHI DELTA KAPPAN 372 (Jan. 1, 1999) (reciting numerous school incidents that led to disciplinary action, including a seventeen year-old student in Chicago who was expelled, taken to jail for seven hours and charged with misdemeanor battery for shooting a paper clip with a rubber band), *available at* http://www.pdkintl.org/kappan/kski9901.htm.

218. *See* Johanna Wald, *The Failure of Zero Tolerance*, SALON.COM (Aug. 29, 2001) (stating that zero tolerance laws "were aimed at dangerous students who brought guns to schools," however "disciplinary policies mandating severe punishments—suspensions, expulsions and increasingly referral to law enforcement—have been expanded in many school districts to cover a broad canvas of student behaviors"), *at* http://dir.salon.com/mwt/feature/2001/08/29/zero_tolerance/index.html; RALPH C. MARTIN, II, AM. BAR ASS'N, ABA ZERO TOLERANCE POLICY (Feb. 2001) [hereinafter ABA ZERO TOLERANCE POLICY] (opining that zero tolerance has "become a one-size fits all solution to all the problems that schools offer and have redefined students as criminals, with unfortunate consequences"), *available at* http://www.abanet.org/crimjust/juvjus/zerotolreport.html; OPPORTUNITIES SUSPENDED, *supra* note 214, at 1 (reporting that "[e]fforts to address guns, drugs and other dangerous school situations have spun totally out of control, sweeping up millions of schoolchildren who pose no threat into a net of exclusion from educational opportunities and into criminal prosecution"). The American Bar Association reports that although zero tolerance policies were a Congressional response to guns in schools, gun cases comprise the least amount of school discipline cases. *See* ABA ZERO TOLERANCE POLICY, *supra*.

219. *See* OPPORTUNITIES SUSPENDED, *supra* note 214, at 16 (describing a policy that exists in two Mississippi counties that requires all students involved in fights to be suspended and summoned to Youth Court, irrespective of the severity).

220. *See* Kate Zernike, *Crackdown on Threats in Schools Fails a Test*, N.Y. TIMES, May 17, 2001, at A1 (reporting that weeks after school shootings in Santee, California, the county prosecutor in Manalapan, New Jersey emphasized the need for zero tolerance for any student who made a threat, even in jest. Fifty suspensions in six weeks followed, mostly of students ranging from kindergarten to third grade, compared to no suspensions the year before. All of the suspended students had police files opened in their names).

221. *See* OPPORTUNITIES SUSPENDED, *supra* note 214, at 15 (attributing increase in criminal charges against school children to zero tolerance policies and stating that children now often face charges "for conduct that poses no serious danger to safety of others").

zero tolerance policies, school officials and law enforcement authorities. Given the mandatory penalties that result when students engage in certain forms of behavior, as well as the procedures that must be followed to address such behavior, zero tolerance policies remove from school teachers and administrators the discretion to handle these matters on individual bases.[222]

Coupled with these hardened disciplinary processes is the increased reliance on law enforcement officials—who are either stationed at the school or summoned there in response to incidents[223]—to enforce zero tolerance policies and the concomitant utilization of the criminal justice system to punish the student violators.[224] The lack of discretion on the part of school administrators, coupled with the increased reliance on law enforcement officials to handle school incidents, has led to an ever increasing number of school children being processed through the criminal justice system for a wide range of school behavior, including behavior that would have once garnered less severe sanctions.[225] Accordingly, the heightened law enforcement presence and increased interdependence between law enforcement authorities and school officials, combined with the broad zero tolerance policies that have proliferated across the country, have in many ways melded the criminal justice system with school disciplinary processes.[226]

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222. *See, e.g.*, *id.* at 11 (stating that the mandatory penalties attached to zero tolerance policies strip away the flexibility school administrators need to handle disciplinary issues).

223. *See, e.g.*, Mark Sanchez & Susan Sandler, *Zero Tolerance Policies Provide Zero Benefit: School Crime Hasn't Diminished and Too Many Students End Up on the 'Prison Track,'* S.F. CHRON., Sept. 10, 2001, at A15 (explaining that zero tolerance policies in California schools have "expanded the prison track by increasingly placing police officers on campus or calling them to campus for minor incidents . . . incidents that would not previously have been perceived as warranting police involvement").

224. *See, e.g.*, RONNIE CASELLA, AT ZERO TOLERANCE 6 (2001) (describing zero tolerance as "the link between schools and prisons"); OPPORTUNITIES SUSPENDED, *supra* note 214, at 2 (stating that as a result of zero tolerance polices, many children "are being shunted into the criminal justice system as schools have begun to rely heavily upon law enforcement officials to punish students").

225. *See* Bernadine Dohrn, Keynote Address at the Annual Conference of the Juvenile Justice Center at Suffolk University Law School (May 5, 2000) (stating that because of zero tolerance policies, behavior that once resulted in being sent to the vice-principal's office, or maybe a call to parents, now can result in arrest and/or expulsion), *available at* http://www.law.suffolk.edu/academic/jjc/dohrn.html; KIM BROOKS ET AL., JUSTICE POLICY INST., SCHOOL HOUSE HYPE: TWO YEARS LATER: POLICY REPORT (2001) (opining that "trivial" matters are now resolved in the courts, rather than classrooms), *available at* http://www.justicepolicy.org/article.php?id=46.

226. In response to these developments, the American Bar Association passed a resolution in February, 2001, opposing "'zero tolerance polices' that have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances of the offense or the student's history." JUVENILE JUSTICE CTR., AM. BAR ASS'N, REP'T TO THE HOUSE OF DELEGATES (2001), *available at* http://www.abanet.org/ crimjust/juvjus/zerotolres.html.

3. Race and Public School Punishment: The Disproportionate Effect of Zero Tolerance Policies on African-American and Latino School Children

Because the convergence of heightened law enforcement and zero tolerance policies has caused public schools to rely increasingly upon the criminal justice system to discipline school children, it is important to consider to what extent, if any, these policies disproportionately impact certain student populations. The disparate treatment of people of color, particularly African-Americans and Latino/as, throughout all aspects of the criminal justice and juvenile justice systems has been widely documented and debated.[227] In the public school context, reliance on zero tolerance policies contributes to the disparate treatment of these very same populations in these systems, particularly because of the formalized relationships that have increasingly been forged between public schools and law enforcement authorities.

Several studies illustrate that students of color, particularly African-Americans, are disproportionately punished in public schools throughout the country.[228] Moreover, these students are disproportionately subjected to the most punitive sanctions such as suspensions and expulsions,[229] including the mandatory

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227. *See, e.g.*, Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 729 (2003) (citing statistics illustrating that African-American men are disproportionately imprisoned as well as under some form of criminal justice supervision); FELD, *supra* note 156, at 264–71 (citing studies showing that minority youths are disproportionately represented through all phases of the juvenile justice system, as well as studies indicating that minority youths disproportionately receive severe sentences such as out-of-home placements).

228. *See, e.g.*, TURNING *TO* EACH OTHER, *supra* note 57, at 4 (citing findings that African-American students are suspended nationally at twice their percentage in the national school population) (citing OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., PROJECTED STUDENT SUSPENSION RATE VALUES FOR THE NATION'S PUBLIC SCHOOLS BY RACE/ETHNICITY (2000)); ZERO TOLERANCE, ZERO EVIDENCE, *supra* note 208, at 11 (reviewing numerous studies on discipline and concluding that African-Americans are "overrepresented in the punitive use of school discipline").

229. *See* ANN ANNETTE FERGUSON, BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY 3 (2000) (citing studies from Michigan, Minnesota, California and Ohio showing that African-American males were disproportionately suspended and subjected to corporal punishment); Anthony J. DeMarco, *Suspension/Expulsion—Punitive Sanctions from the Jail Yard to the School Yard*, 34 NEW ENG. L. REV. 565, 569 (2000) (citing MASS. DEP'T OF YOUTH SERVS., YOUTH, PARTNERSHIP, AND PUBLIC SAFETY: THE DYS STRATEGIC PLAN 6 (Nov. 1998)) (finding that African-Americans have made up twenty-five percent of the expulsions in each of the previous five years); Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILD. 381, 381 (Spring 2000) (noting that African-American students are disproportionately subjected to suspension, expulsion and corporal punishment), *available at* http://www.ideapractices.org/resources/files/townsend.pdf; BUILDING BLOCKS FOR YOUTH, FACT SHEET: ZERO TOLERANCE (citing findings that African-Americans were suspended twice as much as whites in Tennessee during the 2000 school year, and that during the 1997–98 school year in Chicago, African-Americans comprised 54% of the student population, but represented 63% of the suspensions and 71% of the expulsions), *at* http://www.buildingblocksforyouth.org/ issues/zerotolerance/facts.html. In 1993, African-

sanctions that are wedded to zero tolerance policies.[230] While several theories have been posited to explain these discrepancies,[231] one consistent theory is that cultural gulfs separate students of color from many school teachers and administrators, which result in varying behavioral interpretations[232] based on difference,[233] as well as

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American parents in Oakland filed a federal discrimination suit based on findings that African-Americans, who comprised half of the student population, accounted for 73% of all suspensions. As a result of the suit, Oakland entered into an agreement with the United States Office of Civil Rights to reduce suspensions by 20%. Meredith May, *Blacks Likely to Lose Out in School Crackdown*, S.F. CHRON., Dec. 18, 1999, at A21.

230. *See* FACING THE CONSEQUENCES, *supra* note 208, at 2 (noting the correlation between zero tolerance polices and the disproportionate numbers of students of color, particularly African-American students, who are suspended or expelled); Skiba & Peterson, *supra* note 217 (noting the consistent findings by researchers that students of color disproportionately receive "exclusionary and punitive discipline"). One report observes that zero tolerance policies are more likely to exist in school districts which are predominantly African-American and Latino. *See* OPPORTUNITIES SUSPENDED, *supra* note 214, at 7 (reporting that during the 1996–97 school year, school districts that were primarily African-American and Latino were more likely than white school districts to have zero tolerance policies addressing violence, weapons and drugs). Other commentators more simply note that zero tolerance polices are enforced against all students, but that students of color suffer disproportionately from these policies. *See, e.g.*, Sanchez & Sandler, *supra* note 223.

231. *See, e.g.*, TURNING *TO* EACH OTHER, *supra* note 57, at 6 (opining that racial discrepancies in school discipline are the products of, *inter alia*, "racially hostile" school environments that ignore or marginalize "the culture and history of students of color" and disciplinary interventions that ignore "the students' perceptions or what is shaping their behavior").

232. *See* OPPORTUNITIES SUSPENDED, *supra* note 214, at 8 (reporting that in South Carolina "while black and white children were charged in equal proportions for weapon violations and white students had much higher drug charges, the discipline of black students soared in the most subjective categories [such as disturbing the schools or threatening school officials], where the school official's determination that an infraction occurred may be tainted with bias or stereotypes").

233. One commentator who studied the acculturation of African-American males at one public school observed that:

> The behavior of African American boys in school is perceived by adults . . . through a filter of overlapping representations of three socially invented categories of "difference": age, gender and race. These are grounded in the commonsense, taken-for-granted notion that existing social divisions reflect biological and natural dispositional differences among humans: so children are essentially different from adults, males from females, blacks from whites. At the intersection of this complex of subject positions are African American boys who are doubly displaced: as black children, they are not seen as childlike but adultified; as black males, they are denied the masculine dispensation constituting white males as being 'naturally naughty' and are discerned as willfully bad.

FERGUSON, *supra* note 226, at 80. As a result of these differences, school authorities can often misperceive the behaviors of African-American students, particularly males. *See* RUSSELL J. SKIBA ET AL., INDIANA EDUC. POLICY CTR., THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 17 (2000) ("Teachers who are prone to accepting stereotypes of adolescent African American males as threatening or dangerous may overreact to relatively minor threats to authority, especially if their anxiety is paired with a

categorization and stereotype.[234] One commentator has described the relationship between these misperceptions and the disproportionate discipline of African-American students:

> Misperceptions . . . occur when a school adult misinterprets a student's behavior because of cultural differences. In some cultures it is permissible for young people to loudly express anger and frustration at an adult as long as they comply with the adult's demands. Young people who express themselves in this way are viewed as honest and genuine. In other cultures, such expression towards an adult would be considered highly disrespectful and also an indication that the student was refusing to comply with the adult's demands. Sometimes students misinterpret the behavior of school adults due to cultural differences and this can also get them into the disciplinary system. For example, in some African-American communities, adults give students direct orders such as, "Pick that up." If an adult from another culture said, "Would you please pick that up?" a student might say "No." This student may not intend to defy the adult; rather, he or she thinks that the adult was giving a genuine choice—otherwise, the adult would have given an order.[235]

Another commentator explained that cultural differences in communication styles may lead to higher rates of discipline among African-American students:

> Nonverbal communication is equally open to misunderstanding. Many African American students . . . talk using a unique style of communication. To others, they appear to use excessive nonverbal gestures to communicate and punctuate their points. That communication style is popular among young African Americans and is frequently demonstrated in television and video media that target that group. Yet speaking in such an impassioned and emotive manner

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misunderstanding of cultural norms of social interaction."), *available at* http://www.indiana.edu/~safeschl.cod.pdf.

234. Professor Anthony Thompson succinctly describes the phenomena of categorization and stereotype, which is rooted in difference and results in generalized behavioral interpretations, in the context of police work. He explains:

> [P]olice officers often proceed on the basis of "traits" that, they assert, correlate with criminal behavior. For example, they will watch for certain mannerisms, language or modes of dress as clues to unlawful conduct. But when we examine the individuals whom officers target as suspicious, these individuals often possess characteristics that differ from those of the officers.

Thompson, *supra* note 152, at 986–87 (citation omitted).

235. TURNING *TO* EACH OTHER, *supra* note 57, at 5. Sandler also finds that some schools constitute a "racially hostile environment" because of the lack of diversity reflected in the curriculum, the racialized division of labor among school personnel, and the negative stereotypes reflected in many teachers' comments. *Id.* at 6. Because of this adverse environment, students of color perceive themselves as marginalized members of the community and respond with behaviors that are subject to disciplinary action. *Id.* (stating that students "might misbehave" as a result of feeling "[i]nvisible, labeled, judged, bored, alienated, disorientated, confused, helpless [and] despairing").

> may come across as combative or argumentative to unfamiliar listeners. Some educators admit to taking offense when their students talk with them in that manner and have referred those students to the principal's office. Another example involves African American males or females who talk in louder tones than students of mainstream culture. That style can be disconcerting in an environment where students are expected to use quieter tones and can be perceived as an infraction or violation of classroom and school codes. Thus, African American students' verbal and nonverbal modes of communication may appear noncompliant, increasing the risk of suspension or expulsion.[236]

In addition to cultural differences, another explanation for these punishment discrepancies is simply that zero tolerance policies are more likely to exist in schools with considerable percentages of students of color. Statistics gathered by the United States Department of Education's National Center for Education Statistics illustrate that in the 1996–97 school year, the vast majority of public schools reported having zero tolerance policies for various student offenses—including violence, weapons possession, alcohol, drugs and tobacco. However, the highest percentages of schools implementing these polices were those with a minority enrollment of fifty percent or higher.[237]

Accordingly, students of color are disproportionately affected and punished by zero tolerance policies.[238] Because of the increased law enforcement presence in public schools, particularly schools with considerable percentages of students of color, these policies and protocols have converged to disproportionately track students of color into the juvenile justice and criminal justice systems.[239]

4. The Effects of Casting a Broader "Criminal" Net Over Public Schools: Disproportionality and System Capacity Issues

Over the past several years, legislatures have enacted measures attaching broader criminal responsibility to juveniles. For instance, federal and state legislation passed in recent years has facilitated the transfer of cases involving juveniles to adult court.[240] These measures have been motivated by deepened concerns of escalated

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236. Townsend, *supra* note 229, at 384 (citations omitted).

237. *See* INDICATORS OF SCHOOL CRIME AND SAFETY, *supra* note 45, at 137 tbl.A1.

238. *See* ABA ZERO TOLERANCE POLICY, *supra* note 218 (observing the "increasing evidence that zero tolerance polices are having a disproportionate impact on students of color").

239. *See* Wald, *supra* note 215 (noting the convergence of zero tolerance policies and the "ubiquitous" police presence in many schools and reporting that children's advocates have noted the recent dramatic increase in the numbers of children of color who are introduced to the criminal justice system as a result of in-school behavior); OPPORTUNITIES SUSPENDED, *supra* note 214 (stating that African-American and Latino children are disproportionately affected by policies that shuttle children "into the juvenile justice system for minor misconduct").

240. MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILES IN COURT 7 (June 2003) (reporting that from 1992 through 1999, forty-nine states and the District of Columbia either enacted or expanded their respective transfer provisions), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/195420.pdf; Kim Taylor-

youth violence, which has led the drive to hold youths more accountable for their behaviors.

During this same time period, a parallel movement—through the solidified alliances forged between law enforcement authorities and school officials as well the proliferation of zero tolerance polices—has attached more punitive consequences to juvenile behavior on school grounds. As with the movements to enhance the criminal responsibility of juveniles, these measures have also been rooted in concerns about escalated violence and the need to ensure safety.

From a policy perspective, the *concerns* emanating from the increased criminalization of student behaviors are essentially the same as those involving the more generalized juvenile population. The chief concern centers around the racialized affects of these policies and laws. Multitudinous studies indicate that youth of color are disproportionately shepherded into the juvenile justice system,[241] disproportionately charged as adults,[242] and disproportionately given the severest punishments.[243] Similarly, as indicated above,[244] students of color are disproportionately subjected to the most stringent punishments. In addition to being disproportionately suspended and expelled,[245] students of color are more likely to be impacted by zero tolerance policies.[246] Accordingly, as with all other aspects of the juvenile justice system, students of color are likely to bear disproportionately the brunt of escalated punishment schemes resulting from the increased reliance on law enforcement authorities to handle school disciplinary issues.

Moreover, unlike the federal and state legislation that has eased the passage of juveniles into the adult criminal justice system, the recent policies enacted in public

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Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 144 (2003) (observing that Congress has increased the number of federal offenses with which juveniles may be charged).

241. *See, e.g.*, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 37–42 (2000) (reporting the overrepresentation of minority youth throughout all phases of the juvenile justice system, including pre-adjudication detention, petition filings, findings of guilt and incarceration), *available at* http://www.civilrights.org/publications/reports/cj/justice.pdf.

242. *See, e.g.*, Barry Feld, *Juveniles in the Adult System*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 949 (Joshua Dressler ed., 2d ed. 2002).

243. *See, e.g.*, MIKE MALES & DAN MACALLIAR, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA 4 (2000) (citing studies from various states suggesting that minority youth are overrepresented at each stage of juvenile and adult systems); Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 683 (2002) (citing findings that "racial disparities actually intensify with each successive stage of the juvenile justice system").

244. *See generally* Part IV-B-3.

245. *See supra* note 229.

246. *See supra* note 230 and accompanying text. *But see* Annette Fuentes, *The Crackdown on Kids: The New Mood of Meanness Toward Children—To Be Young is to Be Suspect*, NATION, June 15, 1998, at 20, *reprinted in* 72 SCHOOL VIOLENCE 151 (2000) (noting that African-American and Latino youth have "borne the brunt" of the criminalization trend stemming from the proliferation of zero tolerance polices in public schools and juvenile counts, but reports that the trend has "to a degree, spilled over racial, ethnic and class boundaries").

schools have broadened the range of behaviors for which students can be *initially* introduced to the juvenile justice system. Of course, the more serious violent behaviors fall under the traditional mandates of both the juvenile and criminal justice systems. However, as illustrated above, many of the arrests that occur in public schools are for relatively minor offenses, including those that have traditionally been handled through school disciplinary processes.

In this regard, the expanded definitions and interpretations of criminal behaviors that have blossomed in public schools over the past several years are but some of the several widening avenues that have led into the criminal justice system. For instance, several jurisdictions in recent years have cracked down on low-level "quality of life" offenses.[247] While these measures have been applauded for enhancing safety and driving down crime rates,[248] some have argued that these increased arrests have contributed to the overflowing caseloads that have burdened criminal courts[249] and have, as a result, thwarted effective individualized resolutions.

As with the adult criminal justice system, the juvenile justice system has been hampered in recent years by burgeoning dockets that have strained its operational and functional capacities. Meaningful resources available throughout the juvenile justice system, already lacking, have become even sparser as caseloads have escalated. The workloads of all institutional actors—defense attorneys, prosecutors, probation officers and judges—have essentially become unmanageable in several jurisdictions. The ever-increasing shifting of school disciplinary matters to the juvenile justice system has exacerbated these system-capacity issues, as courts are deluged with matters that had previously been handled by school authorities.[250] The

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247. *See, e.g.*, Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN'S L.J. 261, 283 (2002) (stating the increased arrests for quality of life offenses in San Francisco); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 83–84 (2002) (describing implementation of zero tolerance policies in New York City); Kevin Osborne, *Getting Rid of Junk Cars*, CINCINNATI POST, Mar. 22, 2003, at A15 (explaining the numerous measures aimed at quality of life offenses in Cincinnati), *available at* 2003 WL 2913738.

248. *See, e.g.*, Michelle McPhee, *Murder Rate Falls to Four-Decade Low*, DAILY NEWS (New York), Dec. 11, 2002, at 5 (New York City Police Commissioner attributes declining murder rate to various initiatives, including "targeting minor quality of life offenses"), *available at* 2002 WL 102192553. *See generally* Judith A. Greene, *Zero Tolerance: A Case Study of Police Practices in New York City*, 45 CRIME & DELINQ. 171 (1999). *But see* David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 n.76 (2001) ("Claims that . . . zero tolerance of low level criminal conduct ha[s] caused a reduction in crime are much disputed.").

249. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE 193 (1999) (observing that New York City's zero tolerance police has led to, *inter alia*, overburdened criminal courts and overcrowded jails); Douglas L. Colbert, *Baltimore's Pretrial Injustice*, BALTIMORE SUN, Jan. 6, 2003, at 9A (connecting the increased arrests for "low-level crimes" in Baltimore to the strains placed on the jail and court systems).

250. *See, e.g.*, Vickie Ferstel, *Zero Tolerance Policies Create Court Problems*, ADVOCATE (Baton Rouge, La.), Jun. 13, 2001, at 7B (reporting that zero tolerance policies in Louisiana have burdened juvenile courts with cases that schools previously handled); DAVID RICART, ET AL., UNINTENDED CONSEQUENCES: THE IMPACT OF "ZERO TOLERANCE" AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY STUDENTS (Feb. 2003) (noting that judges and court

swamped dockets stifle the energy and abilities needed to tailor creative solutions to individualized cases.

From both policy and legal perspectives, all of these factors provide the contextual backdrop to the Fourth Amendment issues that stem from law enforcement involvement in student searches. The potential consequences attached to a broader array of conduct have become increasingly severe as a result of the various measures that have been enacted to foster greater safety. Moreover, both the measures and the consequences disproportionately affect African-American and Latino/a students. Accordingly, the shift towards the utilization of the juvenile and criminal justice systems to handle more of these matters warrants heightened vigilance for protecting the Fourth Amendment rights of those affected by these various policies.

V. PROPOSED FOURTH AMENDMENT STANDARDS

Commentators and courts have long defined law enforcement "involvement" in school searches too narrowly by focusing on instances when law enforcement officers either initiate searches or direct school administrators to conduct searches.[251] Such "involvement" should not be relegated to situations where officers play *proactive and directive* roles vis-à-vis school officials *in particular searches*. Rather, their "involvement" should be construed more expansively to include situations such as where the officers search students at the request of school officials, or are present during searches for purposes of ensuring compliance and providing the necessary "backup." In addition, as noted above, the physical presence of law enforcement authorities should not be a prerequisite for "involvement"; rather, "involvement" should include situations where school officials—through policies that simultaneously constrain their discretion while broadening the discretion of law enforcement authorities—in effect, collect evidence for law enforcement purposes.

Therefore, given the coalescence of school officials and law enforcement authorities, these officials necessarily act as "institutional arm[s] of law enforcement"[252] when *the purpose of their searches is to uncover evidence of criminal activity*. Accordingly, the *T.L.O.* reasonable suspicion standard should be replaced by the probable cause standard[253] when school officials conduct searches for this

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personnel in Kentucky have suggested that referrals from schools are becoming increasingly overwhelming to Kentucky's juvenile and family courts), *available at* www.buildingblocksforyouth.org/kentucky/kentucky.html; KIM BROOKS, ET AL., *supra* note 225, at n.74 (reporting concern amongst public defenders across the country about rising caseloads due to juveniles being charged for incidents that would have previously been handled administratively).

251. *See supra* notes 162 & 163.

252. Ferguson v. City of Charleston, 532 U.S. 67, 88 (2001) (Kennedy, J., concurring).

253. When the Supreme Court held in *T.L.O.* that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject," New Jersey v. T.L.O., 469 U.S. 325, 340 (1985), the Court modified the traditional Fourth Amendment standard in two respects. First, the Court dispensed with the warrant requirement, finding the general rule to be "unsuited to the school environment" because "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules

particular purpose in the presence of officers employed by law enforcement agencies. In addition, reasonable suspicion should be replaced by probable cause when school officials conduct these searches outside the physical presence of law enforcement officers, but act pursuant to policies that limit, if not eviscerate, their discretion and attach reporting requirements to law enforcement authorities for behavior that could lead to the student's arrest. Both of these search scenarios portray an overarching law enforcement purpose. [254] Conversely, the reasonable suspicion standard should be applicable in those situations where school officials perform searches with no law enforcement involvement and where the purpose of the search is to uncover evidence of a school rule violation that does not impose independent criminal liability.

Detractors could raise counterarguments. For instance, they could rely on *Griffin v. Wisconsin*,[255] to support the notion that the presence of law enforcement officers during a search—including officers who *accompany* officials to the situs of the particular search—does not alone invalidate the special needs exception, even when the fruits of the search could result in the arrest and prosecution of the person searched. In *Griffin*, the Supreme Court utilized the special needs exception to uphold an unannounced warrantless search of a probationer's home by a probation officer who had reasonable suspicion that the probationer might have had weapons therein based on information received by a police officer, and who had been accompanied to the home by three plainclothes police officers.[256]

However, the *Griffin* Court emphasized that probationers have a lesser expectation of privacy, as "they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependant on observance of special [probation] restrictions.'"[257] Moreover, the Court deemed the lower reasonableness standard necessary both to ensure that probationers abide by the terms

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(or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340–41. Second, as explained above, the Court replaced the ordinarily applicable standard of probable cause with the less exacting standard of reasonableness. *See supra* notes 35–37 and accompanying text. Although the proposal presented in this Article calls for applying the probable cause standard when law enforcement authorities are involved in the search, the proposal does not contemplate that student searches would be subject to the warrant requirement. As the Court concluded in *T.L.O.*, the requirement to obtain a warrant is simply too inconsistent with the nature of the school setting. The enhancement of the applicable standard to probable cause would furnish the needed protection of students' rights without unduly subjecting schools to the administrative and practical difficulties of complying with the warrant requirement.

254. Accordingly, the special needs exception to the probable cause requirement is inapplicable. *See supra* note 173 and accompanying text. *See also* Mansukhani, *supra* note 7, at 354–60 (special needs doctrine was meant for non-law enforcement situations involving "exceptional circumstances"); Vaughn & del Carmen, *supra* note 35, at 204 (stating that in cases which have upheld searches pursuant to the special needs exception, "the governmental interest involved is usually something other than enforcing the criminal law").

255. 483 U.S. 868 (1987).

256. The search was conducted pursuant to a Wisconsin regulation that permitted any probation officer to conduct warrantless searches of the probationer's home with supervisor approval and upon reasonable grounds to believe that contraband would have been found. *Id.* at 871.

257. *Id.* at 874 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

of their supervision, and to protect the larger community. The Court stressed the unique supervisory needs inherent in the probation context because of the "very assumption" that probationers have a greater likelihood than the remainder of the citizenry to violate the law.[258] The Court then declared that "[s]upervision . . . is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large."[259] So while *Griffin* "significantly blurred the distinction between searches conducted for traditional law enforcement purposes and those conducted for other governmental purposes,"[260] it involved unique circumstances stemming from the special status ascribed to probationers.[261]

Opponents would also argue that these proposed standards would sacrifice the safety of students and school personnel by constraining the circumstances in which school officials or law enforcement authorities could search students. As a result, students would have greater ability to engage in dangerous and criminal behaviors, and would be better able to possess the dangerous weapons that have raised enormous concern amongst parents, administrators, law enforcement personnel and larger communities.

This concern should be ameliorated by the fact that these proposed standards would not thwart the capabilities of law enforcement personnel to engage in other variations of Fourth Amendment intrusions based on lower levels of suspicion. In fact, officers would be allowed to take the very same actions in schools that they implement during street encounters with the general public. For instance, as part of their investigative function, officers would not be prevented from lawfully detaining students suspected of criminal activity. As they are able to outside the school context, officers would be permitted to stop students when they possess a reasonable belief, based on specific articulable facts, of ongoing criminal activity.[262] If during that stop and subsequent seizure, the officers acquire information that elevates their suspicion level to probable cause, they would be permitted to arrest the students.[263] At that point, the officers would be allowed to search the students incident to the arrest and any evidence derived therefrom could be legally used to prosecute the students.[264]

Moreover, in instances where a law enforcement officer stops a person suspected of criminal activity and, during that encounter, the officer "reasonabl[y]

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258. *Id.* at 880.

259. *Id.* at 875.

260. Probst, *supra* note 172, at 293.

261. In *Ferguson*, the Court recognized these unique circumstances and explicitly limited *Griffin* to its facts, since probationers have lesser expectations of privacy. Ferguson v. City of Charleston, 532 U.S. 67, 79 n.15 (2001).

262. *See, e.g.*, Adams v. Williams, 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identify or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (citing Terry v. Ohio, 392 U.S. 1, 21–22 (1968))).

263. *See* United States v. Watson, 423 U.S. 411 (1976) (holding that the Fourth Amendment permits warrantless arrests in public places where the officer has probable cause to believe a felony has occurred).

264. *See* United States v. Robinson, 414 U.S. 218 (1973).

fear[s] for his own or others' safety, he is entitled for the protection of himself and others in the area" to perform a pat search to determine whether the person has any weapons that could be used against the officer.[265] The proposed standards set forth above are wholly consistent with this established constitutional procedure. Accordingly, in situations where school officials or law enforcement officers reasonably suspect a student to be possessing a weapon, but the suspicion does not rise to probable cause and would therefore prevent a full-blown search, the officer or official could stop the student and perform a pat frisk for the purpose of protecting herself, the student and the school populace. Moreover, because there is no distinction between the level of suspicion police officers and school officials must have to conduct this limited search, a school official who has reasonable suspicion to believe that a student possesses a dangerous weapon could request a law enforcement officer to perform the pat search of the student based on that same level of suspicion.[266] This would eliminate the justifiable concern of having school administrators, who are often untrained in search techniques as well as weapons retrieval and handling, conduct such searches. If, during the pat search, the officer feels what she believes to be a weapon, the officer would be allowed to retrieve that particular item.[267] Should that more extensive search reveal a weapon, the officer would have probable cause both to arrest the student and to conduct a full-blown search of the student incident to the arrest.

These proposed standards would not compromise the safety of students or school personnel, but rather would be entirely consistent with the principles set forth in *T.L.O.* Specifically, these proposed standards would apply only to those situations where school officials seek to uncover evidence of *criminal* activity. Conversely, in instances where a student is believed to have violated a school rule that does not impose *independent criminal liability*, the probable cause standard would be inapplicable. Therefore, school officials acting alone would still be permitted to perform those searches pursuant to the lower reasonable suspicion standard because there is no *law enforcement* purpose related to the searches. If during this search seeking indicia of a school rule violation the school administrator discovers evidence of criminal activity, s/he should be allowed to take appropriate and necessary measures, including reporting this activity to law enforcement authorities.[268] In these

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265. *Terry*, 392 U.S. at 30–31.

266. *See, e.g.*, J.A.R. v. State, 689 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 1997) (upholding search where school official and deputy sheriff had reasonable suspicion that student had a gun and where school official asked the deputy sheriff to conduct the pat down search, because "[t]he fact that the school official prudently asked the law enforcement officer to assist in th[e] search does not increase the level of suspicion needed to perform a pat-down of a student to determine if he or she possesses a dangerous weapon").

267. The Supreme Court has extended the *Terry* rationale to instances involving "nonthreatening contraband" under the "plain feel" doctrine. Minnesota v. Dickerson, 508 U.S. 366, 373 (1993). Therefore, should the officer discover what she believes to be contraband during a patdown search, she would be permitted to retrieve the item(s).

268. This is the exact factual scenario in *T.L.O.*, as the assistant vice-principal searched T.L.O.'s purse for evidence that she had been smoking cigarettes in the restroom—a violation of a school rule—and found marijuana and other indicia of drug usage and selling, which he turned over to law enforcement authorities. New Jersey v. T.L.O., 469 U.S. 325, 328–29 (1985).

situations law enforcement authorities would have probable cause, based on the school administrator's findings, to arrest the student. Indeed, there is a clear distinction between a school official who *happens* upon criminal evidence while conducting a search in furtherance of school policy and an official who at the outset intentionally seeks to uncover such evidence.[269] Allowing school administrators to conduct these searches would afford them the flexibility of enforcing school rules while ensuring the safety of students and school personnel.

Lastly, these proposed aligned search standards would curb the abuses that potentially surface when school officials and law enforcement authorities are beholden to different search standards in situations where their actions and purposes converge.[270] Accordingly, these standards would clarify their respective roles[271] and provide principled mechanisms for courts to evaluate Fourth Amendment claims stemming from these particular types of school searches. Perhaps most importantly, these standards would also afford students the appropriate Fourth Amendment protections.

VI. CONCLUSION

A compelling argument could be asserted that the real underlying *legal* problem related to the increased reliance on law enforcement authorities in public schools is not the legal standards that should govern the particular types of searches discussed in this Article, but rather the ways in which the evidence seized during these

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269. The Supreme Court recognized this distinction in *Ferguson*, as it noted that state hospital employees in certain circumstances are legally required to "to provide law enforcement officials with evidence of criminal conduct acquired in the course of routine treatment," Ferguson v. City of Charleston, 532 U.S. 67, 78 n.13 (2001) (citation omitted), but that such circumstances "surely would not lead a patient to anticipate that hospital staff would *intentionally set out* to obtain incriminating evidence from their patients for law enforcement purposes." *Id.* (emphasis added).

270. However, these proposed standards invite the risk that school administrators would conduct searches for suspected school rule violations under the more flexible reasonable suspicion standard as a pretext to search for indicia of criminal activity. At the federal level, students would probably not be shielded from such pretextual searches. The administrators' subjective intentions would be of no moment, as long as they had reasonable suspicion to perform the underlying search. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (whether or not police officers subjectively intended to use motor vehicle violations as a pretext to search the occupants for evidence of criminal activity is irrelevant, as long as the officers had probable cause to believe that the underlying traffic violation occurred). However, states could afford greater protections to students under their respective constitutions by prohibiting these pretextual searches. *See, e.g.*, State v. Ladson, 979 P.2d 833, 842 (Wash. 1999) (rejecting *Whren* and holding pretextual traffic stops violative of state constitution). *But see* People v. Robinson, 767 N.E.2d 638, 640 & app. (N.Y. 2001) (adopting *Whren* as matter of state law and citing cases from more than forty states that have either followed *Whren* or cited it with approval).

271. *See* New York v. Belton, 453 U.S. 454, 458 (1981) (stating that rules relating to the Fourth Amendment "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" (quoting Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142)).

searches are to be used. The legal standards recommended above perhaps raise a larger question as to whether shifting to the probable cause requirement simply legitimizes the merger between these two distinct institutions and formalizes the legalistic machinations that can be triggered when evidence of criminal activity, broadly construed, is uncovered. Indeed, one alternative could be to incorporate the special needs doctrine into the school searches "involving" law enforcement officers, particularly because many courts have measured the legality of their searches with the reasonable suspicion standard by declaring their activities to have been conducted at the behest of school officials. In this particular context, the discovered evidence would not be used for law enforcement purposes, such as criminal prosecution,[272] but instead would shift the obligation to impose appropriate sanctions back to school authorities.

However, such a scheme is simply unrealistic, given the concerns about dangerous criminal activity in schools, the desire to root out those who compromise the safety of the school populace and the broader movement to hold juveniles criminally accountable for their actions, in both the juvenile and criminal justice systems. Because of these factors, law enforcement authorities, both through policy and presence, have become permanent and deeply entrenched fixtures in school administrative and disciplinary processes.

This increased law enforcement involvement in school security has created a disconnection between rights and ramifications, which stem largely from the fact that school officials and law enforcement authorities have mutually subordinate relationships: From a practical perspective, school officials are subordinate to law enforcement officers, as the officers often dictate the contours of the working arrangement and implement the processes that determine the circumstances under which students are to be searched, as well as decide how to handle those situations that yield evidence of criminal activity. However, from a legal perspective, courts subordinate the law enforcement role by tucking their activities into a broader educational mandate that upholds searches under the lower reasonable suspicion standard.

The recommendations set forth in this article mesh the needs of school officials and law enforcement authorities to search students suspected of engaging in criminal activity with the Fourth Amendment protections afforded to students. The proposed standards recognize not only the serious issues faced by administrators when dealing with myriad safety issues, but also the context—such as the proliferation of zero tolerance policies and greater reliance on the juvenile and criminal justice systems to monitor these situations—within which these searches occur. Lastly, and perhaps most importantly, these standards recognize and contextualize the sometimes permanent consequences that result from introducing a student to the juvenile and criminal justice systems.

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272. *See supra* note 173.