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Supreme Silence: SROs, the 4th Amendment, and the School-to-Prison Pipeline

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Introduction

Jason Shade was a student at the Apple Valley Alternative Learning Center, an alternative high school in Minnesota.[1] On the way to an off-campus shop class, Shade's teacher stopped at a local fast-food restaurant so the students could buy breakfast.[2] Shade bought a container of orange juice and had trouble opening it, so he asked whether anyone around him had something he could use to open it.[3] A nearby student offered Shade his folding knife, which Shade used to open his orange juice before passing it back.[4] Shade's teacher, who was driving the bus, saw Shade with the knife in his hand, but did not see the surrounding events.[5] Three police officers, two of whom served as school resource officers (SROs), were contacted and came to search the bus and the students.[6] The knife's owner admitted to the police that he had a knife and turned it over.[7] For his brief use of the knife on the bus, Shade was charged with and pled guilty to felony possession of a dangerous weapon on school property.[8]

This story is an all too common one in American society. The school-to-prison pipeline is a pervasive issue that has infected many American school districts. The pipeline has many causes, but one of the most critical elements towards the pipeline flourishing is the presence of School Resource Officers (SROs)[9] in American schools.[10] As seen in Jason Shade's story, SROs are routinely called upon to handle minor infractions which results in children being treated like

[1] *See Shade v. City of Farmington*, 309 F.3d 1054, 1056 (2002)
[2] *See Id.* at 1057.
[3] *See Id.*
[4] *See Id.*
[5] *See Id.*
[6] *See Id.*
[7] *See Id.*
[8] *See Id.* at 1058; *See Also Developments in the Law – Policing Students*, 128 Harv. L. Rev. 1747, 1747 (2015)
[9] This paper uses the term "school resource officer" and its acronym because it is the most commonly used term to refer to Police Officers assigned to schools. This paper uses this term even when cited authorities use alternative terms. Alternate terms include: "school liaison officer", and "school board officer."
[10] *See Infra*, Part I.

criminals and being unnecessarily thrust into the criminal justice system.[11] Thanks to the Supreme Court's decision in *New Jersey v. T.L.O.* and lower courts' interpretation of that holding, SROs have been held to a lower standard of reasonableness in the school context than Police Officers are held to in other, similar contexts.[12]

This paper will examine whether holding SROs to the same standard of reasonableness in schools as Police Officers are held to in similar contexts will serve to combat the school-to-prison pipeline. This paper will be broken down into four parts. The first part will examine the school-to-prison pipeline's effects and the role that SROs play in shaping the pipeline. The second part will examine the impact that *New Jersey v. T.L.O.*[13] and other cases had on the 4th Amendment standards that school officials, and by extension SROs, must abide by when conducting a search or seizure. The third part will examine the 4th Amendment standards that normal Police Officers must abide by when conducting a search or seizure of an individual, when conducting an administrative search or seizure, and when conducting a search pursuant to their community caretaking function. The fourth part will examine how the Supreme Court of the United States might decide the issue of whether SROs should be considered school officials or law enforcement officials. The fourth part will also examine whether a determination that SROs should be considered law enforcement officials would serve to combat the school-to-prison pipeline.

Part I: The School-to-Prison Pipeline

The school-to-prison pipeline (the pipeline) refers to the phenomena of juveniles being funneled out of public schools and into the criminal justice system.[14] The pipeline has many

[11] *Developments in the Law – Policing Students*, 128 Harv. L. Rev. 1747, 1747-1748 (2015)
[12] *See New Jersey v. T.L.O.,* 469 U.S. 325 (1985)
[13] *See Id.*
[14] *See https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*

causes, the most driving factors being the implementation of "zero-tolerance" disciplinary policies, the growing presence of police (SROs) in schools, and the criminalization of school discipline.[15] The issues of police presence and the criminalization of school discipline go hand in hand as the presence of police leads to the criminalization of discipline.

The pipeline's origins stem from the overly punitive sentencing and policing policy in the 1970s and 1980s, such as federal and state mandatory minimum sentencing laws and "Three Strikes" laws.[16] These policies led to a dramatic rise in the prison population and has left the United States as the world leader in incarceration both in numbers and in per capita rates.[17] The policies also served to disproportionately target people of color in urban areas.[18] The punitive shift that swept the nation was reflected in the approaches schools began to take as well.[19] Many scholars point to the adaptation of zero tolerance policies and the use of rhetoric originating from the Reagan-era War on Drugs in schools as the origin of the school-to-prison pipeline.[20]

The "zero-tolerance" school disciplinary policies rapidly gained popularity in the 1990s due to a perceived increase in crime in schools.[21] "Zero-tolerance" policies impose severe punishment on students for disciplinary infractions regardless of the circumstances of the

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[15] *See* Judah Schept, Tyler Wall, and Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 Soc. Just. 96, 97 (2014); *See Generally* William Ayers, Rick Ayers, and Bernadine Dohrn, *Zero Tolerance: Resisting the Drive for Punishment in Our Schools: a Handbook for Parents, Students, Educators, and Citizens* (1st. Ed. 2001)
[16] *See Id.* at 98.
[17] *See Id.*
[18] *See Id.*
[19] *See Id.*; *See Also* Judith A. Brown, *Derailed: The School To Jailhouse Track*, Advancement Project at 6. (2003)
[20] *See* Judah Schept, Tyler Wall, and Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 Soc. Just. 96, 98 (2014); *See Also* Judith A. Brown, *Derailed: The School To Jailhouse Track*, Advancement Project at 6. (2003); *See Also* Peter Price, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 Nw. Sch. L. J. Crim. L. & Criminology 541, 541-42 (2009); *See Also* William Ayers, Rick Ayers, and Bernadine Dohrn, *Zero Tolerance: Resisting the Drive for Punishment in Our Schools: a Handbook for Parents, Students, Educators, and Citizens* (1st. Ed. 2001)
[21] *See* Judah Schept, Tyler Wall, and Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 Soc. Just. 96, 98 (2014); *See Also* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2040 (2019)

violation.[22] These policies, and the pipeline in general, disproportionately affect students of color.[23] The rates of school suspension dramatically increased shortly after the embrace of "zero-tolerance" policies, rising from 1.7 million suspensions in 1974 to 3.1 million in 2000.[24] The increase in suspension rates has been most dramatic for children of color who are far more likely to be suspended, expelled, or arrested than their white peers for the same conduct at school.[25] In the 2017-2018 school year, African-American students represented 31.4 percent of students who received one or more in-school suspensions, 38.8 percent of students who received one or more out-of-school suspensions, and 38.8 percent of students who were expelled with educational services despite representing only 15.1 percent of the total student enrollment.[26] These overly harsh disciplinary outcomes serve to push students into the pipeline.[27] Children who are suspended or expelled often find themselves unsupervised and without any constructive activities which can lead to them getting involved in problematic activities they otherwise would not get involved in.[28] These children also more easily fall behind in their schoolwork, leading to a greater likelihood of disengagement and, eventually, drop-outs.[29] All of these consequences of "zero-tolerance" policies increase the likelihood of children being involved in the criminal

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[22] *See Id.*; *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*
[23] *See Id.* at 99; *See Also* Advancement Project, *Education on Lockdown: The Schoolhouse to Jailhouse Track* (Mar. 2005) at 15.; *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*
[24] *See* Advancement Project, *Education on Lockdown: The Schoolhouse to Jailhouse Track* at 15 (Mar. 2005); *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*
[25] *See* Russel J. Skiba, *Zero Tolerance, Zero Evidence* at 11-12 (2000); *See Also* The Advancement Project & The Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* at 7-9 (June 2000); *See Generally* Russel J. Skiba, Robert S. Michael, Abra Carroll Nardo, and Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (2000); *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*
[26] *See* U.S. Education Department, Office for Civil Rights, *2017-18 Civil Rights Data Collection*, (May 2021)
[27] *See* American Academy of Pediatrics, Committee on School Health, *Out-of-School Suspension and Expulsion*, 112 Pediatrics 1207 (Nov. 2003); *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*
[28] *See* American Academy of Pediatrics, Committee on School Health, *Out-of-School Suspension and Expulsion*, 112 Pediatrics 1207 (Nov. 2003).; *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*
[29] *See* American Academy of Pediatrics, Committee on School Health, *Out-of-School Suspension and Expulsion*, 112 Pediatrics 1207 (Nov. 2003); *See Also* Johanna Wald and Dan Losen, *Defining and Re-directing a School-to-Prison Pipeline*, 99 New Directions for Youth Dev. 11 (Fall 2003); *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*

justice system.[30] Once the pipeline was constructed by such policies, the prevalence of SROs in schools served to ensure that children continued to flow through it.[31]

School resource officers (SROs) have become regular features in American public schools since the 1990s and early 2000s.[32] The number of SROs in schools has grown substantially in response to the early-1990s peak crime rate and the rise of mass shootings at schools.[33] As of 2019, there are approximately 20,000 sworn police officers stationed at schools.[34] The presence of SROs in schools is a significant factor which has allowed the school-to-prison pipeline to flourish.[35] The reliance of under-resourced schools on the Police to maintain discipline in hallways has resulted in children becoming far more likely to be arrested for non-violent offenses such as disruptive behavior, exposing them to the justice system early and leading them to become more likely to be exposed to it again later.[36] The presence of SROs in school correlates with an increased likelihood that incidents in schools will be reported to law

[30] *See* Judah Schept, Tyler Wall, and Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 Soc. Just. 96, 99 (2014)("Once a child drops out, he or she is eight times more likely to be incarcerated than youth who finish high school."); *See Also* American Academy of Pediatrics, Committee on School Health, *Out-of-School Suspension and Expulsion*, 112 Pediatrics 1207 (Nov. 2003); *See Also* Johanna Wald and Dan Losen, *Defining and Re-directing a School-to-Prison Pipeline*, 99 New Directions for Youth Dev. 11 (Fall 2003); *See Also https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline*

[31] *See* Judah Schept, Tyler Wall, and Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 Soc. Just. 96, 99 (2014)

[32] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2015 (2019)

[33] *See Id.*

[34] *See Id.*

[35] *See* Judah Schept, Tyler Wall, and Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 Soc. Just. 96, 97 (2014); *See* William Ayers, Rick Ayers, and Bernadine Dohrn, *Zero Tolerance: Resisting the Drive for Punishment in Our Schools: a Handbook for Parents, Students, Educators, and Citizens* (1st. Ed. 2001); *See Also* Henry Giroux, *The Terror of Neoliberalism: Authoritarianism and the Eclipse of Democracy* (2004); *See Also* Torin Monahan and Rodolfo D. Torres, *Schools Under Surveillance: Cultures of Control in Public Education* (2010); *See Also* Henry Giroux, *Disposable Youth: Racialized Memories, and the Culture of Cruelty* (2012); *See Also* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2015 (2019)

[36] *See* Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 Crim. & Just. 256 (2009); *See Also* Jason P. Nance, *Implicit Racial Bias and Students' Fourth Amendment Rights*, 94 Ind. L. J. 48, 76 (2019)

enforcement agencies.[37] Nationally, 17 percent of all juvenile charges arise from incidents at school and that figure is significantly higher in some jurisdictions.[38] Prior to the pervasiveness of SROs, a student who was in possession of a joint of marijuana on school property would have been disciplined through the school, via detention, suspension, or like methods.[39] Today, a student in that situation now also faces being arrested by their school's SRO and will be unnecessarily exposed to the criminal justice system.[40]

The presence of police has no impact on the safety of the school[41], instead offering another avenue for children in under-resourced public schools to be exposed to the criminal justice system.[42] These officers are often poorly trained to deal with adolescents, yet they are responsible for maintaining discipline rather than the administration and appropriately trained guidance counselors. The armed officers put in school to maintain peace are often perpetrators of violence against communities of color in the school.[43] Scholars argue that the very existence of the pipeline negatively affects students who are not directly exposed to it, finding lower academic achievement among all students who attend overly punitive schools.[44] The detrimental effects of the presence of SROs in schools stems in large part from how the Supreme Court of the United States has interpreted the 4th Amendment and how weak the 4th Amendment has become in the school environment.

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[37] *See* Michael Heise and Jason P. Nance, "*Defund the (School) Police"? Bringing Data to Key School-to-Prison Pipeline Claims*, 111 J. Crim. L. & Criminology 717 (2021); *See Also* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2040-2041 (2019)
[38] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2041 (2019)
[39] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2015 (2019)
[40] *See Id*.
[41] *See* Judah Schept, Tyler Wall, and Avi Brisman, *Building, Staffing, and Insulating: An Architecture of Criminological Complicity in the School-to-Prison Pipeline*, 41 Soc. Just. 96, 99 (2014)
[42] *See Id*.
[43] *See Id*.
[44] *See* Brea L. Perry and Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 Am. Soc. Rev. 1067 (Nov. 5. 2014)

Part II: The Fourth Amendment in the School

The Fourth Amendment guarantees people the right to be secure in their persons, houses, papers, and effects.[45] The purpose of the Amendment is to protect the privacy and security of individuals against government intrusion.[46] The Fourth Amendment provides individuals with a broad right against such governmental intrusion.[47] The amendment protects "people, not places" therefore its protections extend to many areas.[48] Fourth Amendment protections extend to the school context, as well as the personal and residential contexts. When compared to the protections provided in other contexts, the protections provided by the Fourth Amendment in schools are diminished.

A. History

Despite the Fourth Amendment extending protection to students in the schooling context, the Fourth Amendment has been frustrated in schools in large part due to The Supreme Court's holding in *New Jersey v. T.L.O.*[49] In *T.L.O.*, a teacher discovered two girls smoking in a bathroom at Piscataway High School.[50] The girls were brought to the principal's office and in response to questioning from the assistant principal, T.L.O. claimed that she was not smoking in the bathroom and did not smoke at all.[51] The assistant principal demanded to see T.L.O.'s purse and, while searching the purse, noticed a package of cigarette rolling papers which in his

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

[46] *See Camara v. Municipal Court of San Francisco*, 387 U.S., 523, 528 (1967) (stating that the "basic purpose" of the fourth amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."); *See Also Mapp v. Ohio*, 367 U.S. 643, 646-647 (1961)

[47] *See* Steven Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 Envr. L. 911, 913 (1988)

[48] *See Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967))

[49] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2019 (2019)

[50] *See New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985)

[51] *See Id.*

experience was closely associated with marijuana use.[52] The purse was then thoroughly searched under suspicion of it containing evidence of drug use.[53] The search revealed a small amount of marijuana, a pipe, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marijuana dealing.[54] The police were notified and T.L.O. had delinquency charged brought against her by the State.[55] T.L.O. moved to suppress the evidence found in her purse, contending that the assistant principal's search of her purse was a violation of her Fourth Amendment rights.[56]

The Court first held that the Fourth Amendment applies to searches conducted by school authorities.[57] To determine the standard of reasonableness which should govern this class of searches, the Court must balance "the need to search against the invasion which the search entails."[58] The Court makes it clear that students have some meaningful expectation of privacy at school which is protected by the Fourth Amendment and weighs that interest against the "substantial" interest of teachers and administrators in maintaining discipline on school property.[59] Applying this analysis, the Court holds that school officials may conduct a warrantless search of students at school needing only reasonable suspicion rather than probable cause.[60] The Court justifies applying this lowered standard by recognizing the need for flexibility

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[52] *See Id.*
[53] *See Id.*
[54] *See Id.*
[55] *See Id.* at 329.
[56] *See Id.*
[57] *See Id.* at 337. (The Court rejects the State's argument that school administrators act *in loco parentis* in their dealings with students and therefore derive their authority from the parent, not the State. The Court holds that school officials act as representatives of the State, not merely as surrogates for the parents, and that they cannot claim parental immunity from the Fourth Amendment.)
[58] *See Id.* at 337. (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S., 523, 536-537 (1967))
[59] *See Id.* at 339.
[60] *See Id.* at 340-342.

in school disciplinary procedures and "the value of preserving the informality of the student-teacher relationship.[61] The Court opines that focusing the standard on reasonableness will spare teachers and school administrators from being forced to learn the nuances of probable cause and will instead allow them to regulate their conduct based on reason and common sense.[62] To determine whether a search is reasonable, a two-pronged test must be applied.[63] Under this test, first one must consider whether the search was justified at its inception and second, one must determine whether the search as conducted was reasonably related in scope to the circumstances which justified the interference in the first place.[64] Having determined the appropriate standard, the Court applied it and held that the assistant principal had reasonable suspicion to believe that both searches of T.L.O.'s purse would produce evidence of a violation of school policy.[65]

It is important to note that *T.L.O.* was decided before SROs were as common as they are today.[66] As of writing, the Supreme Court has not issued a ruling which definitively states the Fourth Amendment standard that applies to searches conducted by or involving SROs.[67] While the Court clearly held in *T.L.O* that school officials acting alone may generally conduct a warrantless search based on reasonable suspicion, it expressly avoided ruling on searches conducted by school officials at the behest of or in conjunction with law enforcement or searches conducted by law enforcement officers themselves.[68] In the absence of clear guidance from the Supreme Court on this issue, most state courts to decide the issue have distinguished SROs from other police officers or have interpreted searches involving SROs as searches initiated or led by

[61] *See Id.* at 340.
[62] *See Id.* at 343.
[63] *See Id.* at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968))
[64] *See Id.* at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968))
[65] *See Id.* at 345-346.
[66] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2018 (2019)
[67] *See Id.*
[68] *See Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985))

school officials.[69] Therefore, in the majority of states that has decided this issue, SROs are held to the lowered Fourth Amendment standard for school officials, rather than the standard for police officers.[70]

Despite never clarifying what standard should apply to searches involving SROs, the Supreme Court has revisited school searches carried out by school officials.[71] The most important cases on this subject are *Vernonia School District 47J v. Acton*[72], and *Board of Education v. Earls.*[73] In both cases, students involved in certain voluntary school activities were required to consent to drug testing as a condition of participating in the school activity.[74] A positive test result would require students to participate in a drug-use prevention program or otherwise be suspended from participation in extracurricular activities.[75] A positive test result carries no law enforcement penalties.[76] The Court balances the State's interest in preventing drug use by children against the Fourth Amendment privacy interests of the students and finds that the need to prevent and deter childhood drug use is substantial enough that suspicionless drug testing programs are reasonable.[77] The *Earls* Court notes in dicta that it has not required a showing of a particularized or pervasive drug problem before allowing suspicionless drug testing.[78] The Court

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[69] *See Id.*; *See Generally People v. Dilworth*, 169 Ill. 2d 195 (Ill. 1996) (holding that SROs are properly considered school officials, rather than law enforcement officials); *See Also In re P.E.A.*, 754 P.2d 382 (Colo. 1988) (holding that a search involving an SRO was initiated and led by school officials)

[70] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2018 (2019); *See Also In re William V.*, 4 Cal. Rptr. 3d 695, 699-701 (Ct. App. 2003); *State v. D.S.*, 685 So. 2d 41, 43 (Fla. Dist. Ct. App. 1996); *Commonwealth v. J.B.*, 719 A.2d 1058, 1065 (Pa. Super. Ct. 1998); *M.D. v. State*, 65 So. 3d 563, 565 (Fla. Dist. Ct. App. 2011); *S.A. v. State*, 654 N.E. 2d 791, 795 (Ind. Ct. App. 1995); *State v. Voss*, 267 P.3d 735, 736, 738-739 (Idaho Ct. App. 2011) (Various state court holdings which acknowledge SROs as school officials.)

[71] *See Id.* at 2022; *See Also Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *See Also Board of Education v. Earls*, 536 U.S. 822 (2002)

[72] 515 U.S. 646 (1995)

[73] 536 U.S. 822 (2002)

[74] *See Earls*, 536 U.S. at 826 (noting that the policy applied to any extracurricular activity but in practice was only applied to competitive activities); *See Acton*, 515 U.S. at 648.

[75] *See Earls*, 536 U.S. at 833-834; *See Acton*, 515 U.S. at 651.

[76] *See Earls*, 536 U.S. at 833-834; *See Acton*, 515 U.S. at 651.

[77] *See Earls*, 536 U.S. at 837-838; *See Acton*, 515 U.S. at 664-665.

[78] *See Earls*, 536 U.S. at 835. (citing *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 673-674 (1989)

asserts that it would make little sense to require a school district to wait until it can show that a substantial portion of its students are using drugs before allowing it to institute a drug testing program designed to deter drug use.[79] Importantly, a "rather critical consideration"[80] in the Court's analysis was that the consequences of the drug test were minor, and particularly that law enforcement would not obtain the results of the drug tests so no delinquency or criminal charges would result.[81]

These cases represent yet another blow against a student's Fourth Amendment protections in the school environment, as now the Supreme Court has identified State interests which are so compelling that searches undertaken to further such interests do not even require reasonable suspicion. Instead, no suspicion at all is required.[82] Scholars like Eve Brensike Primus have argued that cases can be read as identifying children as a special subpopulation with reduced expectations of privacy justifying lower standards for searches.[83]

These cases are especially alarming when considered in comparison to the case *Chandler v. Miller*.[84] In that case, the Supreme Court held that a Georgia requirement that candidates for state office pass a drug test was not a constitutionally permissible suspicionless search.[85] The Court found that there was no substantial special need proffered which was sufficiently vital to overcome the Fourth Amendment's traditional requirement of individualized suspicion.[86] In explaining its inability to find a substantial special need, the Court notes that Georgia did not provide any indication of a concrete danger nor did it suggest that the dangers sought to be

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[79] *See Id.* at 836.
[80] *See* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §10.11(c), at 631 n.139 (5th ed. 2012)
[81] *See Earls*, 536 U.S. at 833-834; *See Acton*, 515 U.S. at 658.
[82] *See Earls*, 536 U.S. at 837-838; *See Acton*, 515 U.S. at 664-665.
[83] *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 222 Colum. L. Rev. 254, 270-71 (2011)
[84] 520 U.S. 305 (1997)
[85] *See Id.* at 323.
[86] *See Id.* at 318.

avoided were real and not simply hypothetical.[87] The Court's willingness in *Earl* to assert that a showing of a particularized or pervasive drug problem was not necessary, when contrasted with its denouncement of Georgia's state official drug testing for lack of a showing of a particularized or pervasive drug problem, suggests that the Court distinguishes the schooling context as an environment where lowered Fourth Amendment standards apply. The Court has shown great deference to purported state interests in the schooling environment and has declined to scrutinize said interests as closely as it does where the rights of adults are implicated.

B. Application to SROs

In the absence of a definitive ruling from the Supreme Court, the determination of what Fourth Amendment standards apply to SRO searches of students in school has been left to state courts.[88] The majority of state courts to address the issue have held that the lowered *T.L.O.* standard for school officials also applies to SROs.[89] The leading case for establishing this majority view is *People v. Dilworth*[90], a 1996 Illinois Supreme Court case.[91]

In *People v. Dilworth*, an SRO suspected that a student, Dilworth, was selling drugs on school grounds.[92] The SRO searched Dilworth on his own initiative and authority[93], found a bag of cocaine, and arrested Dilworth.[94] Dilworth challenged the search under the Fourth

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[87] *See Id.* at 318-319.
[88] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2024 (2019)
[89] *See Id.*; *See R.D.S. v. State*, 245 S. W.3d 356, 367 (Tenn. 2008); *See also Developments in the Law – Policing Students*, 128 Harv. L. Rev. 1747, 1748 (2015)
[90] 169 Ill. 2d 195 (Ill. 1996)
[91] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2024 (2019); *See also* Barry C. Feld, *Cases and Materials on Juvenile Justice Administration* 244 (5th ed. 2018); Leslie J. Harris et al., *Children, Parents, and the Law: Public and Private Authority in the Home, Schools, and Juvenile Courts* 444 (3d ed. 2012) (law school casebooks reporting *People v. Dilworth* as a leading case for establishing the majority view on the treatment of SROs.)
[92] *See People v. Dilworth*, 169 Ill. 2d 195, 198 (Ill. 1996)
[93] *See Id.* at 208
[94] *See Id.* at 198

Amendment, arguing that the SRO needed probable cause because he was a police officer.[95] The Court balanced the nature of the privacy interest upon which the search intruded, the character of the search, and the nature and immediacy of the governmental concern at issue and the efficacy of the means for meeting it to determine whether the probable cause standard or reasonable suspicion standard should apply in this situation.[96] The Court concluded that reasonable suspicion was the appropriate standard.[97] Astonishingly, despite the arrest and prosecution that immediately followed the search, the Court concluded that the SRO's search was initiated to further the school's maintenance of a proper educational environment, rather than being initiated for a law enforcement purpose.[98] Despite the SRO's own testimony that his primary purpose at the school was to prevent criminal activity, the Court found that his overall purpose was to assist other school officials in their attempt to maintain a proper educational environment, and thus, he was properly considered to be a school official.[99]

Since *Dilworth*, the view of SROs as school officials has been adopted by multiple other state courts.[100] This view is so pervasive that it has even been codified in a 2017 Indiana statute.[101] After the Indiana Supreme Court suggested that SRO searches were only entitled to the reasonable suspicion standard when performing school discipline, rather than law enforcement duties[102], the Indiana legislature enacted a statute which allowed SROs to use the

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[95] *See Id.* at 206
[96] *See Id.* at 209-210
[97] *See Id.* at 210
[98] *See Id.* at 208
[99] *See Id.* at 214
[100] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2026 (2019); *See In re William V.*, 4 Cal. Rptr. 3d 695, 699-701 (Ct. App. 2003); *State v. D.S.*, 685 So. 2d 41, 43 (Fla. Dist. Ct. App. 1996); *Commonwealth v. J.B.*, 719 A.2d 1058, 1065 (Pa. Super. Ct. 1998); *M.D. v. State*, 65 So. 3d 563, 565 (Fla. Dist. Ct. App. 2011); *S.A. v. State*, 654 N.E. 2d 791, 795 (Ind. Ct. App. 1995); *State v. Voss*, 267 P.3d 735, 736, 738-739 (Idaho Ct. App. 2011) (Various state court holdings recognizing SROs as school officials.)
[101] Ind. Code § 20-26-18.2-3(a)(2) (2017)
[102] *See K.W. v. State*, 984 N.E. 2d 610, 613 (Ind. 2013)

reasonable suspicion standard for searches and seizures without limit.[103] The fact that the Indiana legislature felt emboldened to codify the application of the reasonable suspicion standard to all searches and seizures undertaken by SROs shows just how accepted the view of SROs as school officials has become.

The lack of guidance from the Supreme Court has resulted in some inconsistent results as some state courts have come to different conclusions when presented with similar facts. Most notably, state courts have differed on whether searches involving SROs are to be considered investigations directed by school officials or the police department.[104] The *Dilworth* Court noted that where outside police officers initiate a search, or where school officials act at the behest of law enforcement agencies, the probable cause standard must be applied.[105] State courts are split on whether the involvement of SROs constitutes a situation where outside police officers initiate a search or where school officials act at the behest of law enforcement agencies.

This split is perhaps best exemplified by the different results in *In re P.E.A.*[106] and *F.P. v. State*[107], two cases decided in 1988 with strikingly similar facts. In *In re P.E.A.*, an outside officer alerted a junior high school principal that two students may have been in possession of stolen marijuana.[108] The outside officer remained at the school while the principal and the school's SRO investigated the claim and ultimately seized P.E.A. physically and searched his vehicle.[109] The Supreme Court of Colorado held that because the officer did not request the

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[103] Ind. Code § 20-26-18.2-3(a)(2) (2017)
[104] *See* Peter Price, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 Nw. Sch. L. J. Crim. L. & Criminology 541, 558 (2009) (citing *People v. Dilworth*, 169 Ill. 2d 195, 206-207 (Ill. 1996))
[105] *See People v. Dilworth*, 169 Ill. 2d 195, 207 (Ill. 1996)
[106] 754 P.2d 382 (Colo. 1988)
[107] 528 So. 2d. 1253 (Fla. 1988)
[108] *See In re P.E.A.*, 754 P.2d 382, 384 (Colo. 1988)
[109] *See Id.*

searches or participate in any way, the principal and SRO did not act as agents of the police.[110] Somehow, the officer supplying information to the principal with the intent of initiating a search and his presence on school premises during the search did not establish that the principal and SRO acted as police agents.[111]

In *F.P. v. State,* an outside police officer was questioning a student at a middle school when he came to believe that F.P. was in possession of a stolen vehicle.[112] The officer informed the school's SRO and the officers tried to find F.P. but could not.[113] After the outside officer left, the SRO saw F.P., called the outside officer, and took F.P. into her office where she asked him if he had anything he needed to give to her.[114] F.P. produced car keys and a paper from his pocket and a few minutes later was arrested by the returning outside officer.[115] Here, the Court of Appeal of Florida held that the SRO acted at the behest of law enforcement, and therefore she needed probable cause to effectuate a constitutionally permissible search.[116]

The fact that almost identical facts can give rise to completely different results depending on what state the case is heard in makes it crucial that the United States Supreme Court address this issue definitively. The presence of SROs in both cases and the murkiness their presence clouds the analysis with suggests that this issue is ripe for Supreme Court determination. At present, an SRO faced with a similar factual situation in a state which has not decided this issue would have no guidance on whether they were an agent of the police or a school official. This SRO would essentially have to guess whether they needed probable cause or only reasonable suspicion when conducting a search. This Fourth Amendment guessing game cannot be what the

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[110] *See Id.* at 385
[111] *See Id.*
[112] *See F.P. v. State*, 528 So. 2d. 1253, 1254 (Fla. 1988)
[113] *See Id.*
[114] *See Id.*
[115] *See Id.*
[116] *See Id.* at 1255

Supreme Court had in mind when it decided *T.L.O* and it is time for the Supreme Court to finally address the issue of whether SROs are school officials or law enforcement officers.

The application of *T.L.O.*'s lowered standard for school officials to SROs combined with the ambiguity over whether their involvement constitutes the involvement of law enforcement creates an environment that is ripe for overinclusive activity by SROs. SROs are free to conduct searches in schools with only reasonable suspicion, rather than probable cause to believe that a search will reveal evidence of a crime.[117] This results in more children being searched by law enforcement under circumstances that would not justify a search in another environment simply because their encounter with the officer occurred at school. These searches directly contribute towards the funneling of children down the school-to-prison pipeline. Children in school find themselves being exposed to the criminal justice system for activity which would not otherwise have justified police intervention. This practice must be addressed in order to combat the school-to-prison pipeline.

Part III: The Fourth Amendment Generally

The cases described in Part II highlight the 4th Amendment protections afforded in a school context. This part will discuss the 4th Amendment's applications outside of the school context. This part is meant to contrast the behaviors of School Resource Officers in schools with those of Police Officers in other contexts.

The Fourth Amendment guarantees individual citizens the right to be secure against unreasonable searches and seizures and requires the issuance of warrants based on probable cause.[118] The requirement of obtaining a warrant based on probable cause is not absolute. The

[117] *See Generally New Jersey v. T.L.O.,* 469 U.S. 325 (1985)
[118] U.S. CONST. amend. IV (stating "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

Supreme Court of the United States has identified exceptions to the warrant requirement.[119] These exceptions apply under specific contexts which have been established by the Supreme Court.[120] Most relevant to the application of the Fourth Amendment in the school context are warrantless searches undertaken due to suspicion of an individual, warrantless searches undertaken in the administrative context, and warrantless searches undertaken as a function of the Police's community caretaking function.

A. Individual Suspicion

The seminal case *Terry v. Ohio* is perhaps the best place to begin an exploration of a Police Officer's right to conduct a warrantless search so long as they possess a "reasonable suspicion" that criminal activity is afoot and that the person they are dealing with may be armed and presently dangerous.[121] In *Terry*, Officer McFadden was patrolling in plain clothes in downtown Cleveland at approximately 2:30 P.M.[122] He observed two men on the corner of the street, Chilton and Terry, who "didn't look right to [him] at the time."[123] As he observed the men, he saw one leave the other and walk down the street, stopping to look in a store window before continuing to walk a short distance, turning around and walking back to the corner, stopping to look into the same store window on his way back.[124] The second man then went through the same series of motions.[125] The two men repeated this pattern approximately five or

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

[119] *See Katz v. United States*, 389 U.S. 347, 357 (1967) (Stating that some warrantless searches are acceptable under a few "specifically established and well-delineated exceptions"; quoting *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963); quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

[120] *See Id.*

[121] *See Terry v. Ohio*, 392 U.S. 1, 30 (1968)

[122] *See Id.* at 5.

[123] *See Id.*

[124] *See Id.* at 6.

[125] *See Id.*

six times each.[126] At one point, a third man approached them and briefly conversed before walking away.[127] After ten to twelve minutes of pacing, the two men walked away following the same path as the third man who had approached them earlier. [128] Officer McFadden had grown thoroughly suspicious by this time, suspecting that the men were planning to rob the store whose window they repeatedly peered into and fearing that the men may have weapons.[129] Following the men, Officer McFadden observed them stop to talk to the same man that they had talked to earlier on the street corner.[130] At this point, Officer McFadden approached the men, identified himself as a police officer, and asked the men for their names.[131] When he received a mumbled response to his inquiries, Officer McFadden grabbed Terry and patted him down to determine whether he had any weapons.[132] Upon feeling a pistol, the officer took action to seize the weapon and searched the other two men for weapons, discovering a revolver in Chilton's overcoat.[133] Officer McFadden testified that he only patted the men down to determine whether they had weapons and that he did not place his hands beneath the outer garments of the men until he had felt their weapons.[134]

The Supreme Court held that Officer McFadden's actions did not violate the Fourth Amendment because under the circumstances of the case, the search was "reasonable."[135] The Supreme Court's holding is written as though it were a narrow one. They assert that each case must be decided on its own facts and limit their holding to:

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[126] *See Id*.
[127] *See Id*.
[128] *See Id*.
[129] *See Id*.
[130] *See Id*.
[131] *See Id.* at 7.
[132] *See Id*.
[133] *See Id*.
[134] *See Id*.
[135] *See Id.* at 30-31.

> Where a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[136]

However narrowly the Court tried to frame its holding, this case provided the groundwork upon which various other warrant exceptions were built. By shifting the standard for searches from probable cause to reasonable suspicion, the Court created a litany of circumstances under which warrants are not needed for police officers to conduct a search.

The exception to the warrant requirement articulated in *Terry* is premised on the theory of safety. An officer shouldn't be constrained by the requirements of probable cause or warrants when they are faced with circumstances which reasonably suggest to them that either their own safety or the safety of the public is at imminent risk.[137] However reasonable this proposition appears, in practice it has resulted in the erosion of Fourth Amendment protections as the exceptions have swallowed the rule.

A series of cases, beginning with *United States v. Cortez*[138], gradually expanded the scope of *Terry* stops and weakened the standard of reasonable suspicion.[139] In *Cortez*, law enforcement stopped persons suspected of smuggling illegal aliens.[140] The Supreme Court used this case to clarify that the legitimacy of a *Terry* stop is not based only on the facts observed by the officer at the scene, but rather on the totality of the circumstances.[141] The reviewing court is

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[136] *See Id.* at 30.
[137] *See Id.*
[138] 449 U.S. 411 (1981)
[139] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Indiana L. J. 659, 665 (1994)
[140] *See United States v. Cortez*, 449 U.S. 411, 413-416 (1981)
[141] *See Id.* at 417; *See also* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Indiana L. J. 659, 665-666 (1994)

to consider police reports and "patterns of operation of certain kinds of lawbreakers"[142] in determining whether there exists evidence that a suspect was engaged in wrongdoing.[143] The *Cortez* court also ordered that courts must weigh the appropriateness of *Terry* stops "as understood by those versed in the field of law enforcement."[144] In other words, courts must determine whether a *police officer*, rather than a reasonable person, would feel that all of the circumstances raise a suspicion that the individual being stopped is engaged in wrongdoing.[145] *Cortez* sent a strong message to lower courts that *Terry* stops were to be evaluated with great deference to the police.[146]

This deference to the police can be observed in several Supreme Court decisions throughout the 1980s[147], culminating in the Court's decision in *United States v. Sokolow*.[148] In *Sokolow*, the police concluded that reasonable suspicion existed based on the combination of seemingly innocent activities.[149] The suspect purchased airline tickets with cash, checked no luggage, appeared nervous, stayed in Miami for a short time, and travelled under a name which did not match the name that his telephone number was listed under. [150] Despite each of these activities being innocent, together they raised the officer's suspicion because they matched the police profile of a drug trafficker.[151] The Supreme Court held that the fact that the suspect fit the profile supplied adequate individualized suspicion to justify a *Terry* stop.[152]

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[142] *See Cortez*, 449 U.S. at 418
[143] *See Id.*
[144] *See Id.*
[145] *See Id.*
[146] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Indiana L. J. 659, 666 (1994)
[147] *See generally Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980)
[148] 490 U.S. 1 (1989)
[149] *See Id.* at 3.
[150] *See Id.* at 3.
[151] *See Id.* at 10.
[152] *See Id.* at 9-10.

As time has gone on, *Terry* stops have been approved based on even smaller amounts of evidence. In *Alabama v. White*[153], a car was stopped based on an anonymous tip which correctly described the defendant's vehicle, time and place of departure, and destination.[154] Police observation corroborated some, but not all, of the descriptions provided by the tip.[155] Despite the fact that the tip provided no indicia of its reliability, the Supreme Court held that police corroboration of some of the tip was sufficient to establish reasonable suspicion.[156]

The Supreme Court has even gone so far as to approve stops that were based on no suspicion, reasonable or otherwise, of the individual who was stopped.[157] In *Michigan Department of State Police v. Sitz*, the police set up a sobriety checkpoint where each car that passed by was stopped.[158] The Supreme Court applied a balancing of interests analysis and concluded that given the magnitude of the drunken driving problem and the slight nature of the intrusion upon the privacy of those stopped, the stops were reasonable even in the absence of individualized suspicion.[159]

This progeny of cases since *Terry* suggests that reasonable suspicion is not a very high standard at all.[160] The standard has continued to weaken over time, to the point that innocent activities grouped together, or even no individual activity at all, can be sufficient to meet the standard.[161] The application of this standard, and its waning strength, has contributed to the erosion of the Fourth Amendment's protections.

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[153] 496 U.S. 325 (1990)
[154] *See Id.* at 327 (1990)
[155] *See Id.*
[156] *See Id.* at 329-331.
[157] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Indiana L. J. 659, 668 (1994)
[158] *See Michigan Department of State Police v. Sitz*, 496 U.S. 444, 448 (1990)
[159] *See Id.* at 453.
[160] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Indiana L. J. 659, 669 (1994)
[161] *See Id.*

B. Administrative Searches

The history of the Fourth Amendment in the administrative context is fruitful for illustrating how the Fourth Amendment's protections have waned over the years. Beginning with the weakening of the probable cause standard in searches requiring a warrant[162] and culminating in the Court's holding in *Donovan v. Dewey* that warrantless searches are valid when Congress has reasonably determined that the searches are necessary to further a regulatory scheme. [163] In the administrative context, the interests of various administrative agencies are prioritized at the expense of the liberty interests of businesspeople, employees, and others subjected to the administrative agents' intrusions. [164] The protection from warrantless searches and seizures has been significantly weakened, as new governmental powers are rarely confined to the context that gave rise to them.[165]

In *Camara v. Municipal Court*, the Supreme Court considered whether warrants are required in administrative searches, and if so, how the probable cause standard is defined in that context. [166] Camara refused to permit a warrantless inspection of his apartment building residence, demanding that a warrant be obtained, and was charged with a criminal violation of the San Francisco housing code.[167] He argued that the housing code which authorized municipal officials to enter a dwelling without a search warrant and without probable cause to believe that a Housing Code violation exists therein is unconstitutional on its face.[168] The Court agreed with

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[162] *See generally Camara v. Municipal Court of San Francisco*, 387 U.S., 523 (1967) (holding that the probable cause requirement of the Fourth Amendment would be met if a legislature or administrative agency established, and a magistrate was presented with, reasonable legislative or administrative standards relating to a particular area of a city.)
[163] *See Donovan v. Dewey*, 452 U.S. 594, 605 (1981)
[164] *See* Steven Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 Envr. L. 911, 916 (1988)
[165] *See Id.*
[166] *See generally Camara v. Municipal Court of San Francisco*, 387 U.S., 523 (1967)
[167] *See Id.* at 526-527.
[168] *See Id.* at 527.

Camara that warrantless administrative searches without probable cause are violations of the interests protected by the Fourth Amendment. [169] However, the Court disagreed with Camara's assertion that warrants should only be issued in the administrative context where the inspector possesses probable cause to believe that a particular dwelling contains violations of the standards prescribed by the code being enforced. [170]

The Court asserts that to apply the probable cause standard, it is necessary to focus upon the governmental interest which allegedly justifies intrusion on a citizens constitutionally protected interests.[171] The Court distinguishes administrative searches from searches pursuant to a criminal investigation, noting that rather than searching for specific contraband or goods like in a criminal search, an administrative search is aimed at securing "city-wide compliance with minimum physical standards for private property."[172] To determine whether a particular search is reasonable, and thus determining that there is probable cause for that inspection, the need for inspection must be weighed against the goals of code enforcement. [173] Applying this analysis, the Court concludes that an administrative search is "reasonable" and probable cause must exist where "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." [174]

This probable cause standard is a marked departure from the traditional probable cause standard which permits a search only when " 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is

[169] *See Id.* at 534.
[170] *See Id.*
[171] *See Id.* at 534-535.
[172] *See Id.* at 535.
[173] *See Id.*
[174] *See Id.* at 538.

being committed."[175] The Court recognized that this applying this standard in the administrative context would inhibit enforcement efforts and justified its modified probable cause standard to reconcile this tension.[176] The weakening of the probable cause standard served as a preview of the impending weakening of Fourth Amendment protections in the administrative arena.[177]

Three years after *Camara* was decided, the Court carved out an exception to the general *Camara* rule. In *Colonnade Catering Corp. v. United States*, liquor was seized without a warrant by Internal Revenue Service agents after a warrantless search of a locked storeroom in Colonnade's catering business.[178] The Court looked to the long history of governmental regulation in the liquor industry and approved of the warrantless inspection and seizure.[179]

The Court established another exception to the warrant requirement in *United States v. Biswell.*[180] In that case, a warrantless administrative search of a pawn shop was conducted by a federal treasury agent.[181] The Court held the challenged statute constitutional, finding that the inspection scheme was of central importance to federal and state law enforcement efforts and finding that the gun business was "pervasively regulated."[182] The holding was limited to situations where the regulatory inspections would further urgent federal interests and the "possibilities of abuse and the threat to privacy are not of impressive dimensions."[183] The only

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[175] *See Brinegar v. United States*, 338 U.S. 160, 175-176 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).
[176] *See* Steven Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 Envr. L. 911, 917-918 (1988)
[177] *See Id.* at 918.
[178] *See generally Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)
[179] *See Id.* at 75-76.
[180] *See United States v. Biswell*, 406 U.S. 311 (1972)
[181] *See Id.* at 312. (The search was pursuant to 18 U.S.C. § 923(g) (1982 & Supp. IV 1986), which provides generally that sellers of firearms shall maintain certain records and make them available for inspection at all reasonable times, and shall grant entry to treasury agents for the purposes of inspection and examination of documents, records, and any firearms or ammunition.)
[182] *See Id.* at 315-316.
[183] *See Id.* at 317.

limits placed on a search in such circumstances was the need for careful limitation in the time, place, and scope of the search authority granted by statute.[184]

These limited exceptions were significantly expanded in *Donovan v. Dewey*.[185] In that case, the warrantless inspection provisions of the Federal Mine Safety and Health Act were challenged. [186] Rather than focusing on the history of the Fourth Amendment, the Court's analysis focused on Congress' "broad authority to regulate commercial enterprises."[187] Addressing the circumstances under which a warrant may not be required, the Court stated: "A warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."[188] This new formulation departs from the need for a long history of regulation articulated in *Colonnade* and the furtherance of urgent federal interests articulated in *Biswell.* Instead, a reasonable Congressional determination that warrantless searches are necessary for regulation would now be enough to convince the Court that a warrantless search is reasonable under the Fourth Amendment. [189]

Justice Stevens writes in his dissent in *Dewey* that the majority's logic appeared "peculiar" to him because this holding makes it so that the scope of the Fourth Amendment shrinks as governmental regulation increases.[190] The message this sends to the government is clear: to justify a desire to search without a warrant, the government must simply increase its

[184] *See Id.* at 315.
[185] *See generally Donovan v. Dewey*, 452 U.S. 594 (1981)
[186] *See Id.* at 596.
[187] *See Id.* at 599.
[188] *See Id.* at 600.
[189] *See Id.*
[190] *See Id.* at 612.

regulatory presence in an industry. Scholars like Steven Wax opine that the government has received this message loud and clear and it has acted accordingly.[191]

C. Community Caretaking

Another relevant doctrine is the Community Caretaking doctrine. The Community Caretaking doctrine applies in situations that officers encounter daily in their "community caretaking" function, including: "the mediation of noise disputes, the response to complaints about stray and injured animals, and the provision of assistance to the ill or injured."[192] In carrying out their community caretaking function, officers are "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect public safety."[193] Like other warrantless searches, the Supreme Court has adopted a "reasonableness" standard.[194] This doctrine is worth exploring due to the "community caretaking" function that SROs serve in schools.

The doctrine was first set out by the Supreme Court in 1973 in *Cady v. Dombrowski*.[195] In *Cady*, a Chicago police officer was driving drunk in Wisconsin when he got into a car accident.[196] After he was arrested and brought to the station for questioning, a Wisconsin officer searched the car's front seat to see if the Chicago officer's service weapon was in there.[197] After the car was towed, Wisconsin officers returned to search it for the service weapon once again.[198]

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[191] *See* Steven Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 Envr. L. 911, 922 (1988)
[192] *See* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 272 (1998)
[193] *See United States v. Smith*, 522 F.3d 305, 313 (3rd Cir. 2008) (quoting *United States v. Rodriguez-Morales*, 929 F.2d 780, 784-785 (1st Cir. 1991)
[194] *See* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 275 (1998)
[195] *See Cady v. Dombrowski*, 413 U.S. 433 (1973)
[196] *See Id.* at 435-436
[197] *See Id.* at 436.
[198] *See Id.* at 437.

During this search, the officers discovered a flashlight with blood on it between the front seats and various items covered in blood in the trunk.[199] After being confronted with the items and conferring with counsel, the Chicago officer communicated that he believed there was a body on his brother's farm.[200] The body was found and the Chicago officer was charged with first degree murder.[201] Upon his conviction, the officer appealed contending that some of the evidence seized from his vehicle was unconstitutionally seized.[202]

The Supreme Court held that the search was reasonable as a product of the police officer's community caretaking function rather than as a product of criminal investigation.[203] Where, as in this case, an officer reasonably believes that the trunk of an automobile contains a gun and that trunk is vulnerable to intrusion by vandals, a search of the trunk is not unreasonable within the meaning of the Fourth Amendment.[204] The Court justifies such a warrantless search under the community caretaking function by acknowledging the interest in maintaining the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle.[205] The Supreme Court limited its holding to vehicular searches because of its own previous recognition of the distinction between motor vehicles and the home.[206]

[199] *See Id*.
[200] *See Id*.
[201] *See Id*. at 434;437.
[202] *See Id*. at 434.
[203] *See Id*. at 448.
[204] *See Id*. at 448.
[205] *See Id*. at 447.
[206] *See Id*.

In the years since *Cady*, the United States Circuit Courts of Appeals have been divided on whether to extend the community caretaking doctrine to the home.[207] The Third[208], Seventh[209], Ninth[210], and Tenth[211] circuits have all rejected arguments to expand the doctrine to apply to warrantless searches of the home. A minority of circuits, including the Sixth[212] and Eighth[213], have upheld warrantless searches of homes relying on the community caretaking function.[214]

The United States Supreme Court addressed the issue just this year when it decided the case *Caniglia v. Strom*.[215] The Supreme Court unanimously declined to extend the community caretaking doctrine to the home, reasoning that neither the holding nor logic of *Cady* justified extending the community caretaking doctrine to warrantless searches and seizures in the home.[216] The Supreme Court, like the Third and Tenth circuits, noted that there is a "constitutional difference" between the warrantless search of an impounded vehicle and the warrantless search of the home.[217]

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[207] *See* Bernard J. Farber, *Home Searches and the Community Caretaking Doctrine*, 2011 (1) AELE MO. L.J. 101, 105 (2011)

[208] *See generally Ray v. Township of Warren*, 626 F.3d 170 (3rd Cir. 2010) (Holding that the community caretaking doctrine did not justify officers' warrantless entry into a home because the holding in *Cady* was based upon the distinction between automobiles and homes.)

[209] *See generally United States v. Pichany*, 687 f.2d 204 (7th Cir. 1982) (Holding that the community caretaking doctrine is limited to automobile searches and refusing to create a "warehouse exception" even where the officers were acting as community caretakers.)

[210] *See generally United States v. Erickson*, 991 F.2d 529 (9th Cir. 1993) (Holding that an officer acting as a community caretaker may only enter a building if he may do so under an already recognized exception to the warrant requirement.)

[211] *See generally United States v. Bute*, 43 F.3d 531 (10th Cir. 1994) (Holding that the community caretaking doctrine did not permit the search of an old manufacturing plant because the holding in *Cady* acknowledged a fundamental difference between searches of automobiles and searches of homes or businesses.)

[212] *See generally United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996) (Holding that officers' warrantless entry into a home was valid because they were acting in their community caretaking function to abate a significant noise nuisance.)

[213] *See generally United States v. Quezada*, 448 F.3d 1005 (8th Cir. 2006) (Holding that an officer acting in his or her community caretaking role may enter a residence without a warrant when the officer has a reasonable belief that an emergency exists that requires attention.)

[214] *See* Bernard J. Farber, *Home Searches and the Community Caretaking Doctrine*, 2011 (1) AELE MO. L.J. 101, 105-106 (2011)

[215] *See Caniglia v. Strom*, 593 U.S. ___ (2021)

[216] *See Id.* at 4.

[217] *See Id.* (citing *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970))).

Part IV: Supreme Court Silence

In spite of the divergence of state courts on whether searches involving SROs are to be considered searches initiated by school officials or law enforcement[218], the Supreme Court has thus far declined to address this issue. The Supreme Court has also neglected to address whether SROs are properly considered school officials or law enforcement officials.[219] Whether the Supreme Court chooses to grant a writ of certiorari is a matter of judicial discretion.[220] Pursuant to Rule 10 of the Supreme Court rules, a writ of certiorari will be granted for only compelling reasons.[221] The character of the reasons that the Court considers are as follows:

> (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[222]

On the issue of SRO searches in schools, several of the reasons justifying granting a writ of certiorari are present. The aforementioned state court divergence[223] on how to classify

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[218] *See* Peter Price, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 Nw. Sch. L. J. Crim. L. & Criminology 541, 558 (2009) (citing *People v. Dilworth*, 169 Ill. 2d 195, 206-207 (Ill. 1996)); *See Generally In re P.E.A.*, 754 P.2d 382 (Colo. 1988) (Holding that SRO involvement in a search at direction of outside police did not constitute the SRO acting as an agent of the police); *See Generally F.P. v. State*, 528 So. 2d. 1253 (Fla. 1988) (Holding that SRO involvement in a search at direction of outside police did constitute the SRO acting as an agent of the police)

[219] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2018 (2019)

[220] *See* USCS Supreme Ct. R. 10

[221] *See Id.*

[222] *See Id.*

[223] *See* Peter Price, *When Is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 Nw. Sch. L. J. Crim. L. & Criminology 541, 558 (2009) (citing *People v. Dilworth*, 169 Ill. 2d 195, 206-207 (Ill. 1996)); *See Generally In re P.E.A.*, 754 P.2d 382 (Colo. 1988); *See Generally F.P. v. State*, 528 So. 2d. 1253 (Fla. 1988)

searches involving SROs seems to be an area of pressing concern yet the Supreme Court appears disinterested in addressing it. Furthermore, the Illinois Supreme Court decided an important question of federal law when it held that SROs are properly considered school officials under the 4th Amendment of the United States Constitution in *People v. Dilworth*.[224] The silence of the Supreme Court in the twenty-five years since *Dilworth* was decided suggests that it does not take issue with the Illinois Supreme Court's interpretation of SROs as school officials. This view is further supported by the fact that the Supreme Court has since revisited school searches carried out by school officials[225] but has never heard such a case which involved an SRO. Therefore, if the Supreme Court ever heard a case where it had to decide whether an SRO is properly considered a school official or a law enforcement official, the Court would likely affirm the majority view stemming from *Dilworth* that SROs are properly considered school officials. If the Supreme Court were inclined to rule in any other way, it would have most likely heard a case on this issue and done so in the decades since *Dilworth*.

If the Supreme Court were to defy expectations and hold that SROs are properly considered law enforcement officials, and therefore the probable cause standard applies to searches undertaken by SROs, the effect would be unlikely to substantially combat the school-to-prison pipeline. As illustrated in Part III, there are several contexts in which the 4th Amendment's protections have waned.[226] An SRO who is classified as a police officer would likely still be able to search an individual child needing only reasonable suspicion under *Terry v. Ohio*[227] and its

[224] 169 Ill. 2d 195 (Ill. 1996); *See Also* Barry C. Feld, *Cases and Materials on Juvenile Justice Administration* 244 (5th ed. 2018); Leslie J. Harris et al., *Children, Parents, and the Law: Public and Private Authority in the Home, Schools, and Juvenile Courts* 444 (3d ed. 2012) (law school casebooks reporting *People v. Dilworth* as a leading case for establishing the majority view on the treatment of SROs.)
[225] *See* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 Fordham L. Rev. 2013, 2022 (2019); *Board of Education v. Earls*, 536 U.S. 822 (2002)
[226] *See supra*, Part III.
[227] 392 U.S. 1 (1968)

progeny. The Supreme Court has found reasonable suspicion based upon the combination of seemingly innocent activities[228], a partially corroborated anonymous tip[229], and even no activity at all on the part of the individual who was stopped.[230] Further stacking the deck in favor of law enforcement is the Court's deference to police in determining whether reasonable suspicion exists.[231] Even if SROs were to be stripped of their classification as school officials and thus be unable to conduct a reasonable suspicion search under *T.L.O.*, they would still be able to conduct individualized searches of children based on reasonable suspicion under the *Terry* line of cases.

Following that thread, it is likely that a variety of searches could also be justified as administrative searches. Following *Donovan v. Dewey*, a warrantless administrative search is permissible when Congress has reasonably determined that such searches are necessary to further a regulatory scheme.[232] The Gun-Free Schools Act of 1994[233] and the Drug-Free Schools and Communities Act of 1994[234], which prohibit the possession of guns and drugs on or near school property[235], provide an avenue through which a warrantless administrative search would be permissible at schools. Law enforcement would be permitted to conduct sweeping searches to ensure that there are no drugs or guns on school property should Congress reasonably assert that such searches are necessary to further the regulatory scheme.[236] As seen in *Earls*[237] and *Acton*[238], the Supreme Court gives great deference to a State's interest in preventing drug use among

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[228] *See United States v. Sokolow*, 490 U.S. 1 (1989)
[229] *See Alabama v. White*, 496 U.S. 325 (1990)
[230] *See Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990)
[231] *See United States v. Cortez*, 449 U.S. 411 (1981)
[232] *See Generally Donovan v. Dewey*, 452 U.S. 594 (1981)
[233] *See 20 U.S.C.S.* § 7961
[234] *See 20 U.S.C.S.* § 7114
[235] *See Id.*; *See 20 U.S.C.S.* § 7961
[236] *See* Steven Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 Envr. L. 911, 922 (1988); *See Generally Donovan v. Dewey*, 452 U.S. 594 (1981)
[237] 536 U.S. 822 (2002)
[238] 515 U.S. 646 (1995)

children, finding this interest so great that it justifies suspicionless school drug testing programs as reasonable.[239] It is easy to imagine that the Supreme Court would be similarly inclined to give deference to a determination that school gun and drug searches are necessary to further the regulatory scheme by preventing drug use and gun violence in schools.

The Community Caretaking doctrine serves as another potential avenue through which SROs could conduct searches under a reasonableness standard.[240] Thus far, the doctrine has only been recognized by the Supreme Court in the context of vehicular searches.[241] The Court has declined to extend the doctrine to the home due to the heightened privacy interest that exists in the home compared to in vehicles.[242] However, as demonstrated in Part II[243], the Court views the school as an area where privacy interests give way to the "substantial" interest of maintaining discipline on school property.[244] Given the Court's inclination to weigh school safety[245] and discipline[246] over privacy interests, it is foreseeable that the Court may extend the doctrine to cover schools if given the opportunity.

In light of the anticipated outcomes of litigation on these issues, it appears that the 4th Amendment is not a viable avenue for combating the school-to-prison pipeline. The Supreme Court's disinterest in addressing the issues surrounding SROs suggests its satisfaction with the current state court approaches. Even if the Supreme Court were to classify SROs as law enforcement officials, the body of law that currently exists suggests that there are various

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[239] *See Earls*, 536 U.S. at 837-838; *See Acton*, 515 U.S. at 664-665.
[240] *See* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 275 (1998); *See Also Cady v. Dombrowski*, 413 U.S. 433, 448 (1973)
[241] *See Cady v. Dombrowski*, 413 U.S. 433, 447 (1973); *See Also Caniglia v. Strom*, 593 U.S. ___ (2021) at 4.
[242] *See Caniglia v. Strom*, 593 U.S. ___ (2021) at 4 (citing *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970))).
[243] *See supra*, Part II.
[244] *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)
[245] *See Earls*, 536 U.S. at 837-838; *See Acton*, 515 U.S. at 664-665.
[246] *See T.L.O.*, 469 U.S. at 339.

approaches to interpreting the 4th Amendment which would independently justify school searches under a standard of reasonable suspicion or lower. It would be fruitless to classify SROs as law enforcement officials because they would still be able to engage in the same behaviors which serve to funnel children into the pipeline. Therefore, challenging the classification of SROs is not an effective method towards solving the problem of the school-to-prison pipeline.