Forty Years After *T.L.O.*: Student Searches in the Age of School Resource Officers

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In 1985, the Supreme Court in New Jersey v. T.L.O. *held that the Fourth Amendment allows school officials to search students in public schools without probable cause. Importantly, however,* T.L.O. *expressly left open the issue of school searches conducted "in conjunction with" or "at the behest of" law enforcement.*

In the forty years since, law enforcement has become increasingly intertwined with the public school system. There has been a significant rise in the number of school resource officers (SROs), law enforcement officers assigned to a particular school or district. According to a recent national study, more than half of the SROs surveyed had conducted a student search in the past month. In light of T.L.O.*'s ambiguity, lower courts have grappled with and disagreed about how to deal with the increasing number of student searches involving SROs. By contrast, scholars have largely agreed that* T.L.O.*'s relaxed search standard should not apply to SROs.*

This Note argues that the prevailing approach proposed by scholars relies on a fundamental doctrinal misunderstanding and produces undesirable results. Since T.L.O.*, the Court has blurred the important distinction between searches based on individualized suspicion and those without. While* T.L.O. *involved a suspicion-based search, it has been erroneously grouped together with a set of "special needs" cases involving suspicion-less searches. The prevailing approach in the academic literature accepts this mischaracterization of* T.L.O. *as a special needs case and looks to cases in the special needs canon for guidance on SRO searches. This Note argues that this move produces more problems than it solves. In doing so, it illustrates the important distinction between suspicion-based and suspicion-less searches, and concludes that* T.L.O.*, once properly understood, remains a valuable, under-theorized source of doctrinal guidance for evaluating suspicion-based student searches.*

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Introduction

Forty years ago, the Supreme Court decided *New Jersey v. T.L.O.*,[1] a landmark case about Fourth Amendment rights in schools. *T.L.O.* was a compromise. For the first time, the Court recognized that students have a right to be free from unreasonable searches in schools.[2] At the same time, the Court concluded that students' Fourth Amendment rights are limited compared to those of the general public due to the unique interests present in the school environment.[3] In particular, when *T.L.O.* was decided in 1985, the Justices were concerned about the "major social problems" of "drug use and violent crime" in schools.[4]

Forty years later, much has changed, but these social problems persist. Adolescent drug use has continued to be a problem,[5] and gun violence in

1. 469 U.S. 325 (1985).

2. *See id.* at 333 (holding that the "[Fourth] Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials").

3. *See id.* at 341 (concluding that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools" requires only that searches be based on reasonable suspicion, rather than probable cause).

4. *See id.* at 339 (citing these as unique interests sufficient to justify the lesser search standard in schools).

5. *See* Michael J. Stoner, Ann Dietrich, Samuel Hiu-Fung Lam, Jessica J. Wall, Carmen Sulton & Emily Rose, *Marijuana Use in Children: An Update Focusing on Pediatric Tetrahydrocannabinol and Cannabidiol Use*, 3 J. AM. COLL. EMERGENCY PHYSICIANS OPEN,

schools has significantly risen since the 1970s.[6] These concerning developments have put pressure on school districts and legislators to enact policies that increase law enforcement involvement in schools to curb criminal activity and ensure student safety.[7] One arm of this response has been the implementation of school resource officers (SROs), sworn law enforcement officers who are assigned to a particular school or district.[8] In 2020, the number of SROs reached 23,400—nearly double the figure reported in 1997.[9] Recently, in response to school shooting incidents, legislatures have even passed laws that require schools to implement SROs.[10]

In theory, SROs fulfill various functions in schools. The National Association of School Resource Officers, a not-for-profit organization that provides school-based law enforcement training, uses the "triad concept" to define an SRO as an "educator . . . , informal counselor/mentor, and law enforcement officer."[11] In practice, however, the emphasis has largely been on law enforcement.[12] According to a national survey conducted in 2019,

August 2022, at 1, https://pmc.ncbi.nlm.nih.gov/articles/PMC9255894/pdf/EMP2-3-e12770.pdf [https://perma.cc/74PG-NNTL] (describing the increasing use of cannabis by children and adolescents).

6. Press Release, Am. Coll. Surgeons, Study Quantifies Dramatic Rise in School Shootings and Related Fatalities Since 1970 (Mar. 6, 2024), https://www.facs.org/media-center/press-releases/2024/study-quantifies-dramatic-rise-in-school-shootings-and-related-fatalities-since-1970/ [https://perma.cc/W3NM-E95B].

7. *See Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1747 (2015) ("In recent years, the connection between schools and police departments has become ever closer."). Many school districts enter into memoranda of understanding with local police departments detailing the extent of their mutual responsibilities. *See, e.g.*, Draft Memorandum of Understanding Between: Chesapeake Pub. Schs. & Chesapeake Police Dep't 4 (Oct. 2024), https://core-docs.s3.us-east-1.amazonaws.com/documents/asset/uploaded file/3995/CPS/4897463/MOU_CPS_and_CPD_DRAFT__October_2024.pdf [https://perma.cc/WBM9-2MYK] ("School personnel will immediately contact the SROs to turn over possession of any contraband . . . . All criminal activity or suspected criminal activity that comes to the attention of the Principal or school staff will be promptly reported to the SROs[.]").

8. *Frequently Asked Questions*, NASRO, https://www.nasro.org/faq/ [https://perma.cc/GP9K-B7FF].

9. "In the late 1970s, there were fewer than 100 police officers in our public schools." Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 98 (2016). By 1997, that number rose to 12,300. *Id.* In 2020, there were approximately 23,400 SROs. ELIZABETH J. DAVIS, BUREAU JUST. STAT., U.S. DEP'T OF JUST., SCHOOL RESOURCE OFFICERS, 2019–2020 1 (2023), https://bjs.ojp.gov/document/sro1920.pdf [https://perma.cc/X6XV-J2KS].

10. *E.g.*, TEX. EDUC. CODE ANN. § 37.0814(a) (West 2025) (requiring that "at least one armed security officer is present during regular school hours at each district campus"); KY. REV. STAT. ANN. § 158.4414(b) (West 2025) (requiring each school to have a "certified school resource officer . . . working on-site full-time on each campus in the district").

11. *Frequently Asked Questions*, NASRO, https://www.nasro.org/faq/ [https://perma.cc/GP9K-B7FF].

12. *See* Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84 THE CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS 160, 160 (2011) ("It must be stressed that an SRO is a police officer first and the SRO should not

more than 50% of SROs had conducted a student search in the past month, and nearly 40% had made an arrest or issued a criminal citation in that same time frame.[13]

As a result, SROs have been criticized for increasing the rates at which students are referred to law enforcement and contributing to the school-to-prison pipeline.[14] *T.L.O.*, insofar as it articulates a relaxed search standard for students, has also been criticized on similar grounds. Indeed, the prevailing approach in the academic literature has been to reject *T.L.O.* and argue that its underlying rationale no longer has force given the significant overlap between schools and law enforcement that exists today.[15]

In the face of these criticisms, this Note attempts to reconcile *T.L.O.* with the significant social changes that have transpired in the last forty years. It argues that the case still provides a valuable framework to assess the appropriate Fourth Amendment standard for school searches and balance the various interests that are implicated.

To that end, this Note focuses on the appropriate standard for suspicion-based searches conducted by SROs. Suspicion-based searches refer to searches premised upon "some modicum of suspicion aimed at a particular person[.]"[16] For example, when an SRO searches a particular student because he or she smells like marijuana, that search is suspicion-based. This class of search can be contrasted with suspicion-less searches where no such individualized suspicion exists.[17] For example, a school policy requiring all students to have their backpacks checked at the school entrance would be a

be thought of as another building-level administrator or teacher[.]") (citation omitted); Intergovernmental Agreement Concerning the Funding, Implementation and Administration of Programs Involving Police Officers in Schools 6 (Sep. 28, 2023), https://wp-denverite.s3.amazonaws.com/wp-content/uploads/sites/4/2023/10/dps-school-resource-officer-mou.pdf [https://perma.cc/A72Q-VQQC] [hereinafter Denver Intergovernmental Agreement] ("[T]he primary duty of an SRO is to handle criminal matters at the school[.]").

13. DAVIS, *supra* note 9, at 9–10.

14. The term "school-to-prison pipeline" refers to policies that push schoolchildren "out of classrooms and into the juvenile and criminal justice systems." *What Is the School-to-Prison Pipeline?*, ACLU (June 6, 2008), https://www.aclu.org/documents/what-school-prison-pipeline [https://perma.cc/M9SU-2W4Z]; *see* Jennifer Counts, Kristina N. Randall, Joseph B. Ryan & Antonis Katsiyannis, *School Resource Officers in Public Schools: A National Review*, 41 EDUC. & TREATMENT OF CHILD. 405, 405 (2018) (noting that during the 2015–2016 academic year, nearly 300,000 students were "referred or subjected to school-related arrest"); CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 37 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/JEA9-G3KV] (criticizing SROs for treating "routine discipline issues as criminal matters" and frequently charging students with minor offenses like "Disorderly Conduct, Peace Disturbance, and Failure to Comply with instructions").

15. *See infra* subpart I(C).

16. Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 318 (2016).

17. *Id.*

suspicion-less search regime. While the case law and academic literature often elide this important difference between suspicion-based and suspicion-less searches, a workable solution to the Fourth Amendment issues undergirding school searches must be sensitive to this distinction.

Furthermore, SROs provide a useful object of study because they occupy the intersection between the school institution and law enforcement, a line that has increasingly become blurred in modernity and ostensibly become important in a set of post-*T.L.O.* Fourth Amendment cases. While *T.L.O.* held that searches conducted by school officials only require reasonable suspicion rather than probable cause, the Court expressly left open the issue of school searches conducted "in conjunction with" or "at the behest of" law enforcement.[18] Given the protean role of SROs, courts and scholars have grappled with whether SROs are "school officials" within the meaning of *T.L.O.*

Part I describes how this ambiguity in the law has played out in the courts and outlines the prevailing approach proposed by scholars. In sum, while courts are split on whether *T.L.O.*'s relaxed search standard should apply to searches conducted by SROs, scholars generally agree that *T.L.O.* should not apply to SRO searches. Scholars argue that *T.L.O.* is grounded in the special needs doctrine, whereby a search can be justified without probable cause when it furthers a special need beyond ordinary law enforcement. According to the prevailing scholarly approach, because searches conducted by SROs do not meet this requirement, SROs cannot benefit from *T.L.O.*

While this approach may seem plausible at first blush, Part II argues that it is misguided. It argues that the Supreme Court has blurred the distinction between suspicion-based and suspicion-less searches, creating a set of conflicting directives that at best fail to provide adequate guidance and at worst encourage courts to misapply the law. *T.L.O.* was about suspicion-based searches, and suspicion-based searches implicate different fundamental concerns than the special needs line of cases, which developed almost entirely in the context of suspicion-less search regimes. The prevailing approach falters because it accepts this confused special needs framework derived from suspicion-less searches and attempts to superimpose it onto a completely different set of suspicion-based search cases.

Part III concludes by sketching out an alternative path forward that returns to *T.L.O.*'s first principles. It argues that *T.L.O.* continues to provide a useful framework to evaluate school searches, applies this alternative framework to suspicion-based searches conducted by SROs, and defends the framework from criticism.

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

I. The Problem with SRO Searches

The increased presence of SROs in schools is likely to be a persisting feature of the American education system. However, due to a lack of guidance from the Supreme Court,[19] lower courts are divided on the appropriate Fourth Amendment standard that ought to apply to suspicion-based searches by SROs in schools. Not only do lower courts disagree about the outcome of these school-searches cases, but they also apply fundamentally different analyses to reach their conclusions.

First, subpart I(A) summarizes the Supreme Court's scant treatment of suspicion-based student searches. Subpart I(B) then examines the divergent approaches taken by lower courts in response to various unresolved legal questions. Finally, subpart I(C) outlines the prevailing approach proposed by legal scholars.

A. T.L.O. *in Brief*

The story begins with *New Jersey v. T.L.O. T.L.O.* involved a suspicion-based search of a student conducted by a school administrator.[20] After the student was suspected of smoking tobacco in violation of school rules, a school official searched the student's purse and discovered marijuana.[21] The issue before the Court was "the proper standard for assessing the legality of searches conducted by public school officials[.]"[22] Justice White, writing for the majority, rejected the State's argument that students "necessarily waive[] all rights to privacy" once they enter the school gates.[23] Instead, the Court held that students retain their Fourth Amendment rights.[24]

However, the Court also determined that students in schools are entitled to less robust Fourth Amendment protections compared to the general public. While warrantless searches are presumptively unreasonable under the Fourth Amendment,[25] the Court created an exception allowing school officials to search students without a warrant when they have "reasonable grounds for suspecting that the search will turn up evidence that the student has violated

19. *See* Tonja Jacobi & Riley Clafton, *The Law of Disposable Children: Searches in Schools*, 13 U.C. IRVINE L. REV. 205, 207 (2022) ("The Supreme Court has had very little to say on the rights of schoolchildren, issuing only two opinions in its history about the right to be free from unreasonable searches and seizures in schools.").

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

21. *Id.*

22. *Id.*

23. *Id.* at 339; *see* Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, B.Y.U. EDUC. & L.J., Winter 1999, at 25, 26–28 (discussing the historical development of the *in loco parentis* doctrine that previously immunized school officials from Fourth Amendment constraints and explaining that *T.L.O.* laid that doctrine to rest in the context of school searches).

24. *T.L.O.*, 469 U.S. at 333.

25. *Id.* at 354 (Brennan, J., concurring) (citing Katz v. United States, 389 U.S. 347, 357 (1967)).

or is violating either the law or the rules of the school."[26] Justice White reasoned that schools have a "legitimate need to maintain an environment in which learning can take place[,]" and a warrant and probable cause requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed" in schools.[27] Applying this reasonable suspicion standard, the Court concluded that the search at issue was constitutional.[28]

However, Justice White, in a footnote, qualified the scope of this holding by noting that the Court was only considering "searches carried out by school authorities *acting alone and on their own authority*."[29] *T.L.O.* thus explicitly left open 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*[.]"[30]

Given the increased presence of law enforcement officers in schools, the number of school searches conducted "in conjunction with or at the behest of law enforcement agencies" has substantially increased. The prevalence of SROs who purportedly fulfill a dual school-official and law-enforcement role raises questions about the scope and applicability of the *T.L.O.* exception. But in the forty years since *T.L.O.*, the Court has declined to provide substantive guidance.[31] These thorny issues have been left to lower courts with mixed results.

B. SRO Searches in Lower Courts

This subpart will consider how lower courts have attempted to determine the appropriate standard for suspicion-based searches conducted by SROs. While many jurisdictions have not directly addressed this issue, the majority view extends *T.L.O.*'s relaxed reasonable suspicion standard to SROs.[32] By contrast, the minority view distinguishes *T.L.O.* and requires

26. *Id.* at 340–42 (majority opinion).

27. *Id.* at 340.

28. *Id.* at 343.

29. *Id.* at 341 n.7 (emphasis added).

30. *Id.* (emphasis added).

31. The only other suspicion-based school search case taken up by the Court is *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009). The Court in *Safford* did not elaborate on these ambiguities, as the facts involved a search conducted by school administrators acting on their own accord. *See id.* at 368–69 (describing the facts of the case involving the search of a thirteen-year-old student by the assistant principal, an administrative assistant, and the school nurse). Instead, the Court merely affirmed the standard from *T.L.O. Id.* at 370.

32. Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 FORDHAM L. REV. 2013, 2024–25 (2019); *see Developments in the Law—Policing*, *supra* note 7, at 1748 ("[M]ost courts hold that reasonable suspicion . . . is constitutionally sufficient to search. This is true even if the search involves a police officer, so long as the officer doesn't initiate the search independently from school officials . . . .").

SROs to have probable cause.[33] Not only do these jurisdictions reach divergent conclusions, but a close read of these cases also evinces a deep confusion about the law as promulgated by the Supreme Court. Lower courts have employed vastly different analyses to adjudicate suspicion-based school searches.

1. The Agent-Centered Approach.—People v. Dilworth,[34] a decision from the Illinois Supreme Court, provides a useful analytical starting point given its influence and depth of analysis.[35] *Dilworth* involved a suspicion-based search of a student conducted solely by an SRO.[36] In determining the appropriate legal standard for this search, the court reasoned that post-T.L.O. school-searches cases can be grouped into three categories:

(1) "[T]hose where school officials initiate a search or where police involvement is minimal,"
(2) "[T]hose involving school police or liaison officers acting on their own authority," and
(3) "[T]hose where outside police officers initiate a search."[37]

The majority explained that under *T.L.O.*, category (1) searches only require reasonable suspicion, while most courts require probable cause for category (3) searches.[38] When placing category (2) searches between these two poles, the *Dilworth* majority concluded that these cases, like category (1) searches, only require reasonable suspicion because SROs are more like "school official[s]" insofar as their role is "to assist other school officials in their attempt to maintain a proper educational environment for the students."[39]

The *Dilworth* typology captures how, for many courts, the locus of the post-*T.L.O.* analysis is about the *agent* of the search. Under this agent-centered approach, to determine what constitutional standard applies to SROs, the central question is whether SROs are more like school officials or law enforcement agents. Many jurisdictions, following *Dilworth*, have adopted blanket rules: Because SROs, in general, are akin to school officials,

33. *E.g.*, State v. Meneese, 282 P.3d 83, 88 (Wash. 2012) (holding that "the school search exception does not apply" to an SRO search "in light of the overwhelming indicia of police action" involved).

34. 661 N.E.2d 310 (Ill. 1996).

35. *See, e.g.*, Russell v. State, 74 S.W.3d 887, 891–92 (Tex. App. 2002) (applying *Dilworth* and noting that Texas cases had "implicitly followed the rationale of *Dilworth*"); *In re* William V., 4 Cal. Rptr. 3d 695, 699 (Cal. Ct. App. 2003) (citing and adopting *Dilworth*).

36. *See Dilworth*, 661 N.E.2d at 313 (describing the search of a student by a police officer "assigned full-time to [the school] as a member of its staff").

37. *Id.* at 317.

38. *Id.*

39. *Id.* at 317, 320.

all SRO searches are subject to a less-than-probable-cause standard.[40] Other courts and judges disagree, concluding that SROs are more like run-of-the-mill law enforcement agents because they are employed by the police department,[41] wear police uniforms,[42] and perform uniquely law-enforcement tasks.[43]

Alternatively, a third set of jurisdictions have adopted a case-sensitive inquiry requiring courts to determine whether a particular SRO should be considered a school official under the specific facts of the case.[44] For example, one court noted that the determinative question is whether the SRO was "assigned duties at the school beyond those of a [sic] ordinary law enforcement officer such that he or she may be considered a school official."[45]

2. The Initiator-of-Search Approach.—As courts attempt to place SROs somewhere on the spectrum between school official and law enforcement agent, they have also tried to determine the constitutional standard for school searches that involve varying levels of collaboration amongst school officials, SROs, and outside law enforcement. In other words, borrowing the language of *T.L.O.*, courts have grappled with cases where school officials work "in conjunction with" and "at the behest of" law enforcement.[46] These cases raise a related set of questions: Does *T.L.O.* apply when a school official with reasonable suspicion recruits a law enforcement officer to conduct a search? Alternatively, what if a school official conducts a search based on a tip from an outside law enforcement officer?

Courts have generally concluded that the result of such collaboration cases turns on the identity of the agent who initiated the search. For example, in *State v. Angelia D.B.*,[47] a school official enlisted the help of an SRO and outside law enforcement officer to search a student suspected of possessing

40. *See, e.g.*, State v. D.S., 685 So. 2d 41, 43 (Fla. Dist. Ct. App. 1996) (holding that the reasonable suspicion standard applies to SROs because an SRO "is a school official who is employed by the district School Board"); M.D. v. State, 65 So. 3d 563, 566 (Fla. Dist. Ct. App. 2011) ("[A] search conducted by a resource officer placed in the school as a liaison is more akin to a search from a school official than from an outside police officer coming into the school to conduct a search . . . .").

41. *Dilworth*, 661 N.E.2d at 322 (Nickels, J., dissenting).

42. State v. Meneese, 282 P.3d 83, 87.

43. *Id.*; *Dilworth*, 661 N.E.2d at 322 (Nickels, J., dissenting).

44. R.D.S. v. State, 245 S.W.3d 356, 369–70 (Tenn. 2008) (suggesting that courts consider several factors including "the specific duties of [the SRO], including information about her daily activities, any interactions with students she has, . . . any agreements between the [Sheriff's Office] and Board of Education about the SRO program, [and] any stated policies in regards to the SRO program").

45. *Id.* at 369.

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

47. State v. Angelia D.B., 564 N.W.2d 682 (Wis. 1997).

a weapon.[48] After a student informed a school official that he saw a weapon in another student's backpack, the school official contacted the SRO, who brought an outside law enforcement officer for additional support.[49] The SRO and law enforcement officer then conducted the student search with the school official present.[50]

The court explained that "when school officials . . . initiate an investigation and conduct it on school grounds in conjunction with police, the school has brought the police into the school-student relationship."[51] Therefore, the *T.L.O.* standard applied to this search because the SRO "conducted the search of [the student] in conjunction with school officials and in furtherance of the school's objective to maintain a safe and proper educational environment."[52] Most jurisdictions have adopted a similar approach to school-official-initiated searches conducted by SROs or other law enforcement.[53]

Some jurisdictions have even extended *T.L.O.* to cases where school officials initiate and conduct a search pursuant to a tip by an outside law enforcement officer.[54] In *In re P.E.A.*,[55] a police officer investigating an off-campus incident learned that a student in a nearby school may have contraband.[56] The police officer then informed a school official and school security officer, who subsequently searched the student without any assistance from the police officer, who was not physically present during the search.[57]

While these facts seem to present a case where a school official conducts a search "at the behest of" law enforcement, the court nonetheless concluded that *T.L.O.* applied because the school official and school security officer

48. *Id.* at 684.

49. *Id.*

50. *Id.*

51. *Id.* at 688.

52. *Id.* at 690–91.

53. *See, e.g.*, F.S.E. v. State, 993 P.2d 771, 773 (Okla. Crim. App. 1999) (holding that the reasonable suspicion standard applies when school officials use law enforcement "to assist with an investigation or search of a student" as long as they are acting "in conjunction with the police and not at the behest of the police"); Cason v. Cook, 810 F.2d 188, 191–92 (8th Cir. 1987) (applying the *T.L.O*. standard when a school official conducted the initial investigation and the SRO only provided limited assistance after); Shade v. City of Farmington, 309 F.3d 1054, 1060–61 (8th Cir. 2002) (holding that while the SRO was more involved than in *Cason*, the reasonableness standard still applied because the search was initiated by school officials in furtherance of school interests).

54. *See, e.g.*, *In re* P.E.A., 754 P.2d 382, 384–86 (Colo. 1988) (applying *T.L.O.* to a search of a student conducted by school officials who were supplied information by an outside law enforcement officer).

55. *In re* P.E.A., 754 P.2d 382 (Colo. 1998).

56. *Id.* at 384.

57. *Id.*

were *not* acting as agents of the police.[58] While the officer "suppl[ied] information to the principal with the intent of initiating the search," the search was actually initiated and conducted by the school official with no further involvement from the officer.[59]

Several jurisdictions have been warier about these law-enforcement-tip cases.[60] The underlying concern in these jurisdictions is that law enforcement officers who lack probable cause may use school officials to conduct searches under the less stringent reasonable suspicion standard. For example, in *State v. Heirtzler*,[61] an SRO testified that "a silent understanding" existed between him and school officials where he would "pass[] information to the school when he could not act" to "gather evidence otherwise inaccessible to him due to constitutional restraints."[62] This practice is a dubious end-run around Fourth Amendment protections.[63] It also turns the logic of *T.L.O.* on its head: The goal of *T.L.O.* is to allow school officials to focus on teaching and other education-related goals, but the kind of "silent understanding" identified in *Heirtzler* would allow SROs and police officers to offload law enforcement functions onto school officials.

Overall, these collaboration cases illustrate the limits of the *Dilworth* framework. *Dilworth* tried to establish brightline rules that apply when school officials, SROs, and outside law enforcement agents act independently.[64] In reality, however, many school searches involve varying levels of collaboration among different agents, making it difficult to fit any case cleanly into the *Dilworth* framework. For example, under *Dilworth*, category (1) searches involve those "where police involvement is minimal," while category (3) searches involve "those where outside police officers initiate a search."[65] But police-tip cases like *In re P.E.A.* arguably fall under both category (1) and (3), because even if police intend to initiate the search, their involvement is otherwise minimal.[66]

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58. *Id.* at 385–86.

59. *Id.* at 385.

60. *E.g.*, F.P. v. State, 528 So. 2d 1253, 1254–55 (Fla. Dist. Ct. App. 1988) (concluding that probable cause was required when an outside police officer enlisted the help of an SRO because the SRO "acted at the behest of a police officer").

61. 789 A.2d 634 (N.H. 2001).

62. *Id.* at 637.

63. *See* Stefkovich & Miller, *supra* note 23, at 40–41 (discussing the "Silver Platter Doctrine," which describes the concern that school officials are able to "search a student under a lesser standard, obtain evidence of a crime, and turn that evidence over to police 'on a silver platter' for use in" criminal prosecution).

64. For example, category (2) searches only cover cases where SROs act "on their own authority." *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996).

65. *Id.*

66. *See In re* P.E.A., 754 P.2d 382, 385 (Colo. 1988) (explaining that the police officer "supplied information to the principal with the intent of initiating the search," but he did not request or participate in the searches in any way).

3. The Purpose-of-Search Approach.—Finally, other jurisdictions explicitly focus their analysis on the purpose of a search.[67] For example, in *T.S. v. State*,[68] the court concluded that it is not the case that "any action by an [SRO]" is subject to the standard of reasonable suspicion.[69] Rather, this lower standard applies only when an SRO is acting "to further educationally related goals."[70] Applying this rule, the court determined that even though the SRO's encounter with the student led to the student being taken to a police station, the SRO was acting to further education-related goals because their initial intent at the time of the search was to investigate a potential violation of school rules.[71] Some jurisdictions have similarly concluded that an SRO is furthering school-related rather than law enforcement purposes when they search a student who they suspect to possess drugs.[72]

The purpose-of-search analysis is distinct from an agent-of-search analysis because the locus of the inquiry centers upon the *intent* of the searcher rather than the *identity* of the searcher. This approach is less concerned about trying to place SROs in the school official or law enforcement bucket and more interested in the *kinds* of activities an SRO is conducting, an inquiry that is arguably more relevant to the privacy interest at stake.[73] Further, the purpose-of-search analysis is also analytically distinct from the initiator-of-search analysis because, in theory, even if a search is initiated by a school official or school resource officer, it could be conducted for non-educational, law enforcement purposes.[74]

In sum, not only have courts disagreed about the application and extension of *T.L.O.*, but they have also disagreed about the proper way to analyze these post-*T.L.O.* school-search cases. Some jurisdictions emphasize

67. *See In re* D.D., 554 S.E.2d 346, 352–53 (N.C. Ct. App. 2001) (noting that "[c]ourts draw a clear distinction between [SRO search] cases and those cases in which outside law enforcement officers search students as part of an independent investigation" because the "purpose" of the latter "is not to maintain discipline, order, or student safety, but to obtain evidence of a crime").

68. 863 N.E.2d 362 (Ind. Ct. App. 2007).

69. *Id.* at 371.

70. *Id.* (quoting Myers v. State, 839 N.E.2d 1154, 1160 (Ind. 2005)).

71. *Id.* ("[The SRO] was concerned with a possible violation of school rules, and not solely a criminal violation.").

72. *See, e.g.*, Commonwealth v. J.B., 719 A.2d 1058, 1060, 1066 (Pa. Super. Ct. 1998) (holding that a reasonableness standard applies in a case where an SRO searched a staggering student, emphasizing that "there was a likelihood that [the student], if under the influence of a controlled substance, could disrupt the learning environment"); *In re* S.W., 614 S.E.2d 424, 427 (N.C. Ct. App. 2005) (noting that SRO was "furthering the school's educational related goals when he stopped the juvenile" because he was helping "maintain a drug free environment at the school").

73. *See* K.W. v. State, 984 N.E.2d 610, 613 (Ind. 2013) (noting a reluctance to blur an "already-fine Fourth Amendment line between school-discipline and law-enforcement duties by allowing the same officer to invisibly 'switch hats'—taking a disciplinary role to conduct a warrantless search in one moment, then in the next taking a law-enforcement role to make an arrest based on the fruits of that search").

74. *See infra* notes 91–92 and accompanying text.

the (i) *agent* of the search and liken SROs to school officials or police officers. However, cases where school officials, SROs, and outside law enforcement work together reveal the limits of an agent-centered approach. In dealing with these collaboration cases, courts have turned largely to the question of who (ii) *initiates* the search because the initiator-of-search is an indicium of the nature of the search and the privacy interest implicated. Finally, other jurisdictions have embraced a (iii) *purpose*-focused approach that explicitly considers the purpose of a particular search as a determinative factor in the analysis.

C. The Prevailing Approach Among Scholars

Although lower courts remain divided on SRO searches, the few scholars who have explored this topic at length are largely unified in endorsing some kind of purpose-based analysis.[75] In support of this position, scholars have argued that the rationale behind *T.L.O.* and other school-search cases is rooted in the special needs exception to the Fourth Amendment's warrant and probable cause requirement.[76] The special needs doctrine provides that "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification."[77] The kinds of special needs recognized by the Supreme Court are broad: securing the national border,[78] regulating the conduct of government

75. *See* 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, 1102 (2003) (arguing that if the "*purpose* of the search [of a student by a school official] is to uncover evidence of criminal activity," then the school official is acting as an agent of law enforcement); Gupta-Kagan, *supra* note 32, at 2059 (explaining that since SROs do not get involved in routine disciplinary matters, the purpose and character of an interaction involving the search of a student necessarily changes when an SRO is involved); *Developments in the Law—Policing*, *supra* note 7, at 1760 (emphasizing that when a school official also serves as a law enforcement officer or is required to report incidents to law enforcement, the law enforcement purpose of the search dominates).

76. *See* Pinard, *supra* note 75, at 1100 (considering the Court's analysis in *T.L.O.* in the context of the special needs doctrine); Gupta-Kagan, *supra* note 32, at 2058–60 (asserting that "the exception from the warrant and probable cause requirements under *T.L.O.*" was justified by the "special need" of "school discipline"); *Developments in the Law—Policing*, *supra* note 7, at 1749 (explaining that the interest of schools in maintaining order, which was recognized in *T.L.O.*, "has since become an example of what the [C]ourt has termed 'special needs'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (Blackmun, J., concurring in the judgment))); *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (noting that the *T.L.O.* Court "found such 'special needs' to exist in the public school context").

77. Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001) (citing *T.L.O.*, 469 U.S. at 351 (Blackmun, J. concurring) and O'Connor v. Ortega, 480 U. S. 709, 720 (1987)).

78. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556–57, 561–62 (1976) (holding that routine traffic stops along major border checkpoints need not be based on reasonable suspicion because of the substantial public interest in border security).

employees,[79] ensuring citizen safety,[80] and maintaining a probation system.[81] If special needs exist, then a court can engage in a balancing analysis to determine whether a warrantless, less-than-probable cause search is reasonable.[82]

Under the prevailing academic approach, *T.L.O.* fits firmly within the special needs tradition because subsequent Supreme Court cases discussing searches in schools conclude that special needs exist in the school environment.[83] Given this characterization of *T.L.O.*, scholars have drawn on other cases in the special needs doctrine to analyze suspicion-based school searches. Importantly, the Court later limited the special needs doctrine by concluding that the exception applies only if the *primary* purpose of a search goes beyond ordinary law enforcement.[84] For example, the Court in *Ferguson v. City of Charleston*[85] concluded that the special needs exception did not allow a hospital to perform drug tests on expecting mothers and share the results of these tests with local law enforcement.[86] Respondents argued that the program was justified by the special need of "protecting the health of both mother and child[.]"[87] Nonetheless, *Ferguson* held that the special needs exception did not apply because the primary purpose served by the search regime was "ultimately indistinguishable from the general interest in crime control."[88] The Court reasoned that while the "ultimate goal" of the program may have been to get women into rehabilitative treatment, the "immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal."[89] Thus, "the extensive

79. *See* O'Connor v. Ortega, 480 U.S. 709, 724 (1987) (concluding that a probable cause requirement would unduly burden public employers due to their unique public interests).

80. *See* Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 620 (1989) ("The Government's interest in regulating the conduct of railroad employees to ensure safety, . . . 'presents "special needs" beyond normal law enforcement . . . .'" (quoting Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987))); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451, 455 (1990) (upholding the use of sobriety checkpoints without requiring individualized suspicion because of "the magnitude of the drunken driving problem [and] the States' interest in eradicating it").

81. *Griffin*, 483 U.S. at 873–74.

82. *Skinner*, 489 U.S. at 619.

83. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (stating that the Court has "found such 'special needs' to exist in the public school context" and referencing *T.L.O.*).

84. Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001); *see* George M. Dery III, *A Deadly Cure: The Supreme Court's Dangerous Medicine in* Ferguson v. City of Charleston, 55 OKLA. L. REV. 373, 396 (2002) ("*Ferguson*, hoping to reign in its special needs treatment, therefore added an entirely new element to the Court's balance: the divination of officialdom's primary purpose.").

85. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

86. *Id.* at 70–71, 84.

87. *Id.* at 81.

88. *Id.* (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)).

89. *Id.* at 82–83.

entanglement of law enforcement [could not] be justified by reference to legitimate [social] needs."[90]

Applying *Ferguson* to suspicion-based school searches, scholars argue that nearly *all* school searches based on individualized suspicion of criminal wrongdoing fall outside the special needs doctrine, regardless of whether the agent of the search is a school official, SRO, or outside law enforcement officer. The argument is as follows:

(1) Doctrinal premise: Under *Ferguson*, the special needs doctrine does not apply when the primary purpose of a search cannot be distinguished from ordinary law enforcement purposes or when a search regime involves extensive law enforcement involvement.[91]
(2) Factual premise (a): The primary purpose of a school search conducted by an SRO is necessarily for law enforcement purposes.[92]
(3) Factual premise (b): Because laws and policies in most school districts require school officials to turn over evidence of criminal activity to law enforcement, the primary purpose of a school search conducted by a school official is also for law enforcement purposes.[93]

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90. *Id.* at 83 n.20. The Court drew a similar distinction in *Edmond* to strike down a drug interdiction checkpoint. *See Edmond*, 531 U.S. at 43–44 (concluding that while the drug interdiction checkpoint furthered the substantial social interest in preventing the proliferation of drugs, the special needs exception did not apply because the primary purpose of the search—detecting drug activity—is akin to ordinary law enforcement).

91. Pinard, *supra* note 75, at 1100–01; *Developments in the Law—Policing*, *supra* note 7, at 1760. In support of the doctrinal premise, scholars point to language in the Supreme Court's school-search cases, which seem to suggest that the purpose of a search is a salient factor in whether the special needs doctrine applies. *See, e.g.*, Gupta-Kagan, *supra* note 32, at 2023–24 (arguing that a closer reading of the Court's cases reveals that students' expectation of privacy in schools depends on "whether the search involves law enforcement actors, purposes, or consequences").

92. *See* Gupta-Kagan, *supra* note 32, at 2058–60 (arguing that by drawing a distinction between school officials and SROs, it necessarily communicates that SROs serve law enforcement purposes); Pinard, *supra* note 75, at 1101–03 (emphasizing the increasingly blurred line between school officials and law enforcement authorities, such that school officials are often acting as agents of law enforcement with law enforcement purposes); *Developments in the Law—Policing*, *supra* note 7, at 1760–61 (arguing that when police officers search students in schools, the law enforcement purpose dominates any non-law enforcement purpose). In support of this premise, scholars discuss the ways in which policies have increasingly limited the role of SROs to law enforcement. *See, e.g.*, Gupta-Kagan, *supra* note 32, at 2046 (arguing that legislation and policy is trending towards narrowly defining SROs' purpose to law enforcement rather than general school discipline).

93. *See* Gupta-Kagan, *supra* note 32, at 2017 (arguing that these policies "transform the character of searches conducted by school officials" into ordinary law enforcement); *Developments in the Law—Policing*, *supra* note 7, at 1760–61 ("In schools . . . where school officials are required to report what they find to law enforcement, the non-law enforcement interest in school safety becomes so entangled with the law enforcement interest that the former cannot be viewed as primary or even distinct."); *see also* Draft Memorandum of Understanding, *supra* note 7, at 4 (requiring school officials to "immediately contact the SROs to turn over possession of any contraband . . . recovered in schools").

(4) Conclusion: Therefore, school searches based on individualized suspicion of criminal activity fall outside the special needs doctrine regardless of whether the agent of the search is a school official, SRO, or outside law enforcement. Instead, probable cause is the appropriate standard for these searches.[94]

Accordingly, these scholars contend that the approach embraced by the majority of jurisdictions—allowing SROs to search students without probable cause—is mistaken. Extending *Ferguson* and its gloss on the special needs doctrine to its logical conclusion in the school-search context would therefore have a sweeping effect on current doctrine.

Scholars identify several advantages to their approach. It would clarify much of the existing confusion and establish an easy-to-apply bright line rule.[95] Requiring a probable cause standard for school officials, SROs, and outside law enforcement would also avoid the silver-platter problem whereby a school official, using their less-than-probable-cause search authority, can conduct a search "on behalf of [an] officer" who lacks probable cause, allowing the officer to "benefit from the fruits of the search."[96] Finally, this approach would provide more robust Fourth Amendment protections to students,[97] reduce youth criminalization,[98] and address concerns about the school-to-prison pipeline.[99]

II. Critiquing the Prevailing Approach

Part I identified the existing confusion in lower courts and the prevailing solution proposed by scholars. These scholars make two critical moves. First, they characterize *T.L.O.* as a special needs case. That is, they argue that if a relaxed standard is to be justified for suspicion-based school searches, it *must* be justified under the special needs doctrine. Then, the prevailing approach argues that, under *Ferguson*, a relaxed standard for suspicion-based searches *cannot* be justified under the special needs doctrine because the primary

94. *See* Pinard, *supra* note 75, at 1120 (quoting *Ferguson*, 532 U.S. at 88 (Kennedy, J., concurring)) (arguing that "the *T.L.O.* reasonable suspicion standard should be replaced by the probable cause standard" when the purpose of a school official's search "*is to uncover evidence of criminal activity*" because, "given the coalescence of school officials and law enforcement authorities, these officials necessarily act as 'institutional arm[s] of law enforcement'") (emphasis in original); *Developments in the Law—Policing*, *supra* note 7, at 1761 ("The non-law enforcement interests should not be viewed as 'special,' and the reasonable suspicion test should not apply.").

95. *See* Pinard, *supra* note 75, at 1123–24 (claiming that the proposed approach would clarify the roles of school officials and law enforcement and provide "principled mechanisms" for courts to apply).

96. *See id.* at 1091 (discussing the dangers of the "silver-platter problem").

97. *Id.* at 1124.

98. *See Developments in the Law—Policing*, *supra* note 7, at 1758–59 (arguing that racial bias affects subjective determination of reasonable suspicion, leading to students of color being disproportionately searched and subjected to criminal charges).

99. Gupta-Kagan, *supra* note 32, at 2063.

purpose of these searches is ordinary law enforcement rather than some other special need.

This Part argues that these moves are doctrinally misguided and practically undesirable. The special needs doctrine, which evolved largely in the context of suspicion-less searches, is a poor doctrinal match to *T.L.O.* and other suspicion-based search cases. It is therefore a mistake to apply *Ferguson*'s primary purpose analysis to suspicion-based searches.

Subpart II(A) argues that the special needs doctrine blurs the important distinction between suspicion-based and suspicion-less searches. Subpart II(B) argues that this problem is attenuated in the school-search context because *T.L.O.*, the seminal suspicion-based school-search case, has erroneously been characterized as a special needs case. Subpart II(C) argues that, as a result, *Ferguson*'s gloss on the special needs doctrine is particularly incoherent in the suspicion-based school-search context. Finally, subpart II(D) explores practical problems with extending *Ferguson* to suspicion-based school searches.

A. Equivocation

In articulating the special needs doctrine, the Supreme Court has equivocated between suspicion-based and suspicion-less searches. The first set of cases that invoked the special needs rationale involved suspicion-based searches[100] but seemed to consider the special needs exception as being grounded in the same line of cases that justified suspicion-less "administrative" searches.[101] After these early suspicion-based cases, however, the doctrine developed entirely in the context of suspicion-less searches, and the Court applied the exception to justify a variety of programmatic search regimes.[102] Thus, while the Court initially invoked special needs to justify a less stringent search standard when there was *some* level of individualized suspicion, the exception quickly expanded to justify searches even when there was *no* individualized suspicion at all.

100. *E.g.*, New Jersey v. T.L.O., 469 U.S. 325, 328, 341 (1985) (concerning suspicion-based search of student); O'Connor v. Ortega, 480 U.S. 709, 712–13, 720 (1987) (concerning suspicion-based search of government employee's workspace); Griffin v. Wisconsin, 483 U.S. 868, 871, 873–74 (1987) (concerning suspicion-based search of probationer's home).

101. *See Griffin*, 483 U.S. at 873 (grouping suspicion-based lower-than-probable cause searches together with suspicion-less administrative searches "pursuant to a regulatory scheme").

102. *E.g.*, Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 606, 624 (1989) (concerning suspicion-less drug testing of railroad employees); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 660–61, 665–66 (1989) (concerning suspicion-less drug testing of government employees); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 826, 838 (2002) (concerning suspicion-less drug testing of students); *see also* Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259–60 (2000) (noting that the "early special needs cases focused on individual litigants and did not deal with large groups subject to random searches and seizures," but later cases significantly expanded the doctrine to encompass suspicion-less searches).

Furthermore, the Court made this shift without explicitly considering the different interests that are implicated by these two kinds of searches.

For example, in the school-search context, *T.L.O.* involved a suspicion-based search of an individual student.[103] But the special needs rationale first received majority treatment in a pair of subsequent suspicion-less searches involving student drug-test programs—*Acton*[104] and *Earls*.[105] The Court in these cases cited *T.L.O.* for the proposition that special needs exist in schools and concluded that the existence of special needs can justify suspicion-less drug tests of students.[106] Most recently, the Court affirmed and applied *T.L.O.*'s less-than-probable-cause search standard to a suspicion-based search of a student conducted by a school official without expressly invoking the special needs language or clarifying the relationship between suspicion-based and suspicion-less cases.[107] The Court has thus sloppily applied special needs as a one-size-fits-all justification for a variety of suspicion-based *and* suspicion-less school searches.

The fundamental issue with this equivocation between special needs as applied to suspicion-based searches (*T.L.O.*) and special needs as applied to suspicion-less searches (*Acton* and *Earl*) is that different protections are necessary to safeguard constitutional rights in these two different search contexts.[108] As Professors Friedman and Stein contend, for suspicion-based searches, whether a search is permissible depends on whether there is sufficient cause to justify the search.[109] By contrast, for suspicion-less searches, whether a search is reasonable depends on generality: "Either everyone is searched, or who gets searched must be decided in a truly random or otherwise nondiscriminatory way—in a manner that eliminates arbitrariness or uncabined discretion."[110] Without sensitivity to the underlying principles of privacy that are implicated by these two kinds of searches, the Court's Fourth Amendment jurisprudence will fail to provide workable standards that adequately protect privacy interests.[111] The special needs doctrine is problematic precisely because the Court's equivocal application of the doctrine in both suspicion-based and suspicion-less searches pays lip service to the unique interests involved in these two different search categories.

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

104. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

105. Bd. of Ed. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002).

106. *Acton*, 515 U.S. at 653, 664–65; *Earls*, 536 U.S. at 829–30.

107. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368–70 (2009).

108. Friedman & Stein, *supra* note 16, at 287.

109. *Id.*

110. *Id.* at 287–88.

111. *See id.* at 319–20 (advocating that the Court conduct a more workable inquiry that focuses on "the differing protections necessary to guard against government arbitrariness when there is or is not cause").

B. Mischaracterization

This equivocation problem is particularly acute in the school-search context because *T.L.O.*, the watershed case, has been *erroneously* categorized as a special needs case.[112] Instead, it would be more appropriate to group *T.L.O.* with the *Terry v. Ohio*[113] line of cases, which permit police officers to conduct a limited search of a person on the basis of reasonable suspicion.[114]

T.L.O., at inception, was not a special needs case. In Justice White's majority opinion, the Court employed a balancing test to determine the legal standard that ought to apply to student searches conducted by school officials.[115] Justice White explained that when a "balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness . . . [the Court has] not hesitated to adopt such a standard."[116] Applying this balancing test to the school context, the Court determined that students have a diminished expectation of privacy in school by virtue of the unique conditions of the school environment.[117] On the other side of the calculus, the Court noted that schools have a "legitimate need to maintain an environment in which learning can take place[.]"[118]

Justice White concluded that a warrant requirement was unreasonable because "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[119] The Court also concluded that a lower-than-probable-cause standard should be applied to school searches conducted by school officials[120] because a reasonable suspicion standard would "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[121] At the same time, this standard would still "ensure that the interests of students will be invaded

112. *See, e.g.*, Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 619–20 (1989) (characterizing *T.L.O.* as a "special needs" case); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829 (2002) (same).

113. 392 U.S. 1 (1968).

114. *Id.* at 30–31.

115. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

116. *Id.* at 341.

117. *See id.* at 338–39 (acknowledging the need to maintain discipline in schools but concluding that students retain some expectation of privacy).

118. *Id.* at 339–40.

119. *Id.* at 340.

120. *Id.* at 341.

121. *Id.* at 343.

no more than is necessary to achieve the legitimate end of preserving order in the schools."[122]

The *only* mention of "special needs" in *T.L.O.* was in Justice Blackmun's concurrence. Blackmun, concurring alone, argued that the majority "omit[ed] a crucial step in its analysis" because a less-than-probable-cause standard can *only* be applied "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable[.]"[123] That is, Justice Blackmun conceptualized the existence of special needs "beyond the normal need for law enforcement" as a threshold requirement that had to be satisfied before the Court could engage in the majority's reasonableness balancing analysis. By contrast, for the majority, something like the existence of a special need was merely one factor to be considered within this balancing analysis.

Justice Blackmun nonetheless agreed with the majority that this special need threshold was satisfied in the school context because "[a] teacher's focus is, and should be, on teaching and helping students rather than on developing evidence against a particular troublemaker."[124] For Justice Blackmun, the "special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifie[d] the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests."[125]

But Justice Blackmun's mention of special needs and the majority's recognition that some set of unique interests inhere in the school context[126] do not render *T.L.O.* a special needs case as the doctrine is understood today. From an interpretive standpoint, Justice Blackmun intended for the existence of special needs to be a *limit* to less-than-probable-cause searches. However, the "special needs" language was later co-opted by other Justices on the Court to substantially *expand* these searches.[127]

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122. *Id.*

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

124. *Id.* at 353.

125. *Id.*

126. *See id.* at 339 (majority opinion) (recognizing the "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds").

127. *See* Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 537 (1997) (arguing that Blackmun was writing "separately to reaffirm the general rule requiring a warrant and probable cause" rather than intending to "create a category of special needs exceptions to the warrant and probable cause requirements"). Notably, Blackmun dissented in the two cases immediately following *T.L.O.* which applied special needs to expand less-than-probable-cause searches. O'Connor v. Ortega, 480 U.S. 709, 732 (1987) (Blackmun, J., dissenting); Griffin v. Wisconsin, 483 U.S. 868, 881–82 (1987) (Blackmun, J., dissenting).

Moreover, the special-needs doctrine developed after *T.L.O.* largely in the context of suspicion-less, programmatic searches without criminal consequences.[128] Thus, *T.L.O.*—which involved a suspicion-based search of one student that led to criminal consequences—is factually distinguishable from subsequent special needs school search cases like *Acton* and *Earl*, which involved compulsory drug-testing programs for groups of students participating in extracurricular activities.

Instead, *T.L.O.* is more similar to the line of cases deriving from *Terry v. Ohio*, which deal with limited less-than-probable-cause searches of civilians conducted by police officers based on special circumstances.[129] *T.L.O* is a better factual match to *Terry* because both cases involve suspicion-based searches of specific individuals without warrant or probable cause.[130]

T.L.O. is also a direct doctrinal descendent of *Terry*, as the *T.L.O.* Court adopted a modified two-prong *Terry* test to determine the reasonableness of a search in the school context.[131] And *T.L.O.*'s two-prong *Terry* analysis is substantially different from the three-prong *Acton* analysis the Court later adopted in its suspicion-less school-search cases.[132] Under *T.L.O.*, the reasonableness of a search depends on (1) "whether the . . . action was justified at its inception,"[133] and (2) "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place[.]'"[134] By contrast, under *Acton*, the reasonableness of a search depends on (1) the "nature of the privacy interest" at stake,[135] (2) the "character of the intrusion,"[136] and (3) the "nature and immediacy of the governmental concern."[137] While the analysis in *T.L.O.* and *Terry* is tailored to determine whether a particular suspicion-based search

128. *See supra* note 102 and accompanying text.

129. *See* 392 U.S. 1, 27 (1968) (authorizing a police officer to conduct a "reasonable search for weapons" when there is "reason to believe that [the officer] is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime"); *see also* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, SUP. CT. REV., 1989, at 87, 160–61 (grouping *T.L.O.* with *Terry* insofar as these cases involve less-than-probable-cause searches based on individualized suspicion).

130. *Compare T.L.O.*, 469 U.S. at 328 (describing the warrantless search of a student who had been caught smoking in violation of school rules), *with Terry*, 392 U.S. at 5–7 (describing the warrantless search of three men who had been observed moving suspiciously up and down a street).

131. *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 19–20).

132. *See* Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 117–19 (comparing the *T.L.O.* test for suspicion-based student searches with the *Acton* test for suspicion-less student searches).

133. *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20).

134. *Id.* (quoting *Terry*, 392 U.S. at 20).

135. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

136. *Id.* at 658.

137. *Id.* at 660.

is reasonable, the *Acton* analysis is tailored to determine whether a suspicion-less search regime as a whole is reasonable.

Therefore, *T.L.O.* should not be understood as a special needs case. It was not a special needs case at inception, and the Court's subsequent co-option of *T.L.O.* into the special needs canon magnifies the equivocation problem discussed in subpart I(A).

As such, it is also a mistake to superimpose *Ferguson*'s primary-purpose test—which developed from a line of suspicion-less search cases—to suspicion-based school searches. As a threshold matter, as discussed above, the *possibility* of criminal consequences should not have any bearing on the Fourth Amendment analysis. *T.L.O.* affirmed a suspicion-based search on less-than-probable cause even when the evidence discovered was turned over to the police, the student searched was arrested, and juvenile delinquency charges were brought.[138]

Instead, proponents of the prevailing academic approach, which applies *Ferguson* to suspicion-based school searches, seem to concede that *purpose* rather than consequence is determinative. That is, the search in *T.L.O.* was permissible notwithstanding criminal consequences because the purpose of the search was to investigate the violation of a school rule against smoking tobacco. For example, Professor Michael Pinard notes that if a school official "discovers evidence of criminal activity" during a search based on suspicion of a school rule violation, they "should be allowed to . . . report[] this activity to law enforcement authorities" because there is "a clear distinction between a school official who *happens* upon criminal evidence while conducting a search in furtherance of school policy and an official who at the outset intentionally seeks to uncover such evidence."[139] Similarly, Professor Josh Gupta-Kagan distinguishes cases where "a school official searches a child based on suspicion of only a school rule violation and discovers evidence of a crime" because "[t]he purpose of the search itself is what determines whether the special needs doctrine applies."[140]

But there are two problems with the prevailing purpose-based analysis. First, the *Ferguson* Court expressly limited its analysis to suspicion-less

138. *T.L.O.*, 469 U.S. at 328–29; *see* Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 446–48 (2007) (arguing that the *T.L.O.* court justified a less-than-probable-cause search "on the basis of the lesser expectation of privacy enjoyed by students, not the purpose of the search, which was, in part, to investigate for evidence of criminal behavior").

139. Pinard, *supra* note 75, at 1123.

140. Gupta-Kagan, *supra* note 32, at 2062 n.374.

searches.[141] Second, the Court in *Whren v. United States*[142] determined that subjective intent is irrelevant when determining the constitutionality of suspicion-based searches at least when there is probable cause.[143] In contrast, the Court in *City of Indianapolis v. Edmond*[144] justified its purpose-based analysis in the context of suspicion-less vehicle roadblocks, distinguishing *Whren* because "cases dealing with intrusions that occur pursuant to a general scheme *absent individualized suspicion* have often required an inquiry into purpose at the programmatic level."[145] *Whren*, however, is not mentioned in *Ferguson*, and commentators have reached different conclusions about whether these cases are consistent.[146] Nonetheless, the language in *Edmond* seems to support the inference that a purpose-based test is only appropriate in cases like *Edmond* and *Ferguson* where this is no individualized suspicion at all. Thus, it would be an error to extend *Ferguson* to suspicion-based searches, especially because *T.L.O.* is not a special needs case.

C. Incoherence

Finally, even if *Ferguson*'s primary purpose analysis were applicable to suspicion-based searches, the distinction between primary and ultimate purpose is arguably incoherent, and, at the very least, it is uniquely difficult to meaningly analyze in the SRO context given an SRO's dual role as school official and law enforcement officer. The coherence of this primary versus ultimate purpose distinction has been the target of much criticism.[147] For example, Justice Kennedy argued in his *Ferguson* concurrence that this distinction "lacks foundation in [prior] special needs cases" because "[a]ll [the Court's] special needs cases have turned upon what the [*Ferguson*] majority terms the policy's ultimate goal."[148] That is, "[b]y very definition,

141. *See* Ferguson v. City of Charleston, 532 U.S. 67, 85 n.24 (2001) ("In [these] circumstances, the Fourth Amendment's general prohibition against nonconsensual, warrantless, and *suspicionless* searches applies in the absence of consent.") (emphasis added).

142. 517 U.S. 806 (1996).

143. *Id.* at 813.

144. 531 U.S. 32 (2000).

145. *Id.* at 46 (emphasis added).

146. *Compare* Dery III, *supra* note 84, at 409 (arguing that *Ferguson*'s primary purpose inquiry is inconsistent with *Whren*'s rejection of "the relevance of subjective motivation to Fourth Amendment analysis"), *with* Butterfoss, *supra* note 138, at 423 (arguing that the new primary purpose test avoids the *Whren* issue by considering programmatic purpose rather than the "subjective motivations of an individual officer acting with probable cause").

147. *See, e.g.*, Butterfoss, *supra* note 138, at 482–84 (describing the difficulties of applying the primary purpose test in a principled manner); *cf.* Schulhofer, *supra* note 129, at 89 (arguing that the distinction between law-enforcement and non-law-enforcement purposes "should . . . be recognized as chimerical and irrelevant").

148. Ferguson v. City of Charleston, 532 U.S. 67, 86–87 (2001) (Kennedy, J., concurring).

in almost every case the immediate purpose of a search policy will be to obtain evidence" of some wrongdoing.[149]

As such, the blurry line between primary and ultimate purpose makes it difficult to apply the *Ferguson* analysis in a consistent manner. *Ferguson* itself provides little guidance on how to navigate this quagmire, simply proclaiming that courts should "consider all the available evidence in order to determine the relevant primary purpose" of a search.[150] Whether framed as an issue of incoherence or lack of guidance, the upshot is that courts disagree on what the primary purpose of a search is.[151] And even if courts agree on this point, they may disagree as to whether the primary purpose goes beyond ordinary law enforcement.[152]

Whether the primary purpose of a search conducted by an SRO is education-related or ordinary law enforcement activity is especially difficult given that an SRO, by definition, is both an "educator . . . and law enforcement officer."[153] As educators and counselors, SROs are "expected to form meaningful relationships with students to help guide them away from delinquency and towards success in school."[154] Thus, even when an SRO is fulfilling what may seem like a law enforcement role by searching or detaining a student, it seems that these functions are inherently tied to "special" educational needs in a way that distinguishes their conduct from ordinary law enforcement. For example, a Memorandum of Understanding between Denver public schools and law enforcement notes that "the primary duty of an SRO is to handle *criminal* matters at the school,"[155] seemingly

149. *Id.* at 87. For example, in *Skinner*, the immediate purpose of the search policy was to obtain evidence of drug and alcohol use by railroad employees. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 606–07 (1989). But in *Ferguson*, Justice Kennedy noted that the *Skinner* Court justified the search on the basis of its ultimate goal of ensuring railroad safety. *Ferguson*, 532 U.S. at 87 (Kennedy, J., concurring). Kennedy's criticism is particularly weighty because he was the author of the majority opinions in both *Skinner* and *Von Raab*, the first pair of drug test cases the Court approved under the special needs rationale. *Skinner*, 489 U.S. 602, 606, 620 (1989); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 659–60, 665–66 (1989).

150. *Ferguson*, 532 U.S. at 81; *see* D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORN. J.L. & PUB. POL'Y 455, 496 (2001) (noting that "neither *Edmond* nor *Ferguson* reaches the more vexing question of what evidence can be used to infer purpose when the government contends that its immediate purpose . . . is something other than (or in addition to) pure crime control"); Butterfoss, *supra* note 138, at 422–23 (noting the "ambiguity about the precise purpose the Court finds improper" and compiling the vast range of language the Court has used to describe "improper" purpose).

151. *See infra* notes 152–155 and accompanying text (discussing disagreement about primary purpose of SRO search).

152. *See, e.g.*, Jonathan Kravis, Comment, *A Better Interpretation of "Special Needs" Doctrine After* Edmond *and* Ferguson, 112 YALE L.J. 2591, 2594 (2003) (describing the "semantic disagreement" between two lower courts over the meaning of "law enforcement purposes").

153. *Frequently Asked Questions*, *supra* note 11.

154. Kerrin C. Wolf, *Assessing Students' Civil Rights Claims Against School Resource Officers*, 38 PACE L. REV. 215, 221 (2018).

155. Denver Intergovernmental Agreement, *supra* note 12, at 6 (emphasis added).

emphasizing the ordinary law enforcement function of an SRO. But in the same breath, the memorandum states that the purpose of an SRO is to "enhance school safety on school grounds *to help foster a safe and secure learning environment.*"[156] This language mirrors Justice Blackmun's concern in *T.L.O.* about the need for "an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself"[157] and suggests that the primary purpose of an SRO engaging in law-enforcement-like activity (such as conducting a search or arrest) on campus is essentially tied up with unique school interests. Ultimately, SROs' "dual roles as law enforcement officers and school administrators creates confusion" and makes it difficult to disentangle the primary purpose of a search conducted by an SRO.[158]

This difficulty is apparent in post-*T.L.O.* cases. For example, in *Dilworth*, the majority and dissent debate the primary duty of an SRO. The dissent, on the basis of school policy and officer testimony, argues that the SRO's primary duty "was the same as any police officer assigned to patrol any area: to investigate and prevent criminal activity."[159] By contrast, the majority argues that the purpose of the SRO was to "assist other school officials in their attempt to maintain a proper educational environment for students."[160] To support this position, the majority points to the fact that the SRO was listed in the school handbook as a member of school staff, handled both criminal and disciplinary problems, and had daily contact with students.[161] Yet the dissent responds that arguably "any police search at a school . . . can be said to have been performed to maintain a proper educational environment."[162]

While *Dilworth* predates *Ferguson* and therefore does not use the vocabulary of primary versus ultimate purpose, the core of the dispute is essentially the same. The majority and dissent disagree as to the primary purpose of an SRO search. For the majority, the primary purpose is to maintain a proper educational environment.[163] For the dissent, the primary purpose is ordinary law enforcement.[164] Further, the dissent's argument that, by the majority's logic, the purpose of *any* police search at a school can be framed as maintaining the school environment, mirrors *Ferguson*'s concern

156. *Id.* at 5 (emphasis added).

157. New Jersey v. T.L.O., 469 U.S. 325, 353 (1985) (Blackmun, J., concurring).

158. *See* Wolf, *supra* note 154, at 224 ("Scholars have also pointed out that SROs' law enforcement and counselor roles can often conflict, as they may attempt to mentor students and then have to arrest the same students, thereby destroying any trust they had built.").

159. People v. Dilworth, 661 N.E.2d 310, 322 (Ill. 1996) (Nickels, J., dissenting).

160. *Id.* at 320 (majority opinion).

161. *Id.*

162. *Id.* at 324 (Nickels, J., dissenting).

163. *Id.* at 320 (majority opinion).

164. *Id.* at 324 (Nickels, J., dissenting).

that "any . . . search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."[165] Finally, the fact that the majority and dissent point to different sources of evidence to support their framing of the primary purpose portends the challenge of "consider[ing] all the available evidence in order to determine the relevant primary purpose" of a search.[166]

Dilworth is a microcosm of the kind of confusion discussed in Part I that has proliferated in lower courts.[167] When courts are grappling with (i) whether SROs are more like school officials or law enforcement officers, (ii) the extent to which collaboration amongst school officials or law enforcement officers affects the nature of the search, or (iii) expressly trying to divine the purpose of a particular search, they are essentially trying to resolve *Ferguson*-like issues about the purpose and nature of a school search. But the Court has provided insufficient guidance as to whether the *Ferguson* inquiry into purpose should apply to these cases and, if it should, how the analysis should proceed. It would therefore be a mistake to accept this defective framework.

D. Practical Problems

Finally, the prevailing approach among scholars, which extends *Ferguson* to suspicion-based school searches, is not practically desirable. One concern is that accepting *Ferguson* and limiting *T.L.O.*, thereby requiring probable cause for nearly all school searches, would undermine student safety and make it more difficult for schools to maintain an environment conducive to learning. In response, proponents of the prevailing approach note that school officials can still search students when they have reasonable suspicion of non-criminal activity, as such a search is not inextricably tied to ordinary criminal investigation.[168]

But this produces an absurd consequence: Teachers can only permissibly conduct a search under reasonable suspicion when they do not expect to uncover evidence of criminal activity. By contrast, if a teacher expects to uncover evidence of criminal activity, they must establish probable cause.[169] This flips intuitions around. The concern for swift discipline and safety is weightier when criminal activity is possibly afoot.

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165. Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001).

166. *Id.* at 81.

167. *See supra* subpart I(B).

168. Pinard, *supra* note 75, at 1123.

169. *See* Gupta-Kagan, *supra* note 32, at 2063 ("If there are situations so serious that law enforcement involvement is desired, then schools should surrender use of the *T.L.O.* exception; having made the choice to refer a category of situations to law enforcement, there should be no pretending that resulting searches only serve school disciplinary goals.").

Therefore, school officials should be able to conduct searches under a more permissive standard under these conditions.

Further, a regime where school officials can *only* conduct reasonable suspicion searches for suspected violations of school rules encourages a system of rampant pretextual searches. This standard "invite[s] the risk that school administrators would conduct searches for suspected school rule violations under the more flexible reasonable suspicion standard as a pretext to search for indicia of criminal activity."[170] This risk is magnified by the fact that nearly *all* criminal activity also violates school rules. Thus, for almost any search, a school official could legitimately claim that the purpose of their search was to enforce school rules rather than find evidence of criminal wrongdoing.

Ultimately, then, superimposing *Ferguson*'s primary purpose analysis on suspicion-based searches is the wrong approach. It elides the critical doctrinal distinction between suspicion-based and suspicion-less searches and produces undesirable results.

III. A Path Forward: Away from *Ferguson*, Back to *T.L.O.*

The previous Part identified several problems with the prevailing special needs approach to suspicion-based school searches that has developed in the existing literature. It argued that it is an error to apply the special needs framework to suspicion-based searches because this framework developed mainly in the context of suspicion-less searches. Further, even if it seems intuitively plausible that something like special needs exists in the school context, the special needs doctrine should still be abandoned because it is doctrinally incoherent and practically impossible to apply in any principled manner.

With the special needs doctrine excised, this Part sketches out an alternative framework grounded in *T.L.O.* itself. Subpart III(A) argues that the Fourth Amendment analysis for suspicion-based school searches should focus on factors like the impracticability of the warrant requirement and the existence of special relationships rather than amorphous special needs. This alternative approach is more doctrinally sound than the prevailing solution proposed by scholars and provides a set of well-defined rules that clarify the confusion that currently exists.

Subpart III(B) then applies this framework to SRO searches, arguing that the relevant factors counsel against extending the *T.L.O.* exception to SROs. Finally, subpart III(C) defends this position from anticipated criticism.

170. Pinard, *supra* note 75, at 1123 n.270.

A. T.L.O. *as an Alternative Framework*

Rather than trying to resuscitate *Ferguson* and the amorphous special needs doctrine, a better approach returns to the principles articulated in *T.L.O.* As discussed above, *T.L.O.* identifies three high-level justifications for doing away with the warrant and probable cause requirement in schools. First, the government has an interest as a guardian-tutor in managing the school institution apart from its ordinary interest in investigating crime.[171] Second, there is a special relationship between the student and government as guardian-tutor in part because school officials have a unique "degree of familiarity with, and authority over," students "that is unparallel except perhaps in the relationship between parent and child."[172] Third, as a result, students have a reduced expectation of privacy in schools.[173] As Justice Powell explained in his concurrence, it is "unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting" because "there is a commonality of interests between teachers and their pupils," since the "attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education."[174]

T.L.O.'s analysis also reveals possibilities for limiting principles. On one hand, the Court seems to contemplate that this exception is appropriate only when ordinary standards for criminal investigation are *impractical* in a particular context. In *T.L.O.*, the Court reasoned that the traditional warrant requirement would "frustrate the governmental purpose behind the search"[175] and "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."[176] Similarly, the Court concluded that "the substantial need of teachers and administrators for freedom to maintain order in the schools" justified departing from the

171. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (stating that school officials have an interest in "maintain[ing] order in the schools"); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (explaining that the "most significant element" in the Court's analysis was the fact that the school policy permitting the search "was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care").

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

173. *See id.* at 341 (majority opinion) (concluding that because of the need to balance school interests against students' privacy, school officials can search students on the basis of reasonable suspicion, rather than probable cause); *see also id.* at 348 (Powell, J., concurring) (explaining that this "lesser expectation of privacy" derives from the close physical association with school officials and the special relationship between teachers and students).

174. *Id.* at 348, 350 (Powell, J., concurring); *see* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 873 (2012) ("[T]he Court has relied on the assumed educational value of school discipline and the purported convergence of interests between school official and student to conclude that ordinary procedural protections are inapplicable in schools.").

175. *T.L.O.*, 469 U.S. at 340 (quoting Camara v. Mun. Ct., 387 U.S. 523, 533 (1967)).

176. *Id.*

traditional probable cause standard.[177] Instead, a reasonable suspicion standard would be practical as it would "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause" and allow them to adequately manage the school institution.[178] It would be the definition of unreasonable if the government could practically employ less intrusive means without a significant loss to their institutional needs.

Second, it seems that the *T.L.O.* exception is inappropriate when the special relationship between student and school official theorized by the Court breaks down. For example, in *T.L.O.*, Justice Powell contrasted the "commonality of interests between teachers and their pupils" to the "adversarial relationship" that law enforcement officers have with the subjects of their investigations.[179] While teachers have an attitude of "personal responsibility for the student's welfare as well as . . . education," law enforcement officers "have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial."[180] This difference in relationship provides a clue for why the Court limited the scope of its holding to "searches carried out by school authorities acting alone and on their own authority."[181]

Thus, a state's legitimate interest in managing the school institution, the purported special relationship between student and government as guardian-tutor, and students' reduced expectation of privacy do not justify *all* school searches. *T.L.O.*, by its own terms, contemplates limiting principles. Unlike the prevailing special needs approach, which embraces *Ferguson*'s analytical emphasis on the *purpose* of a search, the *T.L.O.* framework asks a different set of questions about the impracticability of ordinary search standards and the existence of special relationships. Thus, the *T.L.O.* framework is preferable to the special needs doctrine precisely because the questions it asks are more specific and workable.

177. *Id.* at 341; *see also* Schulhofer, *supra* note 129, at 92 (arguing that *Camara* requires that "alternative procedures are not workable at all" instead of simply that "probable cause would be merely inconvenient or less effective").

178. *T.L.O.*, 469 U.S. at 343; *see also id.* at 353 (Blackmun, J., concurring) ("A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause.").

179. *Id.* at 349–50 (Powell, J., concurring).

180. *Id.*

181. *Id.* at 341 n.7 (majority opinion).

B. The T.L.O. *Framework Applied to SROs*

Under this framework, there is a strong argument that the *T.L.O.* exception should not apply to student searches conducted by SROs because a probable cause requirement is not impracticable for SROs and SROs lack a requisite special relationship with students.

First, it is not generally impracticable to require SROs to have probable cause before engaging in a suspicion-based search of a student. An SRO is a "specifically trained" law enforcement officer with sworn authority[182] who, unlike teachers and other school officials, is well-steeped in the "niceties of probable cause."[183] Furthermore, while a "teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker,"[184] engaging in proper searches of students is clearly part of an SRO's role.[185] SROs have the know-how to apply probable cause, and requiring them to investigate more thoroughly before searching a student would be consistent with their duties. Therefore, unlike a probable cause requirement for teachers and administrators, a probable cause requirement for SROs would not invariably frustrate the government's interest in maintaining a school environment.

Second, even if some special relationship exists between students and school officials, that same relationship does not exist between students and SROs.[186] SROs lack the same level of close physical association and familiarity with students that teachers and administrators possess. By contrast, "even if a student is not close with the principal, or has a bad relationship with the principal, the student will still have interacted with this person and see them on a frequent basis in some capacity."[187] Furthermore, unlike teachers who have "a commonality of interests" with their students, "[l]aw enforcement officers function as adversaries" of their suspects.[188] Similarly, SROs have a responsibility to investigate students' criminal activity and possess the power to arrest and use deadly force. Therefore, there

182. *Frequently Asked Questions*, *supra* note 11.

183. *T.L.O.*, 469 U.S. at 343.

184. *Id.* at 353 (Blackmun, J., concurring).

185. *See, e.g.*, Denver Intergovernmental Agreement, *supra* note 12 ("[T]he primary duty of an SRO is to handle criminal matters at the school[.]"); Model Memorandum of Understanding for School Resources Officer Program, Wis. Dep't Pub. Instruction 1, https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/sromodelmou.pdf [https://perma.cc/KUG7-W65C] (providing that SROs are "responsible for dealing with criminal law issues, not to enforce school discipline or punish students").

186. *See* People v. Dilworth, 661 N.E.2d 310, 326 (Ill. 1996) (Nickels, J., dissenting) ("[T]he special relationship of the kind noted by Justice Powell in *T.L.O.*, and by the majority in *Vernonia*, did not exist between [the student] and [the SRO].").

187. Jacobi & Clafton, *supra* note 19, at 255.

188. *T.L.O.*, 469 U.S. at 349–50 (Powell, J., concurring).

is no "special relationship" between students and SROs that justifies a lower expectation of privacy for students.[189]

One could argue that allowing SROs to search students under a more relaxed standard would substantially further the government's ability to maintain an environment conducive to the development of students. On one hand, giving SROs greater latitude to find contraband and remove disruptive students from the classroom would conceivably improve learning for all other students. At the same time, school discipline and criminal sanctions resulting from successful searches are arguably, on balance, beneficial for the student herself who has an opportunity to change her behavior.[190]

But a permissive legal standard for searches conducted by SROs also paradoxically risks undermining the government's interest as guardian-tutor. Considering the effect of this practice on individuals, empirical studies have shown that referring students to SROs does not deter future criminal behavior and instead has a negative effect on educational outcome.[191] Permissive search standards also have a negative effect on the larger student body "by creating adversarial and distrustful relationships between law enforcement and school authorities on the one hand, and the student body on the other[.]"[192] Resorting to draconian compliance-based disciplinary structures can ultimately undermine student development and produce more disciplinary issues. Therefore, a careful balancing of the factors and limiting principles identified in *T.L.O.* counsel against extending the *T.L.O.* exception to SROs.

C. Defending the T.L.O. *Framework*

This *T.L.O.* framework, at first blush, may not seem substantially different from the way lower courts currently analyze the issue. One could argue that this Note merely substitutes a malleable multi-factor balancing test with another equally malleable multi-factor balancing test—but this is not so. Lower courts have largely centered their analysis around the purpose of a

189. *See Dilworth*, 661 N.E.2d at 326 (Nickels, J., dissenting) ("A school child's expectation of privacy vis-a-vis the State as police officer, even a police liaison officer, is not diminished simply because the child is at school."); Friedman & Stein, *supra* note 16, at 351 ("[W]hatever might be 'special' about the government's relationship with students . . . evaporates when police show up at a . . . school in their regular law-enforcement capacities.").

190. *See* Kim, *supra* note 174, at 861–62 (considering the argument that "restrictions on students' constitutional rights" are justified "on the ground that school discipline, unlike law enforcement, serves the educational interests of youth," because "the educational value of discipline and consequent alignment of interests between official and student render the constitutional protections guaranteed outside of the school context inapposite in schools").

191. *Id.* at 889.

192. *Id.* at 891; *see Developments in the Law—Policing*, *supra* note 7, at 1763 ("[S]ubjecting students to criminal rather than administrative punishments, may have long-term negative effects on the most heavily policed communities, as well as on society as a whole.").

search and whether SROs are more like school officials or law enforcement.[193] Instead, the *T.L.O.* framework proposes an analysis that asks another set of questions about impracticability and the existence of a special relationship. What matters is *not* whether an SRO's search arguably furthers the government's interest in maintaining order in a school or whether an SRO is acting more like a school official or a run-of-the-mill law enforcement officer. Further, questions about impracticability and the existence of a special relationship are more easily resolved than questions about purpose because, as noted above, the *T.L.O.* Court clarified how these issues ought to be analyzed in a suspicion-based school search.

Insofar as the application of this approach limits SROs' ability to search students, there may be concerns about tradeoffs with student learning and safety. However, under the *T.L.O.* framework, unlike the prevailing approach, school officials would still have the ability to conduct reasonable suspicion searches of students.

Perhaps the most concerning threat to student safety is the possibility that if SROs are restricted by a probable cause standard, they would be unable to ferret out dangerous weapons and prevent school shootings. However, SROs would still have various tools to preserve safety in schools. SROs "would be allowed to take the very same actions in schools that [law enforcement officers] implement during street encounters with the general public" to investigate and prevent criminal activity.[194] In the case of a student suspected of possessing a weapon, SROs as sworn law enforcement officers could still utilize *Terry* to search students without warrant or probable cause to protect themselves or others from physical harm.[195]

Finally, proponents of students' rights may argue that this proposed framework does not go far enough, as it leaves the thrust of *T.L.O.* intact and allows school officials to continue conducting reasonable-suspicion searches, even when these searches lead to criminal consequences for students. While there are certainly legitimate concerns about the school-to-prison pipeline, tinkering with the Fourth Amendment search standard through judicial means is not the most effective way of tackling the problem. Often more troubling than the search itself (especially when contraband is discovered) are the overly severe criminal and quasi-criminal consequences levied on

193. *See supra* subpart I(B).

194. Pinard, *supra* note 75, at 1121.

195. *Id.* at 1122 ("[I]n situations where school officials or law enforcement officers reasonably suspect a student to be possessing a weapon, but the suspicion does not rise to probable cause and would therefore prevent a full-blown search, the officer or official could stop the student and perform a pat frisk" to "protect[] herself, the student[,] and the school populace."); *see also* Gupta-Kagan, *supra* note 32, at 2064–65 (discussing *Terry* as a vehicle to prevent school shootings).

students.[196] As many locales require school officials to hand over all evidence of criminal conduct and report incidents, school officials have less autonomy over decisions that affect their students. Ultimately, however, since the needs of each locale are different, the calibration of these competing interests is an issue best left to policymakers rather than courts.[197]

Conclusion

Much has changed since the Supreme Court decided *T.L.O.* over forty years ago. Today's students navigate schools that are increasingly shaped by the presence of law enforcement, and the rise of SROs has complicated the constitutional landscape of school searches, sowing confusion in the courts. While many commentators have responded by calling for the abandonment of *T.L.O.* in light of more recent developments in the special needs line of cases, this approach misunderstands *T.L.O.* and misconstrues the problem. *T.L.O.* was never a special needs decision in the *Ferguson* mold, and trying to superimpose the special needs framework onto suspicion-based school searches creates more problems than it solves.

In order to craft workable rules that balance school safety with students' civil liberties, it is critical that courts and commentators distinguish between suspicion-based and suspicion-less searches, recognizing the different interests implicated by these different search categories. Without fidelity to this critical distinction, the legal confusion surrounding school searches will only deepen, and students will ultimately bear the cost of intrusive and arbitrary searches.

To this end, *T.L.O.*, properly understood as a case about suspicion-based searches, continues to provide a coherent and practical framework to address the difficult cases that continue to emerge as the line between school officials and law enforcement continues to blur. Unlike the prevailing approach proposed by scholars, which focuses on amorphous questions about the purpose of a search, the *T.L.O.* framework asks a different set of more

196. Consider for example, *Dilworth*, where a fifteen-year-old attending an alternative school for students with behavioral disorders was tried as an adult and sentenced to a minimum of four years imprisonment after an SRO found cocaine on the student. People v. Dilworth, 661 N.E.2d 310, 312–14 (Ill. 1996).

197. *See* Pinard, *supra* note 75, at 1124 (acknowledging an argument that the "underlying *legal* problem related to the increased reliance on law enforcement authorities in public schools is not the legal standards that should govern the particular types of searches discussed in this Article, but rather the ways in which the evidence seized during these searches are to be used); Nance, *supra* note 132, at 112 (advocating that "school-led reform is the most effective means for addressing" the problem of using "strict security measures in schools"); *Developments in the Law—Policing*, *supra* note 7, at 1769 (conceding that "a constitutionally founded solution, even if perfectly designed, can go only so far").

determinate questions, for example, about the practicability of traditional constitutional safeguards in a particular context. Even after forty years, *T.L.O.* still asks the right questions and provides the best foundation for balancing competing interests in an era of increasing law enforcement presence in schools.