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Reappraising T.L.O.'s Special Needs Doctrine in an Era of School-Law Enforcement Entanglement

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Reappraising *T.L.O.*'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement

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ABSTRACT

This essay presents one doctrinal method for lawyers to defend children accused of criminal charges in juvenile or adult court: attacking the applicability of the nearly twenty-year old case, *New Jersey v. T.L.O.* to most school searches. *T.L.O.* established a lower standard for searches of students by school officials, but it explicitly did not decide what standard the government must meet to justify school searches performed by police officers, creating a doctrinal starting point for advocates to raise challenges to searches involving police. More fundamentally, the *T.L.O.* Court based its decision on the presumption that firm gates separate public school from law enforcement and criminal justice institutions. Later administrative search cases inside and outside of the school context show that the lower standard of *T.L.O.* depends entirely on programmatic purposes that distinguish school systems and "ordinary law enforcement."

Porous schoolhouse gates have allowed schools and law enforcement to become increasingly entangled. Police officers are stationed full-time in our schools; states, localities and school districts have set policies that *require* schools to turn children over to law enforcement; states have criminalized school-specific conduct; actions taken by schools can lead to violations of a student's probation order from juvenile court; and juvenile courts routinely share confidential information with schools.

This excessive entanglement between schools and law enforcement makes *T.L.O.* inapplicable in a school where such entanglement exists. This conclusion would require the gov-

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ernment to choose: either it can search students using a lower standard and prevent such searches from leading to law enforcement action or it can guarantee students the same civil rights in school that they have on the street. Either choice would be a significant improvement of our current situation where school searches deny children basic civil rights and widen the net of the juvenile and adult criminal justice systems. This essay presents this argument, using specific facts and cases from New York and South Carolina as examples. This argument contrasts with the simplistic approach that several state courts have applied when presented with this issue. Lawyers for children should use the argument presented in this essay to challenge the applicability of *T.L.O.* If they do, they will win victories for their clients in some state and federal courts.

I. INTRODUCTION

On November 5, 2003, school and law enforcement concern regarding suspected drug activity led to a massive police search of Stratford High School in the Berkeley School District, north of Charleston, South Carolina.[1] According to police and school officials' statements to news reporters, fourteen police officers assumed "strategic positions" inside and outside the school. The officers, some with guns drawn, and a drug-sniffing dog "secured" a hallway and the more than one hundred students present there. The police ordered those students to get on their knees and face the wall; the police handcuffed at least twelve students who failed to do so immediately. Police officers physically searched students and turned up no drugs. The dog alerted police to twelve bags carried by various students. Searches of these bags also turned up no drugs.

This essay is concerned with the origins and legal implications of the Stratford High search, which illustrate the issues raised by countless other school searches. News agencies reported that the search arose after close interaction between school and police agencies: A student informed a school official about drug sales at school and a police inves-

1. All facts for this introductory example are based on news reports of the incident. *See* CNN, *Police, School District Defend Drug Raid* (Nov. 10, 2003), *at* http://www.cnn.com/2003/US/South/11/07/school.raid/index.html [hereinafter Police, School District]. While this search may be severe enough to be labeled anomalous, the severity stems from its scope only. It raises issues regarding the relationship between schools, crime, and law enforcement, particularly how to appropriately regulate searches of students on school grounds, with far wider relevance.

tigation soon began. While precise details remain unclear, it seems likely that formal communication and cooperation between the school and police department lead to this investigation.[2] The investigation included analysis of school surveillance video,[3] which made police suspect that videotaped students were serving as drug lookouts. The school principal saw these, and other surveillance tapes and was similarly suspicious. The principal then asked the police to intervene, and the police quickly arranged the drug raid.[4]

This essay asks the hypothetical question: If the raid had turned up evidence of drug dealing on a student, such as a bag of marijuana, would that evidence be admissible in a criminal or delinquency proceeding? What standard should apply—the standard probable cause requirement for police raids or the lower "reasonable suspicion" standard typically applied to school searches?[5] Does it matter that police planned and executed the search? Does it matter if the police investigation stemmed from an independent police investigation or, as seems more likely,

2. The local police department, under agreement with the school district, stations two police officers full time at the high school in question. City of Goose Creek Police Dep't, Special Operations Div., Sch. Res. Officers, *at* http://www.cityofgoosecreek.com/cities/GooseCreekSC/docs/UploadedPages/specialops.htm (last visited May 30, 2004). Additionally, state law and school district policy *requires* school officials to share evidence of a wide range of criminal activity with the police department. *See infra* note 82 and accompanying text.

3. The school has seventy surveillance cameras. Marianne D. Hurst, *Drug Sweep Sparks Lawsuits, Investigations*, EDUC. WEEK, Jan. 7 , 2004, at 3.

4. It is unclear why school officials did not intervene only with suspected students. One speculation is that they were unable to identify individual students based on the videotape evidence and elected to perform the raid rather than investigate further.

5. Even applying the "reasonable suspicion" standard, the severity of this search might prevent the admissibility of any evidence. In particular, the defense would attack the search as not "reasonably related to the objectives of the search" and "excessively intrusive." New Jersey v. T.L.O., 469 U.S. 325, 342 (1985). This point drew immediate attention from advocates, including the American Civil Liberties Union. *See National Briefing\| South: South Carolina: Police Draw Guns in School Raid*, N.Y. TIMES, Nov. 8, 2003, at A11 (quoting Graham Boyd, director of ACLU's Drug Policy Litigation Project, as challenging the use of guns in raid and suggesting school should have called suspected students to principal's office instead). The severity of the search, while the focus of news reports of the search, see *Police, School District Defend Drug Raid, supra* note 1, is not the focus on my analysis. It is similarly the focus of an ACLU lawsuit filed on Dec. 15, 2003, in U.S. District Court in Charleston, South Carolina. The twenty plaintiffs—Stratford students and their families—in *Alexander v. Goose Creek* allege that police and school officials arranged the raid without reasonable suspicion of criminal conduct by students involved and used unreasonable and excessive force, in addition to state law tort claims. *See* Complaint, Alexander et al. v. Goose Creek Police Dep't, *at* http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=14578&c=19 (last visited May 31, 2004).

through collaboration with the school?[6] Does it matter that they did so at the request of the school principal? Does it matter whether that request represented a one-time use of law enforcement at the school or part of a wider policy tying school, police, and prosecutor in a close and ongoing relationship? Does it matter if the police intended to arrest those they found with drugs,[7] or if they merely intended to confiscate any drugs and drug paraphernalia and turn the offending student over to school officials for school disciplinary action? While these questions have specific doctrinal implications, they also speak to broader issues regarding the role of police in schools, how we balance school security with legal protections for children, and whether and how to limit juvenile courts' involvement with children.

This essay's exploration of these questions leads to the conclusion that the increasingly complex relationship between schools and law enforcement requires revision to the doctrine first announced by the Supreme Court nearly twenty years ago in *New Jersey v. T.L.O.*[8] that applies a lower level of scrutiny to school searches than to typical searches. Developments since 1985—when the Court decided *T.L.O.*—undermine a basic assumption of that decision, specifically that schools and law enforcement are fundamentally separate institutions.[9] Increased use of police in schools, formalized school and state policies requiring routine information sharing from schools to courts, and other developments require a reexamination of *T.L.O.*

T.L.O., like other Supreme Court cases examining the constitutional rights of children in schools, presumes that firm boundaries separate schools and the rest of society, thus allowing distinct constitutional rules to apply. One of the most frequently cited lines from *Tinker v. Des Moines Independent School District* envisions schools surrounded by firm gates.[10] The legal question becomes what rights remain when children are inside those gates.

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6. *See supra* note 2.

7. This intent is not explicit in any news reports, but seems likely given the severity of the search.

8. 469 U.S. 325 (1985).

9. *See infra* notes 18-26 and accompanying text.

10. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). This line is frequently cited for the proposition that children at school do not shed constitutional rights generally—not only the First Amendment rights at issue in *Tinker*. *See* Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls,

Schoolhouse gates, contrary to the Court's assumptions in *Tinker* and subsequent cases, have become porous,[11] especially in the realm of school discipline and security. Stronger connections now exist between school disciplinary systems and juvenile and adult criminal courts. These developments not only challenge a central metaphor of Supreme Court case law generally, but they demand a reappraisal of cases that make it relatively easy for school officials to search students. The "special needs" doctrine developed by the Court is premised in large part on firm gates between schools and law enforcement, limiting the impact of most searches to the school context. This essay argues that recent changes in security and discipline practices in public schools require modifications to the "special needs" doctrine regarding searches, seizures and related due process issues in schools and it presents an argument that lawyers for children in juvenile or adult criminal court proceedings may use to challenge that doctrine.

Part II describes how *T.L.O.* envisioned schools separate from law enforcement. It then presents the basic framework of Fourth Amendment "special needs" doctrine—which first asks whether a particular search policy has a justification beyond "ordinary law enforcement" and, if so, whether the resulting search is reasonable considering the goals at issue—and how this doctrine frames the analysis of school searches. Part III uses New York City schools and the recent Stratford High School raid as examples to describe recent changes in the role of police officers within public schools and with school districts' policies regarding when a school search leads to law enforcement action. This Part shows how porous boundaries between schools and juvenile courts have become. Part IV reviews several state court decisions that address these issues—typically

536 U.S. 822, 829 (2002) ("[S]choolchildren do not shed their constitutional rights when they enter the schoolhouse . . . ."), *citing Tinker*, 393 U.S. at 506; Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995), *citing* same; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988), *citing* same; Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 680 (1986), *citing* same; N.J. v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring), *citing* same; Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 865 (1982), *citing* same.

11. Martha Minow has noted that many borders relating to schools have become "up for grabs" in recent years. *See* Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1062 (2000). Professor Minow, while focusing on the porous borders in the three categories in her title rather than those between schools and law enforcement, understands the psychological appeal to justices of strict borders and the need to reevaluate doctrine when those borders no longer hold. *See id.* at 1061 ("[L]awyers care so much about boundaries and borders—which we then continually cross and divide.").

without consideration of issues identified by the Supreme Court's special needs jurisprudence.[12] Part IV then applies the "special needs" test to this new reality of porous school-court boundaries and argues that the deferential standard applied by the Supreme Court in *New Jersey v. T.L.O.* is no longer tenable.[13] While this conclusion immediately seeks to stem the net-widening effects of funneling misbehaving students from schools to the juvenile court, it also seeks to reevaluate how federal courts conceive of schools. This conclusion implies that the jurisprudential metaphor of schoolhouse gates wholly separating schools from society fails to capture the complexity of schools' structure or purpose.

II. BASIS OF SPECIAL NEEDS DOCTRINE: PROGRAMMATIC PURPOSE MUST BE DISTINCT FROM LAW ENFORCEMENT

A. New Jersey v. T.L.O. : Reasonable Suspicion Standard for School Searches, but Unanswered Questions for Modern Day Schools

In *New Jersey v. T.L.O.*, the Supreme Court held that "the substantial interest of teachers and administrators in maintaining discipline in the

12. While this essay addresses interpretation of federal constitutional law, state courts could adopt the framework laid out here under federal or state constitutional theories. State theories could be especially important if federal courts upheld *T.L.O. Cf.* Nina Morrison, *Curing "Constitutional Amnesia": Criminal Procedure Under State Constitutions*, 73 N.Y.U. L. Rev. 880 (1998) (describing state cases extending state protections beyond reigning federal interpretations of Fourth and Fifth Amendment law).

13. Others have argued that police searches of students should be held to probable cause standards, but they have done so for reasons of legal clarity, rather than out of a consideration of widespread dissolution of school-law enforcement boundaries. *See* Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU Educ. & L.J. 25, 67 (1999) ("Considering the ambiguity involved in the relationships between school officials and the police, . . . the solution to this problem seems to lie in crafting uniform standards. In other words, if police are involved in school searches, then they should be subject to the same standards that police normally use."). Stefkovich and Miller's analysis also fails to consider the impact of administrative search cases beyond the school setting. *See also* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 Ariz. L. Rev. 1067 (2003). Pinard argues, as this essay does, that school-law enforcement entanglement calls for application of a probable cause standard to many school searches. While a valuable contribution, Pinard's article does not provide an in depth analysis of the administrative search cases that form the doctrinal core of the argument. *Id.* at 1099-1101. Nor does Pinard discuss how administrative search principles informed *T.L.O.*, a discussion included in Part II.A of this essay. This leads Pinard to a different proposed solution than this essay, one with less doctrinal or policy support. *See infra* notes 120-130 and accompanying text.

classroom and on school grounds"[14] justified a less demanding standard for searches of public school students by school officials. In particular, the Court unanimously held that school officials need not obtain a warrant before searching a student because such a requirement would prevent "the maintenance of the swift and informal disciplinary procedures needed in the schools."[15] Further, the Court announced a reasonable suspicion standard for searches of students by school officials, and held that suspicion of school rules infractions—not only suspicion of illegal activity—could justify searches.[16]

Two points from *T.L.O.* bear emphasis here. First, the Court left unanswered key questions regarding modern school security practice. The *T.L.O.* Court did not consider some factors that have become more prevalent today, nearly twenty years after the Court's holding, leaving open the possibility for lawyers for children to press the argument presented in this essay. The Court explicitly avoided consideration of the proper standard for school searches involving police officers.[17] Further, the Court did not consider the effect of school policies requiring notification of law enforcement officials of evidence of criminal activities. When reciting

14. N.J. v. T.L.O., 469 U.S. 325, 339.

15. *Id.* at 340. While the Court was otherwise split six votes to three, even dissenting justices agreed that warrants were not required. *See id.* at 357 (Brennan, J., dissenting) ("A teacher or principal could neither carry out essential teaching functions nor adequately protect students safety if required to wait for a warrant before conducting a necessary search."); *id.* at 376 (Stevens, J., dissenting) (finding "warrantless searches of students by school administrators ... reasonable when undertaken for those purposes"—responding to "violent, unlawful or seriously disruptive conduct"). This essay does not address the warrant exception for school searches, instead focusing on the bar school officials or police officers must meet before searching a student—probable cause or reasonable suspicion. Under alternative "special needs" tests proposed by scholars, one could separate the warrant requirement from probable cause requirement. Jonathan Kravis, applying an "administrative question" test, argued that the administrative burden school officials would face if required to obtain a warrant requirement, should call for an exception, regardless of the primary purpose of a school search. Jonathan Kravis, *A Better Interpretation of "Special Needs" Doctrine After* Edmond *and* Ferguson, 112 YALE L.J. 2590 (2003).

16. *T.L.O.*, 469 U.S. 325 at 341-42 (finding search justified when reasonable suspicion exists "that the student has violated or is violating either the law *or the rules of the school*") (emphasis added).

17. *See id.* at 341 n.7 ("This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question."). As it is today, the proper standard for searches involving police at schools was a contentious issue. The *T.L.O.* Court listed state and federal court decisions regarding school searches including three cases that "held or suggested" that probable cause is the appropriate standard for such searches. *Id.* at 332 n.2. The Court also cited cases holding that no constitutional barriers limited school searches and those which sought a middle ground. *Id.*

the facts of the search at issue, the Court merely notes that the assistant principal "turned the evidence of drug dealing over to the police,"[18] without noting whether this action was compelled or encouraged by school policy or determined by the assistant principal in his unfettered personal or professional discretion as a tutor of children. This issue becomes more pressing when one reads Justice Powell's concurrence, which represents the views of two of the six justices who announced the reasonable suspicion standard—his and Justice O'Connor's. Powell based his opinion, in part, on the notion that school officials have no "obligation to be familiar with the criminal laws" and instead should focus on teaching.[19] School policies, discussed below in Part III.B, that require school officials to inform law enforcement of any evidence of crime and thus impose an obligation of familiarity with criminal law on school officials, might force these concurring justices to reevaluate their votes.

Second, *T.L.O.* hints at a conception of schools as fundamentally separate from wider society, especially law enforcement systems. The Court spoke at length about the "flexibility" required by the necessity of "maintaining security and order in the schools."[20] Thus, while the majority avoided a thorough discussion comparing this purpose to ordinary law enforcement goals,[21] its holding seems grounded in the Court's conception of schools' interest in discipline within its walls as distinct from broader social interests in law and order. The concurrences make this point clear.[22]

18. *Id.* at 328. This action led to a police request that T.L.O.'s mother bring her to the police station, which led to T.L.O.'s confession. Using both that confession and the evidence discovered by the assistant principal's search, T.L.O. was adjudged a delinquent and received a disposition of one year probation. *Id.* at 329-30. Interestingly, Justice White for the majority used the standard terminology of adult criminal procedure, writing that the juvenile court "sentenced" T.L.O., *id.* at 330, rather than the more typical juvenile court terminology of "disposition." *See, e.g., In re* Gault, 387 U.S. 1, 31 n.48 (1966) (noting that "unique" requirements of juvenile "post-adjudication disposition" separated that inquiry from process required during a juvenile delinquency trial). Perhaps Justice White's terminology indicates his understanding of the severity of the consequences faced by children in the juvenile court system.

19. *T.L.O.*, 469 U.S. at 350 n.1 (Powell, J., concurring).

20. *Id.* at 340.

21. Such a discussion forms the typical analysis of "special needs" searches. The doctrine underlying such searches is discussed in Part II.B.

22. The concurrences are decisive both because they add this logically crucial element to the majority's analysis and because three of the six justices in the majority wrote or signed concurrences, making their reasoning indispensable to the holding. *See T.L.O.*, 469 U.S. at 326 (noting that Justices White, Burger, Powell, Rehnquist and O'Connor signed onto the opinion of the Court, but Justices Powell and O'Connor concurred in a separate opinion, as did Justice Blackmun).

Justice Powell first cited *Tinker*'s schoolhouse gates metaphor[23] and used that to draw a sharp distinction between the school setting and law enforcement purposes: "The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects . . . . Rarely does this type of adversarial relationship exist between school authorities and pupils." [24] Regardless of the accuracy of Powell's statement in 1985,[25] subsequent changes that blur the line between school officials and law enforcement—changes that open the gates between schools and the rest of society—would undermine the holding in *T.L.O.*[26] This essay discusses such changes in Part III below.

B. Under Recent Supreme Court Special Needs Case Law, Schools may not Justify the Reasonable Suspicion Standard without an Analysis Showing its Policy's Principle Purpose to be Separate from General Law Enforcement

In *City of Indianapolis v. Edmond*,[27] the Supreme Court voided a police department's traffic checkpoint program because it called for searches with neither individualized suspicion nor a special need sufficiently separate from typical crime prevention. Rather than pursuing a goal such as border security or traffic safety, the police program sought solely to catch individuals possessing, transporting, and selling narcotics. Thus, the Supreme Court decided to "draw[] the line at roadblocks designed primarily to serve the general interest in crime control." [28]

23. *Id.* at 348.

24. *Id.* at 349-50.

25. T.L.O., the fourteen year old ninth grader, would not likely characterize her relationship with the assistant principal who searched her purse, suspended her from school, and turned her over to the police as a nonadversarial one.

26. Justice Blackmun's concurrence applied different terminology but similar logic. He agreed with the reasonable suspicion standard because "special needs, beyond the normal need for law enforcement" make typical Fourth Amendment search and seizure requirements "impracticable." *Id.* at 351. Framing the problem in this manner invites questions regarding whether "special needs" or typical law enforcement needs motivate a particular school search.

27. 531 U.S. 32 (2000). The Supreme Court has granted cert to another special needs case that depends heavily on how the Court will apply *Edmond*. In *Illinois v. Ledster*, 779 N.E.2d 855 (Ill. 2002), *cert granted*, 123 S.Ct. 1928 (2003), the Illinois Supreme Court applied *Edmond* to prevent Illinois police from setting up a road block to gather information from potential witnesses to a past crime. The issue on review is whether that purpose is "designed primarily to serve the general interest in crime control." *Edmond*, 531 U.S. at 42.

28. *Id.* at 42.

Edmond explicitly calls for inquiries into programmatic purposes, underscoring at several points its emphasis on the primary purpose of the state's policy. "We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."[29] *Edmond* builds off of *Delaware v. Prouse*,[30] which noted that state interests "not distinguishable from the general interest in crime control,"[31] were insufficient to justify exceptions to individualized suspicion requirements.

When the state seeks an administrative search exception from standard probable cause and warrant requirements, the state opens itself to an analysis of its *programmatic* purposes, not the intent of individual actors.[32] *Edmond* cautions "that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene."[33] Thus, applied to school searches, *Edmond* instructs courts to examine statutes, regulations, school board policies and routine school practice to determine the purpose behind a particular search. The inquiry should avoid what an individual police officer is thinking when interrogating or searching a student at a high school, but should consider what the police department or the school was thinking when it set a policy of inviting police officers into schools or of sharing student disciplinary information with the juvenile court.

Even more recently, the Supreme Court struck down the City of Charleston's program requiring drug testing of pregnant women because its purpose and implementation involved "excessive entanglement" with law enforcement.[34] Charleston's policy applied to women who met any of a set of factors raising some suspicion that they would have a drug addiction.[35] The city then tested all such women in a manner designed to

29. *Id.* at 43.

30. 440 U.S. 648 (1979), *cited in* Edmond, 531 U.S. at 41.

31. *Id.* at 659 n.18.

32. *Edmond*, 531 U.S. at 45-46 ("[W]hile subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis, programmatic purposes may be relevant to [administrative searches]. Accordingly, [probable cause doctrine] does not preclude an inquiry into programmatic purpose.").

33. *Id.* at 48.

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

35. *Id.* at 71 (listing nine medical factors, any of which would trigger the city's policy). While triggering the policy required individual action that triggered suspicion, no reviewing court considered these factors to rise to the level of reasonable suspicion, let alone probable cause. *Id.* at 76.

preserve such evidence for use in a criminal trial.[36] A positive drug test after labor led immediately to arrest; during pregnancy, arrest immediately followed after a second positive test or a missed appointment with a substance abuse program.[37] The Court saw through the city's purported public health and safety rationale and found that the purpose of the searches was to gather evidence for law enforcement purposes. Thus, the city could not shield its program with the special needs doctrine.[38]

The *Ferguson* Court's reliance on the law enforcement overtones of Charleston's program is relevant to school searches in several ways. First, close integration of law enforcement in effectuating the policy increases the invasion of privacy. Second, designing the policy in order to provide and preserve evidence on a *routine* basis for law enforcement use may be evidence that the purpose of the search is for law enforcement.[39] Third, having public health and safety purposes in addition to law enforcement purposes are not sufficient to qualify a program as a "special needs case." The Court noted that although the city "may well have" had a goal of ending drug use by pregnant women, the means used indicated an overriding law enforcement purpose.[40]

Scholars analyzing recent special needs cases have similarly concluded that the fundamental issue is "the primary purpose to which the government intended to put the results of the search," distinguishing those searches "that did not involve arrest and prosecution."[41] An analysis of recent school drug test cases bolsters the conclusion that lower scrutiny applied to school searches depends on its separation from criminal or juvenile court sanctions. Even though those cases increased state power at the expense of children's privacy, the Supreme Court's reasoning is based on schools' refusal to allow information discovered in drug tests

36. The policy required hospital staff to follow a chain of custody with urine samples "presumably to make sure that the results could be used in subsequent criminal proceedings." *Id.* at 71-72.

37. *Id.* at 72.

38. *Id.* at 83.

39. *See id.* at 79 n.15 (suggesting that "routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give right to an inference of pretext) (quoting Skinner v. R. Labor Executives' Ass'n, 489 U.S. 602, 621 n.5 (1989).

40. *Id.* at 82-83.

41. Kravis, *supra* note 15, at 2593.

to lead to law enforcement consequences. This point bears special emphasis because state courts do not always recognize it.[42]

In *Board of Education of Independent School District Number 92 of Pottawatomie County v. Earls*,[43] the Court upheld the school district's policy of suspicionless drug testing of all middle and high school students participating in extracurricular activities, but repeatedly noted that the policy did not lead to any law enforcement consequences.[44] The Court concluded that the "character of the intrusion imposed by the Policy"[45] was "not significant"[46] in large part because of the consequences attached to failing a drug test. Most important, testing positive did not lead to criminal or delinquency charges because the school did not share data with law enforcement.[47] This conclusion built on similar reasoning in an earlier school drug test case, *Vernonia School District 47J v. Acton*.[48] There, the Court upheld a school policy requiring suspicionless drug testing of all student athletes in which the school limited consequences of positive test results to suspension from interscholastic sports activity.[49] The school convinced the Court that the policy's "distinctly *non*punitive" purpose distinguished it from searches designed to produce evidence for court proceedings.[50] The Court relied on strict separation between the drug testing policy and any criminal or delinquency-related conse-

42. *See, e.g.*, Commonwealth v. Cass, 708 A.2d 350, 356 (Pa. 1998) (discussing *Acton* but failing to note, as *Acton* Court did, that drug test results were not turned over to law enforcement, which distinguished *Acton* from the criminal case at bar).

43. 536 U.S. 822 (2002). In the eighteen months since the Supreme Court announced *Earls*, much has been written criticizing it. *See, e.g.*, Meg Penrose, *Shedding Rights, Shredding Rights: A Critical Examination of Students' Privacy Rights and the "Special Needs" Doctrine After Earls*, 3 NEV. L.J. 411 (2002/2003). Without detracting from those criticisms, this essay recognizes *Earls*'s binding authority and applies it accordingly.

44. *Earls*, 536 U.S. at 829 ("[T]he School District's Policy is not in any way related to the conduct of criminal investigations . . . ."); *id.* at 833-34 (noting that "test results are not turned over to any law enforcement authority" and school disciplinary sanctions are limited to the ability to participate in extracurricular activities and only when student tests positive three times).

45. *Id.* at 832.

46. *Id.* at 834.

47. *Id.* at 833. The Court, by noting the limited disciplinary implications even within schools, *supra* note 44, implied that the degree of school disciplinary sanctions that attach to such policies affect their constitutionality. A suspicionless drug testing program that, for instance, suspended students who tested positive for a significant amount of time would thus face some constitutional doubts.

48. 515 U.S. 646 (1995).

49. *See id.* at 651 (describing operation of school drug test policy).

50. *Id.* at 658 n.2.

quences.[51] Similarly, what academic support for school drug testing that exists has relied upon a "treatment-oriented model" rather than a more punitive program.[52]

Ferguson indicates the decisive importance of the strict separation between public health or safety policies and law enforcement uses. Sharing information from a search with third parties—such as police or the juvenile court—increases the state's invasion of citizens' privacy. The Court reached this conclusion using language that explicitly evoked the separation that was decisive in *Earls*: "The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an *opportunity to participate in an extracurricular activity*, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties."[53] The *Ferguson* Court considered whether the state turned information over to law enforcement as strongly indicative of whether the "special need" was "one divorced from the State's general interest in law enforcement," noting that the Court relied on limits on the disclosure of drug test results in *Vernonia* to distinguish the school's purpose.[54]

These recent cases focus on suspicionless searches, which differ technically from the search at issue in *T.L.O.* and many school searches and disciplinary actions, which generally have some level of individualized suspicion that falls short of probable cause. They are relevant to *T.L.O.* for two primary reasons. First, the cases all relate to administrative searches, where the threshold question relates to the search's primary purpose. Second, *Edmond* implies that suspicionless search cases apply

51. *See id.* at 658 ("[T]he results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.").

52. *See, e.g.*, James B. Jacobs & Boaz S. Morag, *The Curious Rejection of Drug Testing by America's Schools*, 94 TEACHERS COLLEGE RECORD 208, 208, 221 (1992) (arguing for the legality of universal student drug tests "especially if there is nothing more punitive at stake than counseling, special education, and treatment").

53. *Ferguson*, 532 U.S. at 78 (emphasis added). In *Vernonia*, failing a drug test resulted in barring the student from participating in school athletics. *Vernonia*, 515 U.S. at 651 (noting that students who tested positive for drug use had the choice of participating in a drug treatment program or facing suspension from athletic teams). In *Earls*, decided the year after *Ferguson*, failing a drug test resulted in denying the student the ability to participate in any extracurricular program. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 833 (2002) ("the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities").

54. *See id.* at 79-80, n.16.

to *T.L.O.* The *Edmond* Court, addressing a suspicionless roadblock program, relied on *T.L.O.* for the proposition that a "search must be reasonably related in scope to the circumstances which justified the interference in the first place."[55] The flip side of this conclusion is that the Supreme Court would apply its rule barring probable cause exceptions for suspicionless searches for the general purpose of law enforcement to prevent similar probable cause exceptions where some individualized suspicion exists if the primary purpose is general law enforcement rather than school discipline. *Earls* and *Vernonia* similarly speak to *T.L.O.*'s continuing applicability. Both rely on *T.L.O.*'s concern with not interfering with the "swift and informal disciplinary procedures."[56] These citations—and the separation of the drug test policies at issue from court sanctions discussed above—lead to the inference that the Supreme Court continues to view the special needs doctrine as dependent on school disciplinary interests distinct from police and court involvement, whether the school searches spring from individualized suspicion as in *T.L.O.* or suspicionless searches as in *Earls* and *Vernonia.*

III. SCHOOL SECURITY AND DISCIPLINE POLICIES HAVE EVOLVED TO FEATURE CLOSER CONNECTIONS TO JUVENILE JUSTICE THAN ENVISIONED BY *T.L.O.*

America's public schools look far different today that they did when the Supreme Court decided *T.L.O.* In particular, schools address discipline and security issues far differently now than in 1985. This Part discusses post-*T.L.O.* developments that indicate significant roles of law enforcement officials in day-to-day school security and routine cooperation between school officials and law enforcement that is often informed by state laws and official school district policy. Those developments, which this Part addresses in turn, include the increased presence of police officers in schools, official state and school policies requiring schools to share information related to potential crimes with police departments, state laws criminalizing particular behavior at schools, the role school infractions can have in sparking a contempt finding of a child on probation with the juvenile court, and the sharing

55. 531 U.S. 32, 47 n.2 (2000).

56. New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985), *cited in Earls*, 536 U.S. at 828-29, *Vernonia*, 515 U.S. at 653.

of confidential information regarding juvenile court proceedings with schools officials. Finally, this Part responds to the argument that severe problems with crime and security in schools demand constitutional flexibility; this concern only underlines the need to treat school security like any other state program designed to further general law enforcement goals.

A. Increasing Use of Police Officers in Schools

T.L.O. explicitly reserved judgment on the standard properly applied to school searches involving police officers.[57] Courts can no longer ignore this question as police officers have become regular fixtures in many schools.

New York City schools turned to the New York Police Department (NYPD) to improve security in schools. At the beginning of the 1998-1999 school year, the New York City Board of Education voted to transfer control of all school security officers to the NYPD.[58] Under the plan, the NYPD would recruit, train and manage 3,200 officers. Armed officers would focus their attention on 128 of the city's more than 1,100 schools.[59] More recently, New York City created a task force of 150 to focus entirely on twelve of the city's most violent schools,[60] a decision that quickly led to multiple arrests of teenagers.[61]

With 1.1 million students and national attention, New York City's decision is momentous in and of itself. But New York is not alone in making these changes. Case law discussed in Part IV.A shows that Illinois schools—both inside and outside of Chicago—have regular police presence. While this essay focuses on large urban school districts, especially New York City, one would be mistaken to dismiss these examples as anomalies. The federal government has provided funds for school districts to hire police and install security guards at least since the

57. *See supra* note 17 and accompanying text.

58. Lynette Holloway, *Board Votes to Give Police Control over School Security*, N.Y. TIMES, Sept. 17, 1998, at B5.

59. Randal C. Archibold, *New Era as Police Prepare to Run School Security*, N.Y. TIMES, Sept. 16, 1998, at B1.

60. Elissa Gootman, *Police to Guard 12 City Schools Cites as Violent*, N.Y. TIMES, Jan. 6, 2004, at A1.

61. The day after Mayor Michael R. Bloomberg announced the creation of the task force, the police arrested six students, none on charges more serious than assault. Elissa Gootman, *Six Students Arrested in City Crackdown on Violent Schools*, N.Y. TIMES, Jan. 7, 2004, at B3.

Safe Schools Act of 1994.[62] By 1994, more than 2000 school police officers were on the hallway, cafeteria, and classroom beat across the country.[63] More recently, the federal Department of Justice Community Oriented Policing Services (COPS) Program has spent $700 million dollars to help localities hire, train, and equip school police officers through its "Secure Our Schools" program.[64] These grants have funded school police officers in communities large and small.[65] The Department of Education has reported that, while schools with high crime rates are most likely to have a significant police presence, more than twenty percent of schools only reporting "moderate" or "isolated" crime also reported having a significant police presence.[66]

The Stratford raid also displays the increased role of police enforcing laws in South Carolina public schools. Beyond the obvious police role in designing and implementing the raid in question, the local police department stations two police officers at the school full-time.[67] As the Stratford High School principal himself noted, the mere presence of police at school matters significantly: "[O]nce police are on campus, they are in charge."[68] Many courts have tried to distinguish cases where police initiate searches from cases where police merely carry out searches as directed by the school officials.[69] However, if we take Principal McCrackin's comment at face value, this distinction makes little sense;

62. Stefkovich & Miller, *supra* note 13 at 32.

63. Jessica Portner, *Cops on Campus*, EDUC. WEEK, June 22, 1994 at 30.

64. *See* Press Release, Dep't of Justice, *COPS Office Announces $4.9 Million to Increase School Safety in 27 States*, *at* http://www.cops.usdoj.gov/default.asp?Item=958 (last visited May 30, 2004) (announcing $4.9 million in new grants and noting that COPS has spent a total of $700 million for 6,100 school police officers).

65. *See* Dep't of Justice Off. of Community Oriented Policing Services, *Secure Our School's Grantees*, (Oct. 1, 2003), *available at* http://www.cops.usdoj.gov/mime/open.pdf?Item=957 (last visited May 30, 2004) (listing "Securing Our School" grantees as of Oct. 1, 2003). The most recent set of grantees include localities in twenty-six states, including Othello, Virginia; El Paso, Texas; Cleveland, Ohio; Holyoke, Mass.; and North Pole, Alaska. *Id.*

66. The Department reported that 22.5% of schools with "isolated crime" had at least one police officer on campus thirty or more hours per week, compared with 24.4% of schools with "moderate crime" and 33.1% of schools with "violent crime." PLANNING AND EVALUATION SERVICE, U.S. DEPARTMENT OF EDUCATION, SCHOOL CRIME PATTERNS: A NATIONAL PROFILE OF U.S. PUBLIC HIGH SCHOOLS USING RATES OF CRIME REPORTED TO POLICE, Doc. #2001-37, at 20 (2001), *available at* http://www.ed.gov/offices/OUS/PES/school_improvement.html#3-reports [hereinafter A National Profile].

67. City of Goose Creek Police Dep't., *supra* note 2.

68. Tamar Lewin, *Raid at High School Leads to Racial Divide, Not Drugs*, N.Y. TIMES, Dec. 9, 2003 (quoting Nov. 11 letter from principal George McCrackin to Stratford High School parents).

69. *See infra* Part IV.A.

any search involving a police officer is fundamentally different from other school searches.

B. Official State and School Policies Require Routine Connections between Schools and Law Enforcement Agencies

Both *Edmond*[70] and *Ferguson* instruct lower courts to analyze the intent of a search on a programmatic level, looking at routine practice as indicative of such intent.[71] State and school district statutes and regulations set official policy and govern routine actions and are thus highly probative of whether modern school searches are motivated by general law enforcement concerns. And such official policies indicate routine connections between schools and law enforcement agencies, indicating both a general law enforcement purpose and greater degree of intrusiveness of resulting searches.

Not only have police officers established a regular presence in American schools, but state legislation and local school district policy have regularized contact between schools and law enforcement. Turning school disciplinary incidents into criminal investigations and, eventually, delinquency or criminal charges is now a matter of formal policy and regular routine. An analysis of New York City school regulations and South Carolina and Stratford High School statutes and regulations displays how these formal policies have changed the post-*T.L.O.* world of school security and law enforcement.

The New York City school system revised its "Security in the Schools" regulation in 2000 explicitly because of the presence of police officers in schools.[72] First, the new regulation sees no distinction between the work of school police officers and other school officials, noting that school security is the "collective responsibility" of school officials and police officers who "shall consult and work cooperatively . . . on matters per-

70. *See supra* note 29 and accompanying text.

71. *See* Ferguson v. City of Charleston, 532 U.S. 67, 79 n.15 (suggesting that "routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give right to an inference of pretext) (quoting Skinner v. R. Labor Executives' Ass'n, 489 U.S. 602, 621 n.5 (1989).

72. N.Y. CITY BD. OF EDUC., SECURITY IN THE SCHOOLS, REGULATION OF THE CHANCELLOR, SUMMARY OF CHANGES TO A-412, *available at* http://docs.nycenet.edu/dscgi/ds.py/Get/File-523/RegTOC.html (last visited May 30, 2004) ("The merger between the Board and the NYPD necessitated many of the changes contained in this regulation.").

taining to school security."[73] This cooperation *requires* school officials to inform police officers of any "school-related crime," whether or not it represents an "immediate safety emergency."[74] The regulation does not define the term "school-related crime," but it does require police notification "in all cases" when a school official receives "information or an allegation" of a crime.[75] Thus, by district policy applicable in all New York City public schools, low-level suspicion of a low-level crime necessarily leads to police involvement. This expanded mandatory police involvement also revises the school system's search and seizure policy; now, the search and seizure policy statement refers to the new "Security in the Schools" policy, noting that school officials "must" involve police officers whenever illegal contraband is found in a student's possession.[76] It is worth noting that, despite this change, the school did not revise the standard applied to any school search, which is modeled directly on *T.L.O.*[77] The policy statements indicate no consideration that post-*T.L.O.* changes might change that standard.

Some regulations even require school officials to follow procedures that would enable prosecutors to establish a chain of custody for seized contraband—such as drugs or weapons—and use such contraband as evidence in a criminal proceeding. For instance, a New York City Chancellor's Regulation requires school officials to seal any contraband in an envelope, complete a voucher form, and turn the envelope over to the New York Police Department.[78] This evokes the precise concern

73. N.Y. CITY BD. OF EDUC., SECURITY IN THE SCHOOLS, REGULATION OF THE CHANCELLOR A-412, at 1, *available at* http://docs.nycenet.edu/dscgi/ds.py/Get/File-523/RegTOC.html (last visited May 30, 2004).

74. *Id.* at 2.

75. *Id.*

76. N.Y. CITY BD. OF EDUC., REGULATION OF THE CHANCELLOR A-432, SEARCH AND SEIZURE at 7, *available at* http://docs.nycenet.edu/dscgi/ds.py/Get/File-523/RegTOC.html (last visited May 30, 2004) ("Where a student is found to be in possession of illegal contraband, the appropriate procedures must be followed for notification of the police and arrest of the student."), *citing* Chancellor's Regulation A-412.

77. The policy's standard reads:

> A student's person and possessions may be searched provided that school officials have reasonable suspicion to believe that the search will turn up evidence that the student has violated or is violating either the law and/or school rules and regulations. The extent and scope of the search must be reasonably related to the objective of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.

Id. at 1. This provision closely tracks the language in *T.L.O.* itself. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

78. N.Y. CITY BD. OF EDUC., *supra* note 76, at 9.

voiced by the Supreme Court in *Ferguson*—that following such procedures indicates that the purpose of gathering such evidence is for general law enforcement purposes rather than health and safety of individuals at school.[79] If the school was only concerned with health and safety, it could simply dispose of the contraband. However, it's policy of preserving evidence for courtroom use indicates a different purpose.

The Stratford raid also displays the increased coordination between police and schools. Beyond the full-presence of two police officers at the school,[80] South Carolina law, like New York City regulations, conflates the jobs of police officers and school officials. State law defines the duty of school police as "act[ing] as a law enforcement officer, advisor, and teacher."[81] Regardless of their job description, these police officers must be involved whenever a school crime is suspected; state law *requires* school officials who suspect criminal activity to report this suspicion to the police.[82] The South Carolina Legislature enacted this statute in 1990, five years after *T.L.O.*[83] The following year, the Berkeley School District, which includes Stratford High School, implemented the policy by requiring school administrators to contact law enforcement on "notice" of a broad list of crimes, including assault (without specifying how severe an assault must be), threat of assault to school officials, possession of dangerous weapons, and possession of controlled sub-

79. *See supra* note 36 and accompanying text.

80. City of Goose Creek Police Dep't, *supra* note 2.

81. S.C. CODE ANN. § 5-7-12(B) (West 2003).

82. S.C. CODE ANN. § 59-24-60 (West 2003) ("[S]chool administrators must contact law enforcement authorities immediately upon notice that a person is engaging or has engaged in activities on school property . . . which may result or results in injury or serious threat of injury to the person or to another person or his property as defined in local board policy."). The statute does not define the term "notice," so it remains unclear what level of suspicion triggers this reporting requirement. The legislature appears to direct school officials to err on the side of reporting a suspected crime; the legislature passed a law holding school administrators and their school districts civilly liable for failure to comply with the School Crime Report Act. S.C. CODE ANN. § 59-63-335 (West 2003) ("Failure of a school administrator to report criminal conduct . . . shall subject the administrator and the school district to liability for payment of a party's attorney's fees and the costs associated with an action to seek a writ of mandamus to compel the administrator and school district to comply . . . .").

83. S.C. CODE ANN. § 59-24-60 (West 2003).

stances.[84] Thus, as a matter of policy, Stratford High School and the local police department are linked.[85]

C. Criminalization of Particular Cconduct at School

Requiring school officials to report suspicion of any criminal activity to police leads to even more intrusive invasions of privacy when coupled with the criminalization of additional conduct at school and increased penalties for crimes committed at school. In 2000, the New York legislature added a new charge to second degree assault: "Acting . . . on school grounds and with intent to cause physical injury, he or she: (a) causes such injury to an employee of a school or public school district."[86] By drawing attention to any assaults on school grounds, however minor, and by requiring school officials to report suspicion of any crime,[87] these laws increase the probability that any schoolyard fight could turn into a delinquency or criminal action and increase the severity of any dispositions or sentences that result, both of which relate to the level of intru-

84. BERKELEY SCH. DIST., POLICY RELATIONS WITH POLICE DEPARTMENT/INTERROGATIONS AND INVESTIGATIONS, *at* http://209.125.230.134/cgi-bin/om_isapi.dll?clientID=6020466&adv-query=%2259-24-60%22&depth=2&headingswithhits=on&hitsperheading=on&infobase=berkeley.nfo&record={3725}&softpage=PL_frame.

85. It seems likely that these broad links led to the Stratford raid. It is now clear that at least some links were involved: the Stratford High School principal, George McCrackin, invited the police to raid the school. Lewin, *supra* note 68.

86. N.Y. PENAL LAW § 120.05(10) (Gould 2001). This is a Class D felony. *Id.* Previously, this would have been third degree assault. *See* N.Y. PENAL LAW § 120.00 (Gould 2001) ("A person is guilty of assault in the third degree when: 1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person."). This is a Class A misdemeanor. *Id.* This distinction is particularly important in New York. Juvenile court jurisdiction ends when a child turns sixteen years old. *See* N.Y. FAMILY CT. ACT § 302.1 (McKinney 2003) (granting Family Court jurisdiction over delinquency cases); N.Y. FAMILY CT. ACT § 301.2(1) (McKinney 2003) (defining delinquency to refer to cases involving children between age seven and sixteen). Thus, ratcheting up the severity of a particular crime directly increases the severity of consequences a sixteen year old or older student faces. Secondly, New York law treats second degree assault as a "designated felony" in some circumstances. N.Y. FAMILY CT. ACT § 301.2(8)(v) (McKinney 2003) (describing second degree assault committed by 14 and 15 year olds previously found to have committed such an assault or other specified felonies as "designated felony"). Thus, this law can lead to more severe dispositional consequences. *See* N.Y. FAMILY CT. ACT § 353.5 (McKinney 2003) (describing dispositional procedures for designated felonies).

87. *See supra* Part III.B.

siveness of an administrative search.[88] News reports indicate neither fear is a mere hypothetical.[89]

This law may be less important for the issue of school searches—since evidence of assault is less likely to come from such searches than evidence of drug or gun crimes. Those crimes lead to serious charges in themselves. Nonetheless, these laws are relevant for two reasons. First, they amplify the close connections between schools and law enforcement developed in Parts III.A. and III.B. Second, they increase the policy concern about sparking severe juvenile or criminal court consequences because ratcheting up the severity of a charge possible after a schoolyard fight can lead to longer sentences in both juvenile and adult court.[90]

Similar laws exist in South Carolina. For instance, South Carolina penalizes distribution of narcotics in the proximity of a school in a much harsher manner than other drug dealers.[91] In *T.L.O.*, the school principal found marijuana and indications of selling marijuana on school grounds. Had T.L.O. been of age under state law (and some states classify fourteen year olds as adults for certain crimes[92]), South Carolina's statute would condemn her to double the sentence she could have faced if she were caught outside of school.

Nationally, thirty-one states have enacted legislation to enforce specific penalties for crimes at schools.[93] The Supreme Court has recognized the prevalence of state laws making possession of firearms on or near school grounds a crime. Indeed, the fact that more than forty states had done so was a key point in two justices' votes to overrule the federal ban on gun

88. *See infra* note 141 and accompanying text.

89. The NEW YORK TIMES reported six arrests of high school students in one day for crimes no more serious than assault. *See supra* note 61. Prosecutors charged one student (arrested after a separate incident) as an adult with second-degree assault after shoving a school security officer. Michael Brick, *Student, 16, Charged as Adult in Assault on School Official*, N.Y. TIMES, Jan. 17, 2004, at B1. The criminal charge was in addition to a school suspension, during which the student would attend a "Second Opportunity School," designed to education and provide counseling for students with discipline problems. *Id.* The assault charge could lead to a seven-year prison sentence, *id.*, which would of course interfere with whatever counseling the teenager might get at the alternative school.

90. *See supra* note 86.

91. *Compare* S.C. CODE ANN. § 44-53-445 (West 2003) (requiring penalties for selling drugs within a half-mile of a school of up to ten years in prison, ten-fifteen years if the drug is crack) *and* S.C. CODE ANN. § 44-53-370(b)(2) (West 2003) (limiting to five years penalty for distribution of most controlled substances).

92. *See supra* note 86.

93. Ronald A. Skinner & Lisa N. Staresina, *State of the States*, EDUC. WEEK, Jan. 8, 2004, at 114.

possession near schools.[94] Such laws, coupled with school crime reporting requirements outlined in Part III.B, nearly ensures that any child caught with a weapon at school will soon be involved with law enforcement.

This net-widening result is also amplified by the increased presence of police officers in schools. For example, Toledo, Ohio, passed its Safe Schools Ordinance in 1968, making it a crime to violate a school rule. However, few students were charged under the ordinance until 1995, when Toledo police officers were assigned to secondary schools. The number of charges increased from 314 in 1993 to 1,727 in 2002.[95]

D. Probation

One of the most common results for children entering the juvenile court system is a probation order.[96] While choosing such probation orders means that the child will not go to jail in the short run, violating orders can lead to contempt charges and more severe punishments, including confinement of the child.[97] To the extent that conditions of behavior at school are elements of a probation order, increasing the amount of data released by schools to juvenile courts increases the possibilities that judges will identify factors that can lead to contempt proceedings. For instance, if a judge decides to place a juvenile on probation, a condition of which includes avoiding trouble with school officials, then a search by a school official—police or otherwise—can lead to severe legal consequences for the child. This is less of a doctrinal argument than a policy one. Generally speaking, someone on probation enjoys less Fourth Amendment protections.[98] Regardless of the constitutionality of using school searches to make findings of contempt in pro-

94. U.S. v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

95. Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2003, at A1.

96. The Department of Justice reports that 54% of all adjudicated delinquency cases result in a probation order. U.S. DEP'T OF JUSTICE OFF. OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NAT'L REP. 159 (1999), *available at* http://ojjdp.ncjrs.org.

97. *See* Barry C. Feld, *Cases and Materials on Juvenile Justice Administration* 876 (2000) (concluding that "most [states] have affirmed their juvenile courts' use of the comtempt power to order the secure detention of contemptuous status offenders despite an expression of legislative intent generally banning such detention" and citing cases in Wisconsin, South Carolina, Washington, Illinois, and Minnesota to this effect). *See also id.* at 867-79 (describing use of contempt charges to "bootstrap" probation dispositions into further delinquency charges).

98. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987) (upholding state regulation allowing warrantless searches without probable cause of probationers' homes).

bation cases, any policy that increases the potential numbers of contempt proceedings raises concerns of widening the juvenile court's net. Similarly, the use of probation—and resulting contempt findings—are not new phenomena in juvenile or criminal court. However, sharing increased amounts of information from schools that can lead to findings of contempt is a new development and will likely result in increasing numbers of contempt findings in future years.

E. Juvenile Courts Share Confidential Records with School Officials

A further indication of the crumbling borders between schools and law enforcement comes from widespread state laws calling for juvenile courts to share confidential records with public school officials, often leading to school disciplinary penalties.[99] Thus, school disciplinary actions are now contingent on juvenile court decisions. While this trend is the reverse of this essay's primary concern—this trend involves information flowing from courts to schools, not vice versa—it does display that borders between the two institutions are far from firm. Indeed, some state laws require schools and law enforcement agencies to cooperate on such information-sharing.[100]

This trend is present in both New York and South Carolina. New York state law requires juvenile courts to appoint a school liaison, who will notify a school official (which school districts are required to appoint) to share information regarding a student's criminal or delinquency conviction.[101] South Carolina law requires juvenile courts to notify school principals regarding dispositions of all delinquency cases regarding crimes involving violence, weapons, drug distribution, or certain crimes committed on school grounds, and the school must maintain this information in the student's disciplinary record.[102]

F. Do Increasingly Severe Problems of School Violence and Drug Trade Indicate the Need for Continued Flexibility?

These trends exist in context, of course: Schools face significant amounts of crime, often severe violent crime.[103] Effectively addressing

99. Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 550, 577-88 (2004).

100. *See, e.g.*, CAL. WELF. & INST. CODE § 11325.9 (West 2003) (requiring interagency collaborations in Alameda, San Bernadino, and Ventura Counties in California).

101. N.Y. CRIM. PROC. § 380.90(1) (Gould 2001).

102. S.C. CODE ANN. § 20-7-8510(E) (West 2003).

103. A recent Department of Education Survey displays some of the extent of school crime. The department reported that in a given school year, 18% of students nationwide are threatened

these trends to provide a safe and secure learning environment is undoubtedly a crucial objective of public school systems; indeed the development of these trends led directly away from an *in loco parentis* theory of public school searches to Fourth Amendment jurisprudence.[104] School systems seeking to uphold searches in the absence of probable cause would cite such needs as justifying searches that would not be possible outside of school grounds. This argument would cite *T.L.O.*'s discussion of increasing problems with school discipline, including drug use and violent crime in schools, to justify the increased need for searches at schools.[105]

This argument fails for several reasons. First and foremost, it entirely ignores the Supreme Court's special needs doctrine case law, discussed in Part I.B above. Relying on this statement in *T.L.O.* implies that the more schools are beset by crime, the easier it is for schools to search students without probable cause. Supreme Court jurisprudence indicates the contrary—the more the state interest resembles crime control, the more standard Fourth Amendment requirements such as probable cause are required. Relatedly, we ought to be wary of turning schools into mini police-states for the message it sends to our children regarding their place in society. If we as a society consider school security concerns so great as to require the developing security apparatus that post-*T.L.O.* developments represent, then our legal doctrines ought to protect children from abuses of this apparatus.

Second, it is not clear that aggressive searches that lead to increased use of the juvenile justice system will further the schools' interest in security. Moreover, it might actively harm society's larger interest in crime prevention. Commentators have recognized that the exchange of information between juvenile court and schools, combined with increas-

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with violence, 11% experienced a robbery or threat of violence with a weapon. PLANNING AND EVALUATION SERVICE, U.S. DEP'T OF EDUC., WIDE SCOPE, QUESTIONABLE QUALITY: THREE REPORTS FROM THE STUDY ON SCHOOL VIOLENCE AND PREVENTION, 3 (2001), *available at* http://www.ed.gov/offices/OUS/PES/school_improvement.html#3-reports (last visited May 31, 2004). The study did not address drug crimes.

104. *See* Stefkovich & Miller, *supra* note 13 at 26-28 (describing history of school search doctrine and school crime leading up to *T.L.O.*, which dismissed the notion of *in loco parentis*—which held that school officials acted in parents' place and thus were not state actors for constitutional purposes—and applied the Fourth Amendment to searches by school officials).

105. *See* New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (noting that "in recent years, school disorder has often taking particularly ugly forms: drug use and violent crime in the schools have become major social problem" and reasoning that enforcement of school rules is especially necessary).

ing toughness of delinquency dispositions and school discipline policies "work together to inhibit rehabilitation and actually increase crime over time."[106] A school's decision to share evidence of a crime discovered at school can have the ultimate school disciplinary effect—expelling the student from school as the juvenile justice system maintains custody of the child. Commentators have noted that children so excluded from school are more likely to "refine patterns of delinquency and assimilate into a culture of deviance."[107]

The argument on behalf of allowing school searches without probable cause would be stronger if such searches were not so closely tied to law enforcement. If, for instance, a school set a policy of searching students with reasonable suspicion only but refused to turn evidence gathered in such searches over to law enforcement, then such a policy would fit more closely in line with Supreme Court precedent. Schools have a wide variety of disciplinary options available that do not involve using the juvenile justice system. T.L.O. herself would not have gotten off free of consequences had her assistant principal declined to share evidence from his search with the police: The school suspended her for seven days for possession of marijuana.[108] *Vernonia* and *Earls* demonstrate that school search policies can limit the consequences of such searches to school discipline, including the provision of rehabilitation services.[109] A student found with a loaded gun on school grounds or who repeatedly engages in violence could be suspended or transferred to a school more closely tailored to his or her emotional needs. By avoiding the juvenile justice system, such a result might also serve the school's security interest in the long run.[110]

106. Henning, *supra* note, at 524.

107. *Id.* at 557. *See also* Amalia E. Cuervo, et al., NAT'L SCH. BD. ASSOC., *Toward Better and Safer Schools* (1984); Cherry Henault, *Zero Tolerance in the Schools*, 30 J.L. & EDUC. 547, 550 (2001). Other commentators have correlated schools that adopt zero tolerance policies with higher rates of delinquency and incarceration among their students. Russell Skiba et. al., *Consistent Removal: Contributions of School Discipline to the School-Prison Pipeline*, 4, *available at* http://www.civilrightsproject.harvard.edu/research/pipeline03/Skibbav3.pdf (last visited May 31, 2004) [hereinafter Consistent Removal]. This data both shows the lack of any significant boundary between school discipline and criminal justice policies and suggests, though not conclusively, that zero tolerance policies increase the likelihood that affected students will commit crimes and become incarcerated.

108. *T.L.O.*, 469 U.S. at 329 n.1.

109. *See supra* Part II.B.i.

110. *See supra* notes 106-107 and accompanying text.

Additionally, schools would not be deprived of their ability to protect students from actual emergencies. A school or law enforcement official could still use *Terry* stops and frisks if they have reasonable suspicion that a student might have a weapon that poses a danger to the official.[111]

IV. APPLYING POST-*T.L.O.* DEVELOPMENTS TO SCHOOL SEARCHES

A. Recent Case Law Fails to Fully Consider the Impact of Increased Coordination between Schools and Law Enforcement

A sampling of juvenile court cases from several jurisdictions shows that many courts fail to grasp the importance of increased coordination between schools and law enforcement. Instead, to determine the applicability of *T.L.O.*, courts seek clear but overly formalistic distinctions based on the level of law enforcement involvement in a particular search, ignoring policy-wide or programmatic intent and creating a difficult, fact-specific inquiry for trial courts to apply. This section surveys and critiques some of these cases.

Several courts have tried to craft distinctions between searches initiated by police and those initiated by school officials. Most recently, in *In re Ana E.*,[112] a New York Family Court judge ruled that *T.L.O.*'s reasonable suspicion standard rather than probable cause applied to a search by a school police officer of a student's backpack performed at the request of a school principal. The court expressed some concern that the identity of the person searching the child's bag—a police officer—might change the applicable standard, but held that any such concern dissipated because "the school authorities initiated the investigation that led to the search."[113] The court feared than an alternative result would create a two-tiered system where police officers would be held to a probable

111. Terry v. Ohio, 392 U.S. 1 (1968). *See also* Pinard *supra* note 13, at 1122 (outlining the steps of *Terry* stops and frisks in school).

112. *In re* Ana E., 2002 WL 264315, 2002 N.Y. Slip Op. 40018(U) (N.Y. Fam. Ct. 2002). Earlier cases crafted a similar distinction. *See, e.g.*, *In re* Alexander B., 270 Cal. Rptr. 342, 344 n.1 (Cal. Ct. App. 1990) ("Since the search of appellant and his companions was undertaken by police at the request of a school official, we need not consider the appropriate standard for assessing the legality of searches undertaken by school officials at the behest of police.").

113. *Id.*

cause standard and teachers to a reasonable suspicion standard and that this would encourage teachers to perform searches for dangerous weapons rather than police officers who are better trained to "neutraliz[e] dangerous weapons."[114]

Ana E. errs in its focus on the identity of who searched the student in question and who initiated the search. While these factors are somewhat relevant both to the purpose and overall reasonableness of a search,[115] they do not represent the most important factor. In particular, the court's focus on the individual search failed entirely to consider the purpose of the overall policy of searches performed in schools involving police officers. *Edmond* demands a broader, policy-wide rather than specific-incident intent analysis.[116] Ironically, the New York Family Court implied that fine distinctions regarding who initiated a particular search may have little relevance, opining that, regardless of who initiated a search, "the school safety officers work at the school and are part of the school community."[117] Thus, the Family Court seemed unable to distinguish the work of the police officer and of school officials. *Ana E.* would have been better reasoned had the court followed this point to its logical conclusion: When it came to school searches, police officers and school officials were involved in the same overall enterprise, and the purpose of that enterprise rather than the identity of searchers or search initiators would properly identify the standard applicable to the search at issue. Such an analysis into programmatic purpose would be more consistent with *Edmond* and eliminate the court's concern about creating a two-tiered system differentiating between teachers and police officers, as well as the doctrinal difficulty of distinguishing police and school-initiated searches on a case-by-case basis.[118]

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114. *Id.* The New York Family Court relied on a Wisconsin Supreme Court opinion, *In the Interest of Angelia D.B.*, 564 N.W.2d 682, 690 (Wis. 1997). For another court that relied on the distinction between a search performed by a school official and a police officer and the difficulty of making such distinctions in some cases, see *In re Murray*, 525 S.E.2d 496, 498 (N.C. App. 2000) (determining that when police officer wrestled bag away from handcuffed child then handed bag to teacher to search, "the search of Murray's book bag was conducted by a school official" and thus *T.L.O.* applied). The Massachusetts Supreme Judicial Court implied it would follow a two-tiered approach, applying reasonable suspicion to searches by school officials and probable cause to searches by police officers. Commonwealth v. Carey, 554 N.E.2d 1199, 1203 n.4 (Mass. 1990).

115. *See infra* note 117 and accompanying text.

116. *See supra* note 33 and accompanying text.

117. *In re* Ana E., 2002 WL 264315, 2002 N.Y. Slip Op. 40018(U) (N.Y. Fam. Ct. 2002).

118. For an example of a case showing the difficulty in distinguishing such cases, see *supra* note 114 (discussing *In re Murray*).

Illinois courts have gone a step beyond *Ana E.* and applied a reasonable suspicion standard to searches performed by school police officers even when initiated by the police officer. While this holding avoids the two-tiered difficulty addressed by the *Ana E.* court, it is similarly flawed in its failure to address the programmatic purpose of school searches. The Illinois Supreme Court stated its conclusion in *People v. Dilworth* as applying the reasonable suspicion standard when the case "involv[es] 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."[119] Thus, the court focused on whether the particular search was motivated by the school's interest in a "proper educational environment." This analysis suffers from several flaws. First, it ignores broader systemic factors indicative of programmatic intent. The police officer's presence inextricably mixed educational and law enforcement purposes: He had power to both assign detentions and to arrest students[120] and, by school policy announced in the student handbook, any illegal items found in any search lead to law enforcement involvement.[121] Second, the court's broad statement of the school's non-law enforcement purpose allows significant room for prosecutors to spin a particular search as motivated by a desire for a safe learning environment; eliciting such testimony from the police officer in question likely is easy for a seasoned prosecutor to do.

A lower Illinois court extended *Dilworth* a short time later, holding that even though a police officer's primary purpose for being stationed at school was to prevent criminal activity, searches he performed triggered a reasonable suspicion rather than probable cause analysis.[122] The court's conclusion is flawed on two grounds. First, it presumes that the searcher's identity as a police office made the special needs analysis no

119. People v. Dilworth, 661 N.E.2d 310, 317 (Ill. 1996). This case was an adult narcotics prosecution of a student found by a school police officer with drugs hidden in a flashlight. *Id.* at 313.

120. *Id.*

121. *Id.* at 314. An additional problem in *Dilworth*'s analysis came from its use of *Vernonia.* While it cited that case, it failed to mention that the drug tests at issue there formed part of a policy that specifically excluded law enforcement involvement, while the search here explicitly required it. *Id.* at 318.

122. People v. Pruitt, 662 N.E.2d 540, 544 (Ill. App. 1996).

different than if a school official performed the search.[123] Second, and more shocking, the court acknowledged a law enforcement concern as the officer's "primary purpose" yet failed to recognize the implications of such a purpose for the application of the special needs doctrine.[124]

Courts' focus on who initiated a search and the level of police involvement has led commentators reviewing school search case law to list all the various permutations of how police and school official interaction could lead to a search. Jacqueline Stefkovich and Judith Miller listed seven such possibilities, involving various means of initiation and levels of involvement by police and school officials.[125] Reviewing case law,[126] they conclude that the "standard for police-related searches in schools will be determined by who is the agent of the search."[127] This approach is unfortunate, and rightly criticized. As the *Ana E.* court noted, this two-tiered approach would create perverse incentives for school-police inter-

123. Recent Supreme Court cases have emphasized that law enforcement identity of the searcher is of great importance. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 80 (2001) (distinguishing Charleston's maternal drug testing from previous cases due to its "use of law enforcement"); *id.* at 88 (Kennedy, J., concurring) ("None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the deign of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives.").

124. *Pruitt* involved three cases, each relating to a school search by a city police officer who discovered firearms on defendants' persons or in their bookbags. The state could conceivably argue that the indisputably compelling need to prevent gun violence at schools made the primary purpose of preventing such gun crimes fall under the "health and safety" rationale. However, the reality that these cases immediately turned into criminal charges against the students involved—not simply school disciplinary actions more closely tailored to the interest of school safety—indicates preventing and punishing crime are indistinguishable in this case. In *Pruitt*, a Chicago police officer found a handgun on the defendant after he set off a metal detector, a discovery that immediately led to the defendant's arrest. 662 N.E.2d at 544. ("After the gun was discovered, Officer Sonne escorted Pruitt to a conference room where essay work regarding Pruitt's arrest was completed" and noting that such arrest was official school policy according to a school handbook entered into evidence). In a severe legal error, the court failed to consider this policy—and the explicit law enforcement purpose of arresting juveniles with firearms—when analyzing the search. Accordingly, the primary purpose must also refer to the ordinary law enforcement purpose of charging and punishing individuals for gun crimes, ending any opportunity to use the special needs doctrine. In an additional error, the court cited *Vernonia* for support without noting that the drug tests at issue there had no connection to law enforcement. *Id.* at 547.

125. Stefkovich & Miller, *supra* note 13 at 33. For an alternative list of six categories, see Pinard *supra* note 13, at 1083-90.

126. Stefkovch & Miller's discussion of six school search cases may be found in *id.* at 45-53.

127. *Id.* at 40. *See also id.* at 45 ("The more that police and security guards are involved in the investigation leading up to the search, in the decision to search, and in the actual search, the more likely the court will enforce the stricter probable cause standard.").

action: Police would have incentives to use school officials to perform searches when probable cause does not exist.[128] Additionally, such a standard will burden our already overburdened juvenile courts with difficult, case-specific decisions and would provide little guidance to school districts determining whether or how to collaborate with law enforcement. A premise of *T.L.O.* was the Court's desire to not require school officials to become legal experts,[129] but the standards summarized by Stefkovich and Miller would require enough legal knowledge to evaluate tests applied to each variation of school-police interactions. More fundamentally, focusing on the relative significance of a police officer's involvement in a particular search fails to account for the cooperation, interdependence and inseparability of law enforcement and school officials.

B. Applying the Administrative Search Test in Light of Post-*T.L.O.* Developments

The above sampling of cases displays the need for a more rigorous appraisal of *T.L.O.*'s continued viability. A better approach would ask whether a given school or school district's policies and programs are so entangled with law enforcement as to make *T.L.O.* inapplicable,[130] thus applying one standard—reasonable suspicion or probable cause—to all searches within each school. Applying tests from administrative search cases discussed in Part II to developments in school-law enforcement interdependence discussed in Part III, this section provides a fuller analysis of post-*T.L.O.* school searches. It lays out two arguments, either of which could be adopted by state or federal courts. First, a strong case exists that courts should no longer consider many school searches under the special needs framework because their purpose is now too closely aligned with general law enforcement goals. Second, even if school

128. *See supra* note 114 and accompanying text. *See also* Pinard *supra* note 13, at 1092 ("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.").

129. *See supra* note 19 and accompanying text.

130. This test differs from Pinard's proposal. His test would ask whether "the purpose of their [police or school officials'] searches is to uncover evidence of criminal activity." Pinard, *supra* note 13, at 1119. This requires a case-by-case analysis of the intent behind any search at issue, a difficult task for trial courts and a test that provides little guidance to school policy makers. More fundamentally, it ignores *Edmond* and *Ferguson*'s instructions to focus on the policy-wide or programmatic intent, rather than the individual officer's intent. *See supra* note 33 and accompanying text.

searches may still be considered administrative searches, increased school-law enforcement cooperation increases the level of intrusiveness that they cause and thus add to the set of factors weighing on the side of defendants' case that such searches are unreasonable.

1. Prong One: Are school searches special needs administrative searches or general law enforcement searches?

Developments discussed in Part III indicate that, at the very least, school-law enforcement cooperation has blended the purposes of general law enforcement and maintaining a safe school environment. This conclusion is particularly strong when one considers the Stratford High School raid. The raid was performed by police officers, raising an issue that *T.L.O.* did not address.[131] Cases like *Ana E.* that distinguish searches initiated by school officials from those initiated by police[132] would nonetheless apply *T.L.O.*'s framework, because the police only became involved after contacts from school officials. However, such an analysis would ignore other developments that raise questions about the applicability of *T.L.O.* Police officers are permanently stationed in Stratford High School and, along with security cameras, keep close watch for any illegal activity by students.[133] Whenever "notice" of such activity exists, those police officers are directly involved or, as with the raid in question, school officials are obligated by state law and school district policy under threat of civil liability to report suspicions to the police.[134] Expanding criminalization of activity at school and broad lists of crimes under school policy ensures that school officials will have no shortage of crimes to support.[135] These contacts are reciprocated by juvenile court ties to schools, and contacts in both directions have significant effects on children in both institutions.[136] The sum of all these contacts is that efforts to maintain a safe learning environment are indistinguishable from general law enforcement efforts. Those law enforcement aims—measured as a matter of policy-wide intent[137] and routine practice[138]—should prevent

131. *See supra* note 17.
132. *See supra* Part IV.A.
133. *See supra* note 2 and accompanying text.
134. *See supra* Part III.B.
135. *See supra* Part III.C.
136. *See supra* Parts III.D and III.E.
137. *See supra* note 33 and accompanying text.
138. *See supra* note 39 and accompanying text.

any court from applying *T.L.O.* to the Stratford High School raid. More broadly, it should also prevent any court from applying *T.L.O.* to any school search performed in the shadow of such close routine programmatic ties between schools and law enforcement. Prosecutors would no doubt couch such routine programmatic ties as serving the interests of safe and orderly educational environments, but it seems farcical to distinguish those purposes from general law enforcement purposes once law enforcement is pervasively entangled[139] with schools.

School officials could still take advantage of the reasonable suspicion standard of *T.L.O.* if they search students outside of any policy mandating that the official turn over any incriminating evidence to law enforcement. Distinguishing such a case from situations where *T.L.O.* is not applicable primarily relates to the intent of a school district's program or policy and should not require a difficult investigation of the intent of a particular school official in a specific incident.

2. Prong Two: If T.L.O. *Applies, are the Searches Reasonable—Do Policies Balance the Special Needs with the Intrusion Involved?*

Even if a court fails to recognize the general law enforcement purposes of many school searches, applying the *T.L.O.* test requires consideration of the details of any particular search. It is no stretch to call the Stratford High School raid—involving drawn guns and forcing students to lie down on the hallway floor as police search their bags—unreasonable.[140] However, the broad connections between schools and law enforcement increase the intrusion of any particular search: Searches are more likely to be performed by police officers or with cooperation of police agencies and are more likely to result in a deprivation of freedom. Courts should analyze these factors to determine the reasonableness of any school search.[141]

Other factors—which will necessarily vary from school to school—raise policy concerns regarding developing school-law enforcement

139. *Ferguson v. City of Charleston* used the "excessive entanglement" language while voiding a search the state tried to justify on a special needs ground. *See supra* note 34 and accompanying text.

140. *See supra* note 1 and accompanying text.

141. *Earls* identified three key criteria that affect the reasonableness analysis: the privacy interest at stake, *Earls*, 536 U.S. 830, the "character of the intrusion," *id.* at 832, and "the nature and immediacy of the government's concerns." *Id.* at 834. The severity of consequences that now flow from school searches as a matter of routine and policy relate to the first two factors.

cooperation. Chief among these factors is a concern for racially disparate effect of particular policies; the closer school-law enforcement ties discussed in this essay are more prevalent in low-income and predominantly minority schools. The Department of Education has reported that schools with higher populations of minority students are more likely to have a significant police presence.[142] Thus, a higher proportion of minority students are likely to be faced with such searches that carry with them the added risk of leading to a juvenile court appearance. Commentators have also noted how police school interactions disproportionately burden African-American and Latino students.[143]

Discriminatory enforcement by schools and police could exacerbate this unequal impact. In the South Carolina case, the raid's tactics led to a disparate impact; police initiated the raid immediately after two buses filled largely with African-American children arrived at school.[144] This resulted in a hugely disproportionate burden of the searches falling on African-American students: While less than a quarter of Stratford High school students are African-American, two-thirds of students in the hallway during the raid were African-American.[145] While the South Carolina case may present an extreme example of police behavior, the racially discriminatory enforcement is nothing new to the juvenile justice context. Studies indicate that African-American youth are overrepresented at every stage of the juvenile justice process.[146]

142. *See* Planning and Evaluation Service, U.S. Dep't of Educ., *supra* note 66, at i-ii (reporting that the most violent high schools "tended to be located in urban areas and have a high percentage of minority students" and these schools "were more likely to use" law enforcement personnel than schools with lower crime rates).

143. *See* Pinard, *supra* note 13, at 1113-16 (describing disparate impact of school discipline policies).

144. *See* Lewin, *supra* note 68 ("The timing of the raid, which began at 6:45 a.m., apparently contributed to the racial skew: only the earliest buses, filled mostly with black students, had delivered their passengers . . . ."). The racially disparate impact has "opened a racial chasm in the school," with rallies attended mostly by African-American community members calling for the principal's firing. *Id.* Nineteen of the twenty plaintiffs in the ACLU lawsuit are African-American, according to the ACLU's complaint, *available at* http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=14576&c=19 (last visited May 30, 2004).

145. *Id.*

146. African-American youth are twice as likely as whites to be referred to juvenile court and more likely to be detained once involved in the juvenile court. OFF. OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NAT'L REP. 150, 154 (1999).

This concern also speaks to overall net-widening concerns from increased school-law enforcement connections.[147] "Net-widening" refers to practices that "extend the social control function of the juvenile court to youngsters who otherwise would not have been involved in the juvenile justice system."[148] Commentators typically criticize such practices for leading to unnecessary state intervention in the lives of children and families.[149] This belief is informed by a general belief that the juvenile justice system is unlikely to provide positive intervention, even for children whose behavior indicates that some sort of intervention is decidedly necessary because such intervention interferes with counseling and related services available outside of the criminal justice system. The proper scope of the juvenile court's intervention is a topic well beyond the scope of this essay. However, the notion that the juvenile court's failures ought to lead courts to hesitate before allowing net-widening policies should not be controversial; even courts opposed to children's rights understand that their decisions will increase involvement with the juvenile justice system and have worried about this result.[150]

It seems likely that school discipline policies will increase the frequency with which students are found delinquent or convicted of adult crimes.[151] Indeed, academics and policy advocates consider this result so striking that conferences on the "school to prison pipeline" are now com-

147. For an example of how policies discussed in this essay have actually widened the net of one city's juvenile court, see the statistics noted in the text accompanying note 95.

148. Ira M. Schwartz et al., *Nine Lives and then Some: Why the Juvenile Court Does not Roll Over and Die*, 33 WAKE FOREST L. REV. 533, 543 (1998).

149. *See, e.g., id.* ("Net-widening was roundly criticized as reduc[ing] individual freedom, increas[ing] the number of rearrests, contribut[ing] to the behavioral difficulties [of youths], and facilitat[ing] unnecessary intrusions into families.") (quotations and citations omitted).

150. *See, e.g.,* McKeiver v. Pennsylvania, 403 U.S. 528, 543-44 (1971)

> (We must recognize . . . that the fond and idealistic hopes of the juvenile court proponents . . . have not been realized. . . . Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged. The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.).

151. *See* Skiba et al., *supra* note 107, at 16 (reporting high correlation between tougher school discipline policies and relatively high rates of delinquency findings and adult criminal convictions).

152. *See, e.g.,* HARVARD CIVIL RIGHTS PROJECT, SCHOOL TO PRISON PIPELINE CONFERENCE: CHARTING INTERVENTION STRATEGIES OF PREVENTION AND SUPPORT FOR MINORITY CHILDREN, May 15-16, 2003, *at* http://www.civilrightsproject.harvard.edu/convenings/schooltoprison/synopsis.php (last visited May 31, 2004). This conference focused on issues broader than that of this essay. In particular, many presentations discussed the links between tougher school discipline and later criminal acts.

monplace.[152] Even a cursory glance at policies governing Stratford High School illustrates how "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."[153] Under a school district policy enacted to conform with the state's School Crime Report Act, the school *must* report evidence of crimes as minor as assault to law enforcement agencies.[154] Accordingly, as a matter of school policy, nearly any schoolyard fight leads to a police investigation and a delinquency proceeding. The same is true for possession of a small amount of marijuana.

V. CONCLUSION

A crucial pillar of *T.L.O.* has not fared well in the nearly twenty years since that decision. It is no longer tenable to envision schools as separated by firm gates from the outside world. Whatever the implications of this insight in other contexts, it should force schools to consider the implications of pervasively entangling themselves with law enforcement and it should force courts to reevaluate the applicability of *T.L.O.* in an era of close cooperation between schools and law enforcement. This reevaluation requires analysis of all forms of programmatic and routine ties between schools and law enforcement. More fundamentally, such analysis is predicated on the recognition that subjecting schoolchildren to regular law enforcement supervision and searches requires attaching the same protections from police abuses that adults enjoy. Refusing to reevaluate *T.L.O.* would leave us with the doctrinally-flawed decisions discussed in Part IV.A. More disturbingly, it would allow school systems and law enforcement agencies to continue sending children a poor message: We will subject you to a police state at school because you are children without rights, then we will subject you to severely-punitive, adult-like consequences for any infraction. Courts have the power to send children a better message, and lawyers for children ought to raise issues presented in this essay until they do so.

153. Pinard *supra* note 13, at 1069.

154. *See supra* note 82.