Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse

Paul Holland

Follow this and additional works at: https://digitalcommons.law.seattleu.edu/faculty

Part of the Courts Commons, Fourth Amendment Commons, Juvenile Law Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
https://digitalcommons.law.seattleu.edu/faculty/568

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.
INTRODUCTION

Walking the halls of America’s public schools today, one should not be surprised to see a police officer. Officers’ regular activities at schools include making arrests, teaching class, and talking with students (the troubled and the curious). The presence of police in schools has changed more than just the frequency and nature of interactions between students and police. School administrators have altered their activities to collaborate with police officers. Unsurprisingly, these changes have had an impact beyond the walls of the schools. Walking the halls of America’s juvenile courts, one should not be surprised to see young people facing charges arising out of incidents at school. This article addresses one particular aspect of this transformation of the educational and juvenile justice systems: the applicability of the Miranda rules to the interrogation of
students at school. 3

To speak generally about the role of police in schools is to speak inaccurately. With respect to many American schools today, the epithet “police-dominated atmosphere,” taken from the Miranda opinion, would be hyperbolic. 4 Principals and teachers have always asserted authority over students as part of their responsibility to educate, and in many schools the authority which school administrators wield retains this tutelary character. 5 There are, however, many schools where the police have asserted their authority with all the force at their disposal. A 2005 report described that “[d]ozens of incidents in which police officers have used electric stun guns to subdue unruly students have led school officials around the USA to restrict the use of the devices on campus.” 6

A school with a traditionally tutelary principal and one with a taser-firing officer stand at opposite ends of a spectrum with respect to the degree and nature of force to which students may be subjected. Miranda claims at either end are fairly easy to address. A principal, acting alone and without invoking or outwardly benefiting from the authority of any law enforcement officer may question a student without complying with Miranda’s requirements. A student’s answers to such questions will be

3. In Miranda v. Arizona, 384 U.S. 436, 467-74 (1966), the Supreme Court ruled that before engaging in custodial interrogation, law enforcement officers must inform suspects that they have the right to remain silent, that any statements they make can be used against them, that they have the right to consult with counsel and to have counsel present during interrogation and that if they cannot afford counsel, counsel will be provided for them.


5. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (noting that court has previously emphasized that “the nature” of the State’s power over schoolchildren “is custodial and tutelary”).

admissible at subsequent juvenile or criminal proceedings. On the other hand, a police officer who acts in traditional law-enforcement mode—for example arranging for a student to be removed from class, handcuffed, and placed in a closed office alone with the officer—must advise the student of her rights before questioning the student. If the officer fails to do so, any statements made by the student will not be admissible in juvenile or criminal proceedings. The challenges for courts will come from the array of cases that fall between these two extremes. The modern alignment between educational and law enforcement authorities requires courts to determine whether and when a principal’s collaboration with police renders the principal’s questioning subject to *Miranda* and how an officer’s part-time assignment at the front of a crowded classroom should affect the analysis of the officer’s subsequent interrogation of a lone student in a closed office.

The Supreme Court has never issued an opinion addressing the application of *Miranda’s* rules to interrogation occurring at a school. The Court has ruled, however, in *New Jersey v. T.L.O.*, that school officials acting in furtherance of their educational responsibilities have greater latitude under the Fourth Amendment than law enforcement officers do to search students and their property. Many courts have simplistically combined *T.L.O.* and *Miranda* and assumed that *Miranda* does not apply to questioning by school officials unless those officials are acting as agents of law enforcement. These opinions have not addressed, often because it was unnecessary on the facts presented, the extent to which the developments in school-law-enforcement collaboration have rendered the *T.L.O.* framework obsolete.

This article is not the first to suggest that modern school-policing practices have undermined *T.L.O.’s* continued vitality.

---


8. See Part II.A. *infra* for a discussion of these cases.

9. See Kagan, *supra* note 6, at 294 (noting that “the increasingly complex relationship between schools and law enforcement requires revision” of the *T.L.O.* doctrine); Pinard, *supra* note 7, at 1080-82 (noting that *T.L.O.* provides no guidance on how courts should treat the increased presence of law enforcement in public
Unsurprisingly, the work that has addressed this subject has developed within the framework of the Fourth Amendment. This article directs attention to the manner in which modern practices illuminate the fallacies of the doctrinally unsound extension of *T.L.O.* into Fifth Amendment analysis. Courts' frequent and superficial *T.L.O.* gloss on the *Miranda* requirements ignores important distinctions between the Fourth and Fifth Amendments. In those cases that do not exempt all school-sited questioning from *Miranda*’s reach, courts place too much weight on the job title of the questioner without taking account of the full context in which the questioning took place. Rather than offering persuasive analysis, some courts have summarily dismissed the suggestion that *Miranda* has any meaningful role to play in addressing school-sited interrogation. Judges present this dismissal as a necessary act of self-restraint in which they are refusing to add the “burden” of *Miranda* compliance on school administrators or the law enforcement professionals with whom they collaborate.

This rhetoric is misleading in that it (1) overstates the effect of recognizing *Miranda*’s appropriate scope in the school interrogation setting and (2) suggests that those raising or recognizing *Miranda* claims on behalf of interrogated students would be introducing the criminal justice framework into the school setting. Having decided to coordinate educational and law enforcement practices, educators and law enforcement officials have imposed the criminal justice paradigm on students’ behavior at school. This article does not assess the legitimacy of this coordination but instead proposes a framework for appreciating (schools); Jacqueline Stefkovich & Judith Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25, 25-26 (1999) (arguing that the *T.L.O.* decision did not sufficiently address the complex nature of the public school system in relation to the historical background of the Fourth Amendment and its requirements of law enforcement).

10. See, e.g., *M.H.* v. *State*, 851 So. 2d 233, 233-34 (Fla. Dist. Ct. App. 2003). The court issued a conclusory one-paragraph ruling that the presence of an officer at the principal’s interrogation of a student was not enough to render *Miranda* applicable. *Id.* That rule is unobjectionable, but the assumption that the principal’s action was not cloaked in authority shared with the police officer is faulty.

and appropriately regulating its effects on the lives, rights, and power of the principal parties—students, educators, and police officers. This article shares with the T.L.O. opinion the concern that decisions involving the rights of students at school be rooted in an accurate appreciation of school life. This article moves beyond T.L.O. and its progeny, however, by confronting the complexity of modern school-law-enforcement collaborations, as seen in a recently published study of the activities of School Resource Officers (SROs) from across the country.  

A categorical approach to Miranda's application to school-based interrogation (e.g., one that creates a rule for all schools or that makes the questioner's job title dispositive) ignores the diversity of approaches within current school-based law enforcement practice and disregards the intimidating aspects of many encounters students have with law enforcement officers and the school administrators who work with them. This article directs courts to base their application of Miranda on an explicit and contextually sound consideration of the relationships among students, officers, and administrators. This article argues that Miranda applies when a state agent questions a student under circumstances in which it would be reasonable for the student to believe that she is the subject of law enforcement authority, regardless of whether a law enforcement officer conducts the questioning.  The determination that Miranda applies is not tantamount to a decision that the student was in custody. It is merely a prelude to the custody inquiry. This article does not call for any change in the prevailing definition of custody, but proposes a structure for that inquiry that takes into account the special features of the school setting.

12. The study, funded by the National Institute of Justice, was conducted by Peter Finn, Michael Shively, Jack McDevitt, William Lassiter, and Tom Rich. See generally CASE STUDIES, supra note 2 (outlining results of SRO study); PETER FINN, ET AL., NATIONAL ASSESSMENT OF SCHOOL RESOURCE OFFICER PROGRAMS FINAL PROJECT REPORT (2005) [hereinafter REPORT] (same); PETER FINN, ET AL., COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER PROGRAMS (2005) (hereinafter COMPARISON) (same).

13. This test echoes Pinard's call for a more expansive understanding of law enforcement "involvement" in the Fourth Amendment context. See Pinard, supra note 7, at 1070 (suggesting that Fourth Amendment standards be employed when law enforcement is involved in school searches, "either through their actual physical involvement or through policies which transfer discretion from school officials to law enforcement authorities"). As will be discussed in Part II, however, there is considerable divergence in application of these similar notions to the discrete doctrines.
The attention called for here to the actual conditions of modern schools would not result in an inflexible requirement that all children be deemed to be in custody (and thus entitled to *Miranda* warnings) by virtue of their compulsory presence at school. Properly understood, the test set out above need not interfere greatly with the effective administration of school safety or discipline. A school administrator and even a school-based police officer could question a student in most school settings without the need to advise the student of his *Miranda* rights.

Part I of this article illustrates the ways in which courts have mishandled the issue of *Miranda* in the modern school context. Framed around a recent state court case that generated five opinions that each failed to adequately address the issue, this section includes a basic outline of *Miranda* principles and introduces the ruling in *T.L.O.* Part II demonstrates that *T.L.O.* cannot provide an adequate foundation for resolving the question of students' rights during interrogation because of fundamental differences between the Fifth Amendment and Fourth Amendment and between interrogation and the search for physical evidence. Part III sets forth how the *Miranda* framework sensibly accommodates the attention to relationships that is essential for resolving the challenges presented by modern school-policing as described in the National Assessment of SRO programs. Part IV illustrates (with a Case Study examining the complex dynamics of student-officer relations and a separate close analysis of a principal-officer collaboration) the ways in which the approach developed here preserves students' rights while also permitting effective security measures in schools, thus promoting essential instruction in constitutional democracy.

---

14. A plurality of the Pennsylvania Supreme Court made this mistake in its treatment of the issue in *R.H.* See *R.H.*, 791 A.2d at 333-34 (stating that it was “uncontested that Appellant was in custody during the interrogation”).

15. In fact, the rule proposed herein recognizes—contrary to many cases that cite *T.L.O.* as a basis for limiting *Miranda*'s reach—that *Miranda*'s protections do not extend to all cases in which school officials are in fact acting as agents of law enforcement. Consistent with established *Miranda* doctrine, warnings would not be required in any case in which the circumstances of a school official's questioning fails to convey to the student that the official is sharing or otherwise drawing on the authority of law enforcement officers. See Illinois v. Perkins, 496 U.S. 292, 295 (1990) (noting that *Miranda* presumes “that the danger of coercion results from the interrogation of custody and official interrogation”).
I. MIRANDA MEETS T.L.O. DOWN BY THE SCHOOLYARD

A. IN RE R.H.: ONE STUDENT + TWO SCHOOL POLICE OFFICERS = FIVE JUDICIAL OPINIONS

Investigating a report of breaking and entering and vandalism, school police officers at East Stroudsburg High School in Pennsylvania entered a classroom and discovered graffiti on the blackboard, desks overturned, and a discharged fire extinguisher. Although employed by the school rather than any municipal law enforcement agency, the school police officers were vested with the same power to arrest as any municipal officer (with this power confined to the territory of the school). The officers discovered a footprint in the fire extinguisher residue and focused their attention on R.H., a student whose size was consistent with the footprint and who had a history of behavior problems and attended a class in the room in question. One of the school police officers, dressed in uniform and wearing a badge, located R.H. and escorted him to the main administration building where he had R.H. take off one of his shoes for comparison with the footprint in the residue. The officer told R.H. that his shoe matched the print they had found, that the officer was going to keep the shoe as evidence, and that he was going to question R.H. about the break-in. The officer and a colleague questioned R.H. without advising him of his Miranda rights.

16. R.H., 791 A.2d at 331. Courts in many states have addressed some aspect of this issue. See, e.g., In re J.C., 591 So. 2d 315, 316 (Fla. Dist. Ct. App. 1991) (affirming trial court's ruling that no Miranda warning was required when a school principal questioned a student in the presence of a sheriff's deputy); In re V.P., 55 S.W.3d 25, 27 (Tex.App. 2001) (affirming adjudication of delinquency after an investigation by a police officer and an assistant principal revealed the existence of a handgun in a student's possession); J.D. v. Commonwealth, 591 S.E.2d 721, 723 (Va. Ct. App. 2004) (affirming a conviction arising out of incriminating non-mirandized statements made by a student while being questioned by a principal in the presence of a police officer); In re L.A., 21 P.3d 952, 963 (Kan. 2001) (affirming conviction arising out of a search of a student's possessions by a principal and a school security officer). This article uses R.H. to set out the issues because the case generated so many differing views within one court and because the views help illuminate the issues that need to be resolved in order to develop a constitutionally correct approach to these questions.

17. R.H., 791 A.2d at 331.
18. Id. at 334.
19. Id. at 332.
20. Id.
21. Id.
rights, and R.H. admitted being involved in the break-in.\(^\text{22}\)

Charges were filed against R.H. in juvenile court and counsel for R.H. filed a motion to suppress the incriminating statement based on the officers' failure to advise R.H. of his *Miranda* rights before conducting a custodial interrogation.\(^\text{23}\) When the case reached the Pennsylvania Supreme Court, the State not only conceded that no warnings were given (a necessary concession given the evidence) but also conceded that R.H. was in custody (an unnecessary concession apparently based on either a misunderstanding of the law or the desire to obtain a broad ruling).\(^\text{24}\) Instead of contesting custody, the state sought affirmance of the lower court ruling on the ground that the school police officers were not law enforcement officers within the meaning of *Miranda* and thus, there was no basis for subjecting the interrogation to *Miranda* analysis.\(^\text{25}\) The seven justices deciding the case produced five opinions. Before addressing these opinions, this article will set out the pertinent elements of both *Miranda* and *T.L.O.* so that the discordant analyses can be seen in their proper doctrinal context.

1. **THE DOCTRINAL BACKGROUND**

a. *Miranda* Custody: A Basic Framework

i. A Degree of Restraint Similar to That Created by an Arrest

*Miranda* does not require police to advise suspects of their rights regarding interrogation unless the suspect has been "taken into custody or otherwise deprived of his freedom by the authorities in any significant way . . . ."\(^\text{26}\) The *Miranda* Court declared that the requirements it was imposing were necessary "to dispel the compulsion inherent in custodial surroundings . . . ."\(^\text{27}\) The individuals whose cases were before the Court in *Miranda*, all of whom were questioned at a stationhouse while being held against their will, qualified easily as having been "taken into custody." Courts have recognized that

---

23. *Id.* at 333.
24. *Id.*
25. *Id.* at 333-34.
26. *Id.* at 478.
individuals can be in custody in locations other than the stationhouse and that merely being at a police station does not render one in custody. Although the phrase “otherwise deprived of his freedom of action in any significant way” suggests a broad conception of custody, the Court has adopted a more restrictive view: “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.

ii. Suspect Focus

In *Thompson v. Keohane*, the Court directed judges to contextualize the facts of the interrogation as fully and richly as possible, making sure “the scene is set and the players’ lines and actions reconstructed.” This immersion in the facts is essential for the court to fully appreciate, as it must, the perspective of the suspect. An interrogator’s intention to arrest a suspect or to allow a suspect to leave does not affect the custody determination unless that intention would have been manifest to someone in the suspect’s position in light of the words and deeds of the officer and any other circumstances. Thus, a suspect may be found not to be in custody, for *Miranda* purposes, even though the officer concluded at the outset of the encounter that he was going to arrest the suspect, provided that the officer’s actions up to and during the time of the questioning did not communicate this intention. Similarly, a suspect may be found to be in custody, notwithstanding the officer’s intention to allow the

---

30. *Beheler*, 463 U.S. at 1125. The Court did create some grounds for confusion on this point in *Thompson v. Keohane*, 516 U.S. 99 (1995), in which it directed courts to ascertain whether a reasonable person would “have felt he or she was not at liberty to terminate the interrogation and leave?” at 112. This test approximates the test for seizure under the Fourth Amendment, and the Court had previously ruled that the class of Fourth Amendment seizures was larger than the class of custodial environments under *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). Whatever the Thompson Court meant to say by framing the issue this way, it reiterated that the “ultimate inquiry” was whether the suspect had been subject to arrest-like restraint. Thompson, 516 U.S. at 112.
32. *Berkemer*, 468 U.S. at 442. “[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” *Id.*
suspect to leave freely at the conclusion of the questioning, provided the circumstances were such that a reasonable person in the suspect's position would not have felt free to terminate the interrogation and leave.

This focus on the suspect aligns the custody inquiry with the definition of interrogation in *Rhode Island v. Innis*—express questioning as well as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." The *Innis* opinion explains that the definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police" precisely because *Miranda*’s rules were designed to protect suspects against coercive practices "without regard to objective proof of the underlying intent of the police." While intended as a guide to those who would conduct interrogations, the tests for both custody and interrogation are designed primarily to protect the subjects of that interrogation. Similarly, the central issue of this article—whether *Miranda* applies at all to a particular class of interrogations—must also be resolved with this degree of attention to the perceptions of the suspect.

b. The ABC's of T.L.O.: What Latitude Do School Administrators Have and When do They Have It?

The issue before the Court in *New Jersey v. T.L.O.* was the constitutionality, under the Fourth Amendment, of a principal's actions in searching a student's purse after a teacher reported that the student broke a school rule prohibiting smoking. In the course of the search the principal found marijuana and other incriminating items. The *T.L.O.* Court upheld the search, but did not give school officials the full authority the state had

---

35. *Id.*
36. The centrality of the suspect focus within *Miranda* doctrine is also evident from *Missouri v. Seibert*, in which a plurality of the Court applied a suspect-focused approach to a different issue within *Miranda* doctrine: the validity of a waiver of rights. *Missouri v. Seibert*, 542 U.S. 600 (2004). Describing the plurality's approach, Justice Kennedy wrote in his concurrence, "This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations." *Id.* at 621 (Kennedy, J., concurring).
39. *Id.*
sought. In a claim that foreshadowed the expansive position taken by Pennsylvania in \textit{R.H.}, when it asked that school police officers be deemed exempt from \textit{Miranda}, the attorneys for New Jersey had argued in \textit{T.L.O.} that the search did not violate the Fourth Amendment because students had "virtually no legitimate expectation of privacy in articles of personal property 'unnecessarily' carried into a school." The Court rejected the implicit assertion that students had no legitimate need for such items as not "well anchored in reality." The \textit{T.L.O.} opinion adopted a middle-ground approach, synthesizing concern for students' liberty with an appreciation of the demands on school administrators. The actions of school officials must comply with the Fourth Amendment's prohibition of unreasonable searches and seizures. In light of administrators' "substantial interest . . . in maintaining discipline in the classroom and on school grounds," however, the Court ruled that neither a warrant nor probable cause was necessary for such searches to be reasonable and thus constitutional. Instead, a search need be based only on a reasonable belief that it would turn up evidence of a violation of a school rule.

3. \textbf{THE R.H. OPINIONS}

The five opinions in \textit{R.H.} fail to successfully navigate the intersection of \textit{Miranda} and \textit{T.L.O.}. Although they come to different results, the plurality opinion and one dissent share the view that the issue is quite simple. The magnitude of the errors

\begin{itemize}
\item[40.] \textit{T.L.O.}, 469 U.S. at 341.
\item[41.] \textit{Id.} at 338.
\item[42.] \textit{Id.} at 339. It is now common for school districts to adopt policies, distributed to students and parents at the start of the school year, explicitly stating that the lockers assigned for student use while at school are school property and may be entered at any time by school officials, thus defeating any claim of an expectation of privacy in this space. See, e.g., Seattle Public Schools "Student Rights and Responsibilities,Revised 8/2005, p.4, www.seattleschools.org/area/discipline/SRR2005-06official-English.pdf, last visited 5/4/06.
\item[43.] \textit{Id.} at 333.
\item[44.] \textit{Id.} at 339-42. "[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult . . . . Accordingly, we have recognized that maintaining security and order in the schools required a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." \textit{Id.} at 340.
\item[45.] \textit{T.L.O.}, 469 U.S. at 342.
\end{itemize}
within these two brief opinions, however, is evidence of the issue’s complexity. One concurrence highlights the core concern of *Miranda* most clearly, but then shies away from the practical implications of its basic insight. The remaining two opinions engage in a rhetorical battle to claim *T.L.O.*’s legacy. A dissent sees in *T.L.O.* a way to sidestep, or at least minimize, *Miranda*’s impact on the school setting, while a concurrence views *T.L.O.* as a way of placing some constraints on school-based interrogation. Each of these latter opinions is consistent with *T.L.O.* to some degree, but neither is suitable as a basis for a set of rules governing school-based interrogation.

a. **Plurality Opinion**

The plurality concluded that *Miranda* did apply to the questioning of R.H. by the school police officers and cited as a reason the fact that “the interrogation ultimately led to charges by the municipal police, not punishment by school officials pursuant to school rules.”\(^4\) As one of the dissents points out, this logic is patently erroneous. The custody determination must be made in light of the nature of the encounter between questioner and suspect, as experienced, not as transformed by later events. If an officer’s decision to detain a suspect does not render an otherwise consensual encounter custodial, there is simply no basis for according a prosecutor’s subsequent charging decision any significance in the *Miranda* inquiry.\(^4\)

The lead opinion contains another equally significant flaw in its acceptance (and apparent approval) of the state’s concession that all students are in custody by virtue of their status as minors. The United States Supreme Court has recognized, in *Schall v. Martin*, that children are “always in some form of custody.”\(^4\) Like *T.L.O.*, however, *Schall* did not present Fifth Amendment concerns, and its holding and reasoning are of limited utility in deciding the proper scope of *Miranda* in the school setting. “Custody” as used in *Schall* is properly understood as a form of control to which minors are subject by virtue of their dependent status. This concept, describing a minor’s inability to make decisions and the need and obligation of another to make them for him/her, lends nothing to an analysis of *Miranda*

---

custody, which involves constraint imposed through the coercive power of the state.

b. Dissent: When is a Police Officer Not a Police Officer?

As blithely as the plurality adopted the fallacious custody claim, one dissent summarily dismissed the notion of requiring school police officers to provide *Miranda* warnings. According to this opinion, the school police officer who interrogated *R.H.* "was not a law enforcement officer for purposes of the Fifth Amendment." This opinion stated that because they worked at a school, the officers should be treated by courts in the same manner as any other school employee. This assertion begs the questions why the legislature would have conferred traditional law enforcement powers—to arrest and detain—upon these officers and why the District opted for a school police officer rather than, for example, a private security guard. The opinion makes no attempt to explain why the place *where* the officers do their job—rather than *what* they do or *how* they do it—should control the analysis. This absence renders the opinion empty. Custody is not a function of location or of job titles. Custody, for *Miranda* purposes, is a condition in which a suspect may be placed. Ignoring the nature of the officers' authority and the ways in which it differs from that of traditional school officials is simply nonsensical.

The dissent's reasoning is like a riddle—when is a police officer not a police officer? The author's linguistic contortions around this issue are unfortunately not unique. In an even more troubling example, a Florida appellate court affirmed a ruling that a student was not entitled to receive *Miranda* warnings when questioned in a principal's office despite the participation of a sheriff's deputy in the interrogation. At the hearing on the suppression motion, the deputy testified that he "could have asked a question or two." The appellate court noted this "complication" and stated, "[w]ithout more, this participation by the deputy would, in our opinion, require the giving of a *Miranda*..."
warning, but the trial judge here was apparently satisfied that the deputy’s contribution was *de minimus* and, as the judge said, ‘it doesn’t strike me that the questioning was by the police officer.’ This example shows a court electing to be complicit in the infantilization of the justice system as it affects the rights of children, rather than honestly putting a true name to the law enforcement practices it can only pretend not to see.

Such seemingly result-oriented opinions are not produced only by judges who are loath to apply *Miranda* to school-sited interrogation. The Minnesota Court of Appeals ordered the suppression of statements per *Miranda* despite the fact that the sheriff conducting an interrogation told the student that “he did not have to answer the detective’s questions and he was free to go at any time.” While telling a suspect that he does not have to answer questions, and no more, would be inadequate as an administration of the *Miranda* warnings, telling a suspect that he is free to leave, if done in a minimally plausible way, removes the suspect from the coercive setting in which such warnings are required. A suspect in such circumstances could neither claim that he was seized under the broader Fourth Amendment standard nor that he was subject to restraint equivalent to arrest. The detective in this case was investigating an alleged sex offense and asked the youth several times if he was acting out of curiosity.

54. *J.C.*, 591 So. 2d at 316. *But cf.* *In re G.S.P.*, 610 N.W.2d 651, 659 (Minn. Ct. App. 2000) (finding that principal and officer who alternated questioning were engaged in “one concerted effort” that required warnings before any questions could be asked by either of them).

55. The Illinois Supreme Court engaged in a similar rhetorical maneuver, albeit in the Fourth Amendment context, in *People v. Dilworth*. 661 N.E.2d 310 (Ill. 1996). The Court essentially ignored the testimony of the school liaison officer in that case that he opened and searched a flashlight belonging to a previously unsuspected student because the student and a friend were “looking, laughing at [him] like [he] was played for a fool.” *Id.* at 313. Unable to shoehorn this action into the category of searches carried out or initiated by school officials, the court invented its own classification, stating, “[t]his case is best characterized as involving a liaison police officer conducting a search on his own initiative and authority, in furtherance of the school’s attempt to maintain a proper educational environment.” *Id.* at 317. That characterization is “best” only in the sense of “what is the best face one can put on an action that is best understood as an officer asserting his authority in the face of a mild challenge to it?” This ruling’s disregard for the lived context of the school hallways makes it far from “best” or even good as a model for addressing law enforcement activity in schools.

or the desire to rape or use force. The court appears to have been troubled by this mode of questioning and the ability of the student to resist the detective's tactics. The court offers no satisfactory explanation, however, for its ruling that custody existed notwithstanding the detective's introductory statements regarding the student's freedom to leave. As with the other cases discussed in this sub-section, the judge is denying words their most obvious meaning.

c. Concurrence: The Benefits and Limits of Judicial Modesty

One brief concurring opinion from R.H. rejects the all-or-nothing approach of the plurality and this first dissent. While seeking to preserve the latitude necessary for school administrators to perform their jobs, this judge remarks on the "significant change in dynamics in encounters involving school officials dedicated to security and investigative purposes and, in particular, uniformed school police officers, particularly where they are possessed with the power and authority of law enforcement officials, including the power of arrest." This sensitivity to the power relations within the interrogation encounter is at the heart of the approach this article develops in Parts III and IV. The opinion, however, makes no effort to draw lines that could serve as useful guides applicable to the array of security and law enforcement practices present in modern schools.

d. Concurrence: A Test That Flunks

The author of the above-described brief concurrence may well have been warned off of any attempt to provide a broadly applicable test by the failure of the concurring colleague who tried to do so. This concurrence proposes a complicated balancing test under which warnings would be required when

58. Id. at *6-7.
59. Id. at *7.
61. R.H., 791 A.2d at 350. The author of this opinion speaks directly to the two dissenting judges, writing in a footnote to the section quoted here that "the distinction between educators and those operating under color of police authority and possessing general police powers including the power of arrest" is "highly material." Id. at 350 n.1.
“the constitutional interests of the student outweigh the interest of the school in solving the crime.”\textsuperscript{63} Attempting to fuse \textit{Miranda} and \textit{T.L.O.}—in its words, to “extend \textit{T.L.O.”}\textsuperscript{64}—the concurrence creates a hybrid that does not produce the benefits of either opinion. The opinion is reminiscent of \textit{T.L.O.} in the sense that it affirms the continued existence of a constitutional right for students while at the same time promising greater latitude for school officials. The test, however, is doctrinally unsound and wholly impracticable. It mistakenly imports the reasonableness standard of the Fourth Amendment into Fifth Amendment doctrine\textsuperscript{65} inviting school officials to demonstrate that, notwithstanding the fact that a student was in custody, “it was reasonable for them not to Mirandize the student.”\textsuperscript{66} This doctrinal transplant must be rejected. According to \textit{T.L.O.}, a school official intending to search a student’s person or property need only consider her reasons for believing the student has violated a rule.\textsuperscript{67} This is fairly concrete. The \textit{R.H.} concurrence asks that same official to consider if she has sufficient reasons for not advising a student who would otherwise be entitled to receive warnings.\textsuperscript{68} This requires something quite different from an evaluation of the quality or quantity of evidence supporting one’s actions. It requires one to make a judgment about the relative value of competing interests. Asking those involved in investigating possibly criminal conduct to contemplate and compare such countervailing interests is to ask for an unattainable degree of even-handedness.

A review of the factors to be considered as part of this inquiry reveals that this approach also severely underemphasizes the perspective of the suspect. The factors the opinion requires be considered are:

(1) the age of the student to be questioned (the older the student is, the more likely the information elicited . . . will be used against him in a court of law . . .); (2) the ability of the juvenile to understand the \textit{Miranda} warnings . . .; (3) the gravity of the offense alleged (likewise, the more serious the

\textsuperscript{63.} \textit{R.H.}, 791 A.2d at 348 (Newman, J., concurring).
\textsuperscript{64.} \textit{Id.}
\textsuperscript{65.} \textit{See infra} Part II.B. (discussing Fourth Amendment principles and \textit{Miranda’s} scope).
\textsuperscript{66.} \textit{R.H.}, 791 A.2d at 348.
\textsuperscript{68.} \textit{R.H.}, 791 A.2d at 348 (Newman, J., concurring).
offense ... the more likely that he will be criminally charged); (4) the prospect of criminal proceedings, as opposed to merely school-related discipline; and (5) the extent of the coercive environment in which the questioning occurs. 69

Factor (2) is central to the determination of whether a suspect was capable of making a valid waiver of his rights, but it has no place in determining whether the suspect was entitled to these rights in the first place. Factors (1) and (3) are merely guides to make the necessarily speculative consideration of factor (4) more manageable. 70 They are rough surrogates, at best, for the likelihood of prosecution, and no clear guidelines are possible. In sum, the concurrence avoids the error of the plurality opinion, which relied on what did happen after interrogation, by installing a test that requires courts to go back to the moment of the interrogation and make a prediction, as of that instant, as to what was likely to happen. This is decidedly not an improvement. Factor (5), the opinion notes, “presumes the existence of custody.” 71 The test proposed by the concurrence thus suggests a concept of super-custody, requiring warnings while denying protection to student-suspects subject to merely typical custodial restraint.

e. Dissent: Partial Credit, But Excessive Passion

A second and more detailed and impassioned dissent cogently dissects the errors already noted in the plurality opinion with regard to the issue of custody and the consideration of post-interrogation events in determining whether Miranda warnings were required. 72 This dissent articulates the appropriate test for custody, requiring “some restriction on liberty beyond that inherent in the school setting, and of a nature likely to affect substantially the student’s will to resist and compel him to speak where he otherwise would not do so...” 73 In addition, the

---

69. R.H., 791 A.2d at 348.
70. Id. As explained in Part III.B.2. infra, it is appropriate to consider a suspect’s age in the custody inquiry, but not because of the concurrence’s unsupported assertion that a suspect’s age helps determine the likelihood of prosecution. Instead, age is important precisely because it is a necessary consideration for truly appreciating the coercive nature of the setting.
71. R.H., 791 A.2d at 348.
72. Id. at 336-46 (Castille, J., dissenting).
73. Id. at 339. See Cervantes v. Walker, 589 F.2d 424 (9th Cir. 1978) (finding a prison inmate in custody for Miranda purposes only when subject to restriction on liberty greater than that inherent in status as prisoner).
dissent is also persuasive in its rejection of the unworkable test offered in the concurrence.\textsuperscript{74} Also, the dissent soundly attempts to bring the discussion back to the crucial overarching question of whether “the concerns that powered the \textit{Miranda} decision are present”\textsuperscript{75} in the modern schoolhouse setting.

Having cleared away much of the brush left behind by the other opinions, however, this dissent forges errors of equal if not greater significance. The dissenting judge states that he was “unconvinced that appellant was in fact not free to leave” the interrogation room.\textsuperscript{76} It is worth recalling that one of the two school police officers questioning the student had taken the student’s shoe, telling him he was going to compare it with the footprint, and then, having made the comparison, told the student that his shoe matched the print they had and that the officer was keeping the shoe as evidence and was going to question the student about the break-in.\textsuperscript{77} Reason and common sense—the values that the dissent invokes later in its opinion\textsuperscript{78}—would lead anyone in the student’s circumstances to conclude that (1) the officer had concluded he had committed the crime\textsuperscript{79} and (2) having taken his shoe, the officer did not intend to allow the student to walk out of the room.\textsuperscript{80}

Resisting the import of these fairly obvious conclusions, the dissent notes, as if it were significant, that “the record here is silent as to \textit{what would have happened} if appellant had refused to cooperate or attempted to leave the school building.”\textsuperscript{81} “What would have happened,” even if discernible with confidence after the fact, is not a proper consideration in the \textit{Miranda} custody inquiry. Before pointing out this supposedly significant gap in

\textsuperscript{74} \textit{R.H.}, 791 A.2d at 345.
\textsuperscript{75} \textit{Id.} at 337.
\textsuperscript{76} \textit{Id.} at 337.
\textsuperscript{77} \textit{Id.} at 332.
\textsuperscript{78} \textit{Id.} at 341.
\textsuperscript{79} The officer’s mere possession of information creating probable cause would not be relevant to the custody inquiry per \textit{Stansbury}, but once the officer communicates the information to the suspect, he has changed the way the suspect will interpret the situation, particularly with respect to his freedom to leave.
\textsuperscript{80} While it would have been physically possible for the student to leave, of course, the notion that any student would think he would be permitted to walk away is purely fanciful. The fact that this incident occurred in December in Pennsylvania also undermines the dissent’s implicit suggestion that the student could simply have headed home barefoot.
\textsuperscript{81} \textit{R.H.}, 791 A.2d at 337. (emphasis added).
the record, the dissent also fills in a different gap, concluding that the student was “likely acquainted” with the school police officers as a result of his prior disciplinary problems at the school.\textsuperscript{82} As far as can be gleaned from the totality of the opinions in this case, the student’s disciplinary record indicated he had “exhibited unruly behavior.”\textsuperscript{83} There is no reference in any opinion to any evidence in the record showing that the student’s behavior prior to the alleged break-in ever required intervention by anyone other than a teacher. As discussed in Part III, the nature of a student’s relationship with authority figures in the school is a proper consideration in determining the applicability of \textit{Miranda}. To be truly helpful, however, it is essential that conclusions about the relationship rest upon solid evidence.

This imprecision as to the facts presented is indicative of the dissent’s relative lack of concern with the case before it and its interest in a more far-reaching mission: resisting the “importation of \textit{Miranda} from the station house to the schoolhouse.”\textsuperscript{84} It is curious, to say the least, that the “importation” of criminal justice principles “from the station house to the schoolhouse” appears to raise such alarms only when those principles constrain, rather than extend, authority—or preserve, rather than derogate, rights.\textsuperscript{85} The dissent wields the “seminal case” of \textit{T.L.O.} as the principal means of resisting this feared importation, urging that if \textit{Miranda} cannot be entirely abolished, at least its effect in schools could be modified by “a \textit{T.L.O.-like rule of reason and common sense}.”\textsuperscript{86}

There is more passion than reason in the dissent’s lament, “[w]hat is a fourth-grader, for instance, to make of the \textit{Miranda} litany?”\textsuperscript{87} This judicial \textit{cri de coeur} is notable for two reasons. First, the case before the court involved a high school student. Assuming, if only for a moment, that a person’s incapacity to understand and invoke legal protections was a basis for denying the individual those protections, the proper response to that would include, as the cumbersome concurrence did, a mechanism

\textsuperscript{82} \textit{R.H.}, 791 A.2d at 338. At this juncture in the opinion, the dissent refers to the officers as “members of the school staff,” an obvious rhetorical turn intended to downplay the significance of the officer’s law enforcement authority. \textit{Id.}

\textsuperscript{83} \textit{Id.} at 332.

\textsuperscript{84} \textit{Id.} at 337.

\textsuperscript{85} \textit{Id.}

\textsuperscript{86} \textit{Id.} at 340.

\textsuperscript{87} \textit{R.H.}, 791 A.2d at 344 n.6.
for determining the individual's capacity before extinguishing the protection entirely. Even a minimalist approach, such as requiring warnings in the high school setting but not in elementary school would be a marked improvement over this dissent's blanket exclusion of all students from *Miranda*'s protection. This minimalist approach would itself be constitutionally unsatisfactory precisely because justice requires that those who are ill-equipped to assert their rights in the criminal justice process receive greater, not lesser, protection than those who can protect themselves. The dissent's hypothetical fourth grader does not become any more competent when interrogated by a police officer at the police station, yet the child is undoubtedly entitled to all of *Miranda*'s protections in that setting. The mere invocation of overstated horrors is simply an inadequate foundation for determining whether and how the school setting and the responsibilities of those who work within it require modification of basic constitutional norms, such as those announced in *Miranda*.

In sum, the *R.H.* opinions, though numerous, prove inadequate to resolve the question before the court. None of these opinions, save the brief concurrence, truly focus on *Miranda* at all, despite its centrality to the issue. The battle between the *R.H.* dissent and concurrence over how best to apply *T.L.O.* to school-based interrogation is instructive for what it reveals about how courts are inclined to treat these issues, but, ultimately, the energy that went into the concurrence's elaborate test and the dissent's vehement protest is ultimately wasted. Parts II and III of this article demonstrates how fundamental doctrinal and practical questions render *T.L.O.* largely irrelevant and *Miranda* especially well-suited to reconciling the disparate interests presented by school-based interrogation, in all of its various forms.

**II. *T.L.O.*'S ACCOMMODATION OF THE INTERESTS OF AUTHORITIES AND THOSE OF STUDENTS IS UNSUITED TO THE INTERROGATION CONTEXT**

**A. *T.L.O.* ADDS LITTLE TO THE INTERROGATION ANALYSIS**

At its most abstract level, *T.L.O.* remains instructive today:

---

89. *Id.* at 344 n.6.
courts cannot determine the nature of students' rights and the appropriate means of regulating the activities of school authorities unless they first examine the actual circumstances of the schools. However, T.L.O.'s most notable doctrinal innovation, i.e., the creation of a separate standard imposing fewer restrictions on school officials than on law enforcement officers, is misdirected in the context of modern school-based interrogation. Courts have consistently ruled that Miranda warnings are unnecessary when a principal or other administrator, acting completely independently of any law enforcement agency, questions a student. In one such case, the Appellate Division of the New Jersey Superior Court held that a student's answers to a principal's questions were admissible despite the absence of Miranda warnings, writing:

_We have no doubt, however, that the T.L.O. standards concerning Fourth Amendment searches are equally applicable to defendant's Fifth Amendment claim._ A school official must have leeway to question students regarding activities that constitute either a violation of the law or a violation of school rules. This latitude is necessary to maintain discipline, to determine whether a student should be excluded from the school, and to decide whether further protection is needed for the student being questioned or for others._

90. _In re Navajo County Juvenile Action No. JV91000058_, 901 P.2d 1247, 1249 (Ariz. Ct. App. 1995) (finding that because the principal was "responsible for safety, administration, and discipline in his school," had the "independent responsibility to investigate a student infraction committed on school grounds," and did not act "at the behest or direction of the police," Miranda warnings were unnecessary); _In re Corey L.,_ 250 Cal. Rptr. 359, 361 (Cal. Ct. App. 1988) (finding that "[q]uestioning of a student by a principal . . . cannot be equated with custodial interrogation by law enforcement officers" and thus, did not merit Miranda warnings); S.A. v. State, 654 N.E.2d 791, 797 (Ind. Ct. App. 1995) (finding that questioning by a school official and a student's father did not constitute custody for Miranda purposes); Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992) ("There is no authority requiring a school administrator not acting on behalf of law enforcement officials to furnish Miranda warnings."); State v. Tinkham, 719 A.2d 580, 583-84 (N.H. 1998) (finding that because the school principal who searched the defendant "was neither a law enforcement officer nor an agent of the police," no Miranda warning was needed); State v. Biancamano, 666 A.2d 199, 203 (N.J. Super Ct. App. Div. 1995) (finding that no Miranda warnings were required of a vice-principal who questioned defendant); _In re Harold S._, 731 A.2d 265, 268 (R.I. 1999) (allowing a non-Mirandized statement made to the principal to be admitted into evidence).

91. _Biancamano_, 666 A.2d at 202. (emphasis added).
A principal acting completely independently of any law enforcement agency, such as the one in the case quoted above, cannot possibly convey the sort of compulsion equivalent to that associated with arrest. Thus, there is no need for Miranda's protections. Accordingly, straightforward Miranda analysis would exempt such questioning from the rules applicable to custodial interrogation. The question of custody need not even be raised because the principal lacks the power that raises Miranda concerns. The T.L.O. opinion—which does not address interrogation or the Fifth Amendment privilege—simply does not make a meaningful contribution to this straightforward Miranda analysis. The error highlighted here, harmless in this context, becomes consequential when judges seek to extend T.L.O.'s "standards" to questioning conducted by or in the presence of law enforcement officers, i.e., individuals with the power to arrest and whose actions carry a threat of compulsion no principal acting alone can ever convey.

The T.L.O. Court limited its ruling to "searches carried out by school authorities acting alone and on their own authority" explicitly withholding any opinion as to "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies...."92 Although it did not cite to T.L.O. when doing so, the Supreme Judicial Court of Massachusetts adapted this approach to a Miranda inquiry in Commonwealth v. Snyder, stating "[t]he Miranda rule does not apply to a... school administrator who is acting neither as an instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile."93 Many of the cases exempting principals from Miranda cite either to Snyder or to a case relying on it.94 Thus, their analysis shares the same flaw—following Illinois v. Perkins, Miranda warnings need not be given to a suspect if he is unaware of the involvement of a law enforcement agent in the questioning.95 Thus, a principal's

94. See supra note 98 (discussing cases in which courts allowed statements without Miranda warnings).
95. Illinois v. Perkins, 496 U.S. 292 (1990). For a discussion of Perkins, see Part II.C. and III.C. It is perhaps understandable that Perkins had not come to the attention of the Snyder Court in 1992, but for this analysis to remain undisturbed by the time of the Tinkham opinion in 1998 is reflective of a deeply-rooted analytical error.
interrogation of a student could be stage-managed by a hidden police officer without violating *Miranda* even in the absence of warnings. "Guile," in and of itself, is not within *Miranda*’s concern. Thus, a hidden connection to law enforcement is the same for *Miranda* purposes as no connection.

It is not significant that the inapplicability of *T.L.O.‘s* Fourth Amendment framework to school-based interrogation involving law enforcement is most clearly shown by an example in which following *T.L.O.* provides more protection for students than *Miranda* requires. It is more important to note how these mistaken cases demonstrate the necessity of applying *Miranda* to modern school-based law enforcement practices. In the Fourth Amendment context, the “agent of law enforcement” exception recognizes that when a school administration agrees to introduce law enforcement activity into a school, it can only do so with the constitutional constraints imposed on law enforcement activity generally.\(^9\) If a school administrator must conform to constitutional criminal procedure norms when she agrees to a single, *ad hoc*, collaboration with law enforcement with respect to one particular incident, *a fortiori*, those same constitutional principles ought to constrain school practice when the administration undertakes a thorough-going multi-dimensional collaboration with law enforcement.\(^9^7\) This result is consistent with the language of *T.L.O.*, in which the court distinguished the principal there, who acted alone, from a principal acting “*in conjunction with* or at the behest of law enforcement agencies.” The phrase “*in conjunction with*” is italicized here because the typical form of collaboration in modern schools is marked by joint action between administrators and law enforcement rather than an agency relationship in which the schools merely do the bidding of the police.

---

96. State v. Heirtzler, 789 A.2d 634, 640 (2001) ("The record supports the trial court's conclusion that a prior agreement existed between the department and school officials for purposes of establishing that an agency relationship existed.").

97. See *infra* Parts III-IV for a thorough discussion of this argument. *See also* Heirtzler, 789 A.2d at 640. The court stated:

If school officials agree to take on the mantle of criminal investigation and enforcement, however, they assume an understanding of constitutional criminal law equal to that of a law enforcement officer. In such circumstances, even if school officials claim their actions fall within the ambit of their administrative authority, they should be charged with abiding by the constitutional protections required in criminal investigations.

*Id.* *See also* Pinard, at 1119-1120, and Kagan, at 325.

B. FOURTH AMENDMENT PRINCIPLES CANNOT FULLY PROTECT THE INTERESTS SERVED BY MIRANDA

The erroneous conflation of Fourth and Fifth Amendment analysis (e.g., “we have no doubt however, that the T.L.O. standards concerning Fourth Amendment searches are equally applicable to defendant’s Fifth Amendment claim”) may have escaped notice at a time when the constitutional basis of Miranda was in doubt. With Congress, many commentators, and the Supreme Court itself criticizing, minimizing, or belittling the opinion, lower courts could transpose the T.L.O. framework onto the interrogation setting and believe that they were giving suspects at least as much constitutional protection as was due and perhaps more. The R.H. dissent made this point explicitly, arguing that the fact that T.L.O. reduced protection for students under Fourth Amendment doctrine:

[If anything, counsels for a greater need for a reasonable, common sense rule in the Fifth Amendment context. Unlike issues involving school searches or seizures, questions involving Miranda already involve a significant degree of attenuation from the basic right being protected, i.e., the Fifth Amendment trial privilege against compulsory self-incrimination.]

In Dickerson, however, the Supreme Court looked past its own prior equivocation on the subject, invalidated Congress’s effort to minimize Miranda’s reach, and declared Miranda to have “announced a constitutional rule.” Thus, analysis of

100. See 18 U.S.C. § 3501 (2000) (listing factors for use by trial judges for determination of admissibility of confessions, which many commentators thought may legislatively overrule Miranda, but which was invalidated by Dickerson v. United States, 530 U.S. 428 (2000)).
102. Michigan v. Tucker, 417 U.S. 433, 445-446 (1974) (“we have already concluded that the police conduct at issue here did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege.” The Dickerson Court acknowledged “language in some of our opinions that supports the view” that Miranda did not announce a rule of constitutional dimension. Dickerson, 530 U.S. at 438.
104. Dickerson, 530 U.S. at 444.
Miranda claims cannot be so easily reduced to the quasi-constitutional or sub-constitutional status they previously received.105

To better understand the ways in which the Fourth Amendment framework of T.L.O. inadequately addresses the issues raised by interrogation, it is necessary first to consider the variety of purposes the Fifth Amendment privilege against self-incrimination serves. In Murphy v. Waterfront Comm'n, the Court wrote of the privilege:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."106

This multiplicity of interests has resulted in considerable confusion as to the nature of the privilege. This article does not attempt to delineate any irreducible essence of the privilege, but instead draws out the contrast—as it pertains to modern school-based law enforcement—between the protection provided by the privilege and that rooted in the Fourth Amendment right to be free from unreasonable searches and seizures.

105. See Chavez v. Martinez, 538 U.S. 760, 763 (2003) (holding that an officer's failure to provide Miranda warnings did not violate suspect's constitutional rights and thus did not give rise to a cause of action under title 42, section 1983 of the United States Code); United States v. Patane, 542 U.S. 630, 634 (2004) (finding that failure to provide Miranda warnings did not require suppression of physical evidence found as a result of an unwarned confession).
Unlike evidence subject to search or seizure, such as illegal drugs, a weapon, or an incriminating document, evidence sought by interrogation is inaccessible to the state until the moment that the suspect utters an incriminating response. The constitutional significance of this is evident from *Schmerber v. California* in which the highly invasive measure of extracting a suspect's blood was held not to violate the Fifth Amendment because it did not require the suspect himself to utter anything. In other words, the privilege protects an interest so deeply internal that it is not compromised even by a gross intrusion upon bodily integrity. It is this aspect of the privilege that led the *Murphy* Court to speak of the privilege as a means of respect for "the inviolability of the human personality." To reveal self-incriminating information by confessing is not merely to open a door behind which something is hidden; it is to surrender oneself, literally and figuratively.

The significance of these observations to the question of how to regulate school-based law enforcement can be seen from a quick hypothetical contrast. Walker Middle School is staffed with a full-time School Resource Officer ("SRO"). Holmes Middle School, a short distance away but in another school district, is not. The hallways at Holmes, therefore, are monitored by teachers and other staff. If one of the monitors at Holmes reports to the principal that she has seen a student engage in behavior that creates a reasonable suspicion, but not probable cause, that the student possesses illegal drugs, the principal at Holmes will be authorized, according to *T.L.O.*, to search that student. Assume that the SRO at Walker observes similar behavior and reports it to the principal at Walker. Can the principal search the student? And what about the SRO? The resolution of those questions turns on whether the new arrangements for policing schools undermine the rationale for the *T.L.O.* rule authorizing searches by school authorities on less than probable cause.

108. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964). See also, William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393 (1995). Stuntz locates the roots of the Fifth Amendment privilege in the prosecutions of dissenters in England, and he argues that this provenance renders the privilege ill-suited to the general run of criminal investigations. Stuntz further notes that although "as recently as a generation ago privacy was the dominant explanation for why the privilege existed," Stuntz, supra, at 394, "the privacy-autonomy value that lay at the core of Miranda" has since been abandoned. Stuntz, supra at 442-43.
Kagan and Pinard have argued that the principal should not be authorized to search under such circumstances. The North Carolina Court of Appeals recently held that even an officer should be permitted to search, provided the search is confined to the scope which would be allowed for the principal. What is most important about this scenario with respect to the question of interrogation is that the search itself is not meaningfully different when the officer conducts it than when the principal does.

The same cannot be said with respect to interrogation of a student. Unlike the searches in the example above, interrogation is a psychological rather than physical process. Thus, the nature and identity of the participants will matter. An officer's participation in interrogation necessarily changes the experience from the student's standpoint. The mere presence of a law enforcement figure at an interrogation is likely to create apprehension and even fear. If the officer participates in the questioning, the effects can be expected to be even greater. More important, the effects of an officer's presence or participation are likely to have a direct impact on the results of the process. Simply put, the marijuana recovered from a student's backpack will be exactly the same whether recovered by an officer or a principal, and it is no more likely to be discovered if the officer is involved. A suspect's statement, on the other hand, is the intangible product of an interaction between the people involved. The content of any such statement is shaped by the personalities and actions of all participants. The statements a student

109. See Kagan, supra note 6, at 294, 325 (describing students as “children without rights” who are searched and then subjected to “severely-punitive, adult-like consequences under the T.L.O. reasoning); Pinard, supra note 7, at 1070 (stating that “the current standards which govern the Fourth Amendment’s application in public school searches need to be revamped in light of the increased interdependency between school officials and law enforcement authorities in the years following [T.L.O.]”).

110. In re S.W., 614 S.E.2d 424, 426 (N.C. Ct. App. 2005) (extending analysis applied to searches by school officials to law enforcement officers working “in conjunction with school officials”). See also Stuntz, supra note 114, at 445 (reasoning that “one's privacy interest does not depend on whether one is being searched by a police officer or a school principal”).

111. This insight was at the heart of the abbreviated concurrence in R.H., discussed supra Part I. In re R.H. 791 A.2d 331 (2002) (Newman, concurring).

112. In a November 30, 2005 presentation at Seattle University School of Law, Professor Richard Leo (Criminology, Law and Society, University of California-Irvine) described a confession as “a co-authored product.”
makes in response to questioning may vary considerably depending upon his or her reaction to and apprehension of the people involved in the questioning. In fact, whether the student speaks at all may depend in large part on such reactions and apprehensions.

These distinctions between searching for evidence and conducting an interrogation are mirrored in the Fourth and Fifth Amendments. The T.L.O. Court was able to undertake the balancing of interests because the text of the Fourth Amendment makes reasonableness a central consideration and thus invites such balancing.\(^\text{113}\) The recognition of “special needs” within the school setting weighed in favor of expanded, but not unlimited, discretion for administrators.\(^\text{114}\) Individual rights had to yield accordingly, permitting searches upon a lesser showing of suspicion than would otherwise be required.\(^\text{115}\) In contrast, “[t]he Fifth Amendment’s strictures, unlike the Fourth’s, are not removed by showing reasonableness.”\(^\text{116}\) Authorities may not obtain judicial authorization to compel a confession, no matter what the quality or quantity of evidence supporting their action, unless they offer immunity and thereby remove the possibility of incrimination. The Fifth Amendment’s protections for the individual do not offer courts the opportunity for balancing, but instead require courts to scrutinize the circumstances in which the individual is placed for sufficient indicia of compulsion and then, if the compulsion comes from the custodial setting of an interrogation, to determine if the questioner complied with Miranda’s requirements.\(^\text{117}\)

C. DETERMINING MIRANDA'S PROPER SCOPE REQUIRES ANALYSIS OF THE RELATIONSHIPS AMONG ALL PARTIES TO SCHOOL-BASED INTERROGATION

The Miranda Court recognized that, even in the absence of physical coercion,\(^\text{118}\) a police officer’s dominance\(^\text{119}\) of the custodial

---

114. Id. at 351.
115. Id. at 365.
118. Miranda v. Arizona, 384 U.S. 436, 448 (1966) (“Since [Chambers v. Florida] this Court has recognized that coercion can be mental as well as physical and that
interrogation setting created grave risks to a suspect's ability to make and persist in a decision to refuse to answer questions. The Court highlighted the fact that contemporary interrogation manuals instructed officers to create and exploit conditions in which the suspect would be deprived of the support that would encourage or enable the suspect to resist the officer's authority. In the absence of such support, the suspect would lack confidence "in himself or his surroundings." As a result, the will of the suspect would collapse and be supplanted by the will of the interrogator. The protections announced in Miranda were designed to re-balance what would otherwise be a relationship of dominance.

Since Miranda, the Court has explicitly made the relationships among suspects, questioners, and important third-parties a crucial factor in determining the scope of Miranda's protections. Two such cases involved probation officers, individuals whose ambiguous status makes them an extremely useful comparison group in the discussion of school-based police. In Fare v. Michael C., the Court rejected a claim that a juvenile suspect's request to have his probation officer present was equivalent to the assertion of the right to counsel. In Minnesota v. Murphy, the Court ruled that statements made by an adult probationer in a mandatory interview with his probation officer need not be suppressed despite the absence of Miranda warnings even though the probation officer had inquired about crimes other than that for which the individual was on probation and had done so with the intention of reporting incriminating answers to law

the blood of the accused is not the only hallmark of an unconstitutional inquisition." (quoting Blackburn v. State of Alabama, 361 U.S. 199, 206 (1960)).
119. Miranda, 384 U.S. at 451 (citing one interrogation manual which taught would-be interrogators that a successful interrogator "must dominate his subject and overwhelm him with his inexorable will to obtain the truth").
120. Id. at 450. The Court highlighted the contrast one manual drew between a home and a police station. At home, the suspect's "family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." Id. Later, the Court crystallized the approach against which it designed its protections as follows: "To be alone with the subject is essential to prevent distraction and to deprive him of any outside support." Id. at 455.
121. This insecurity is created by keeping the suspect "off balance." Id. at 455.
122. See id. at 457 ("It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.").
These cases share more than their negative results for the suspects. In each case, the Court explained its ruling in ways that relate back to the concern about a relationship of dominance that was at the heart of Miranda. One of the ways the Miranda Court chose to accomplish the necessary re-balancing between suspect and interrogator was by granting the suspect the right to the presence of counsel, a person sworn to undivided loyalty to the suspect. The Fare Court ruled that a probation officer could not fulfill this function because a probation officer is:

[A] peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. [The probation officer] owes an obligation to the State.... In most cases, the probation officer is duty bound to report wrongdoing by the juvenile when it comes to [the officer's] attention, even if by communication from the juvenile himself. Precisely because the probation officer's loyalty runs in twoopposite directions—to the youth and to the law enforcement authorities—she is unable to achieve the rebalancing that Miranda seeks. In Murphy, the Court asserted that Murphy's prior dealings with his probation officer ought to have "served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the privilege." Just as the Fare probation officer could not sufficiently re-balance the interrogation setting, the Murphy probation officer was seen as insufficiently authoritative to unbalance a suspect and render him incapable of refusing to answer questions.

The Murphy Court did observe that "[a] different question would be presented if [the suspect] had been interviewed by his

125. Miranda, 384 U.S. at 469 (noting that "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators" which makes the right to counsel at the interrogation "indispensable to the protection of the Fifth Amendment privilege"). See also Edwards v. Arizona, 451 U.S. 477, 487 (1981) (holding that a suspect who asserts right to counsel cannot be interrogated unless he is first given the opportunity to consult with counsel or the suspect initiates contact with the authorities).
126. Fare, 442 U.S. at 720.
127. Murphy, 465 U.S. at 433.
Miranda and School Interrogation

The Court has never addressed that specific question, but it did resolve a similar issue in Arizona v. Mauro,129 where the suspect was in police custody related to the killing of his son. The police granted Mauro's wife's request to speak with Mauro, and then heard incriminating statements he made to her. The Mauro Court ruled that Miranda did not prohibit the admission of statements Mauro made in the course of the conversation with his wife, who was herself a suspect at the time of their conversation. The Court reasoned that, even though Mauro was indisputably in custody, questioning by his wife, someone he knew was not a law enforcement officer, did not amount to interrogation within the meaning of Miranda.

In Mauro, the nature of the relationship between questioner (wife) and suspect (husband) trumped the plain language of the controlling test for interrogation: "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."130 The Mauro majority strained to harmonize its ruling with the Innis test. The police did not question Mauro, but they did permit his wife to enter the room to speak with Mauro while an officer remained inside the room. Given the complete control the police had over Mauro's contact with other people while he remained in custody, his encounter with his wife was undeniably the result of action on the part of the police.131 With respect to the second half of the Innis test, the majority ultimately determined that, although incrimination was at least minimally foreseeable, the facts did "not present a sufficient likelihood of incrimination" to require a finding of interrogation under Innis.132 The Court made no effort to "show its math" with respect to this calculation of the probability of incrimination, and it is hard to see how one could conclude that incrimination was anything but the most likely outcome of such a conversation.133

---

128. Murphy, 465 U.S. at 429 n.5.
131. This situation is clearly distinguishable from one where a suspect is placed under arrest and while the police are arranging for his transport a family member approaches and engages the suspect in conversation. The inability of the police to control that inadvertent encounter would render it unjustifiable to consider the ensuing statement by the suspect as a result of police action.
132. Mauro, 481 U.S. at 529 n.6.
133. See WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 6.7 (4th ed. 2000)
Notwithstanding the foregoing criticism, the Mauro result is consistent with the core values of Miranda. However tortuously it applied the Innis test, the Mauro majority persuasively asserts that the “weakness” of Mauro’s claim of having been interrogated can be “underscored by examining the situation from his perspective,” the very thing that Innis requires courts to do. The Mauro majority raises a well-placed “doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way.” There is nothing in the case to suggest that it would have been reasonable for Mauro to conclude that his wife was being used as a tool by those with the ability to extend his custodial status or otherwise inflict harm on him if he chose not to speak to her. Thus, rather than placing excessive strain on the Innis formulation, the Mauro majority ought to have placed the case outside Miranda’s reach on relational grounds. The independence of the wife from law enforcement placed Mauro on level ground during their conversation, thus rendering untoward coercion unlikely and warnings unnecessary despite Mauro’s custodial status. Mauro has been cited in a number of third-party questioning cases in which a reasonable person in the suspect’s circumstances would have experienced the encounter as an incident within an ongoing relationship she had with the third-party and not as part of a joint undertaking between the third-party and law enforcement. In such cases, the suspect’s

134. Mauro, 481 U.S at 528.
135. See supra Part I. for a discussion of Innis.
136. Mauro, 481 U.S. at 528.
137. See generally Whitehead v. Cowan, 263 F.3d 708 (7th Cir. 2001) (holding that the defendant’s incriminatory statements to his friends were admissible although he asked for a lawyer); Snethen v. Nix, 885 F.2d 456 (8th Cir. 1989) (holding that the police had coerced the defendant into making inculpatory statements when they had his mother urge him to confess); Cook v. State, 514 S.E.2d 657 (Ga. 1999) (holding that the defendant’s incriminatory statements to his father were admissible because his father, through an FBI agent, was acting in his familial capacity when the statements were made); United States v. Gaddy, 894 F.2d 1307 (11th Cir. 1990) (holding that defendant’s aunt was not acting in her capacity as a police officer when she urged the defendant to confess). In most such cases, the non-police actor is a close relative or intimate acquaintance of the suspect, with no pre-existing relationship with the police (except for Gaddy and Cook where relatives who spoke with the suspects were professionally affiliated with police, although not engaged in official business when meeting with suspect). The primacy of the suspect-questioner relationship in the suspect’s eyes is best exemplified by Cook, in which the suspect asked to speak with his father at the same time that he asked for a lawyer. Cook,
responses are best seen as deriving from their relationship to the questioner rather than from the questioner’s relationship to the police.

_Mauro_ could be easily subsumed under _Illinois v. Perkins_, in which the Court held that statements made by an inmate to an undercover police officer posing as a fellow inmate did not need to be suppressed notwithstanding the absence of _Miranda_ warnings.\(^{138}\) The Court assumed, for purposes of discussion, that Perkins was in custody within the meaning of _Miranda_, and there was no doubt that he was interrogated in that he was asked direct questions about the offense under investigation.\(^{139}\) Thus, a formalistic application of _Miranda_ would have resulted in suppression. The _Perkins_ Court, however, recognized that, viewed from the perspective of the suspect, the dangers that _Miranda_ sought to prevent were not present.\(^{140}\) Perkins had no reason to believe that the person he was speaking with exercised any official authority over him or could use officially-sanctioned force to compel him to speak against his wishes.\(^{141}\) In other words, his relationship with his interlocutor was not unbalanced in any way that _Miranda_ warnings or the presence of counsel were necessary to correct. Although their significance for day-to-day criminal investigations has been largely eclipsed by _Perkins_, the _Mauro_ cases remain instructive for the examination of schoolhouse questioning precisely because the often-jumbled relationships characteristic of modern school-based law enforcement do not lend themselves to simple resolution per _Perkins_.

The foregoing analysis of Fourth and Fifth Amendment doctrines establishes that it is unwise to address school-based interrogation through the Fourth Amendment lens of _T.L.O._ and far preferable to look instead to _Miranda_ to resolve the

---

514 S.E.2d at 662. These actions suggest that he viewed the lawyer as a necessary buffer in his interactions with the police, but that he needed no such buffer with regard to his father. \textit{Id.}

138. _Illinois v. Perkins_, 496 U.S. 292, 295 (1990) ("Conversations between suspects and undercover agents do not implicate the concerns underlying _Miranda_. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.").

139. _Perkins_, 496 U.S. at 295.

140. \textit{Id.}

141. \textit{Id.}
complicated questions presented by such practices. Part III presents a framework for doing so that is tailored to the realities of modern school life, and Part IV applies that framework to examples of interrogation drawn from circumstances that have become common in schools today.

III. MINOR MODIFICATIONS TO MIRANDA DOCTRINE WILL BE SUFFICIENT TO ADDRESS THE SPECIAL CHALLENGES POSED BY MODERN SCHOOL-BASED INTERROGATION

The discussion in Part II.C of the significance of the relationships among suspects, questioners, and other actors provides a foundation for resolving whether and how the Miranda framework should apply to school-based interrogation. It bears pointing out that the determination that Miranda applies in a given situation does not amount to a ruling that warnings are required. Instead, such a determination is merely the prelude to the standard Miranda inquiry with respect to custody and interrogation. In deciding whether Miranda applies to any particular instance of school-based questioning, a court must ask whether it would be reasonable for a person in the circumstances of the student-suspect to believe that she was the subject of law enforcement activity. Rather than stopping at the superficially attractive inquiry "who asked the question(s)?," a court should conduct an analysis of the relationships among all parties involved. Courts should examine how a reasonable student would understand his or her experience, considering the role, if any, that a law enforcement officer plays in the specific encounter as well as the background norms within the school as to how authority is asserted in such situations. Where the totality of the circumstances reflect the influence of law enforcement authority, further Miranda analysis is necessary.

This approach expands upon, but is consistent with, the command of Miranda to provide guidance to law enforcement as

142. This formulation is similar to that set out by the Washington Supreme Court in State v. Heritage, 95 P.3d 345, 347-350 (Wash. 2004). In that case, however, the court focused on the suspect's perception of the identity of the questioner and the test offered here examines instead the suspect's understanding of the power to which she is vulnerable. This modification is necessary in order to capture the possibilities for coercion created due to school-law enforcement collaborations in which the boundaries between the authority and responsibilities of school and law enforcement actors are quite fluid.
to how the power conferred upon them may be used in the interrogation of suspects. In fact, this expansion is congruent with the obligation of school authorities to adapt their practices to criminal procedure norms when they engage in collaboration with law enforcement. Just as schools that "import" law enforcement practices into their domain assume an obligation to respect the constraints attendant upon such practices, so does a law enforcement agency that exports its authority into the school setting retain an obligation to continue to honor appropriate constraints with respect to how that authority is deployed and leveraged. Just as schools cannot pretend ignorance of the rules of criminal procedure, neither can police ignore, as beyond their responsibility, the ways in which school officials take advantage of their presence and actions.

Regulating school-based interrogation need not unduly hinder school-based policing. Applying basic Miranda principles will leave school and law enforcement officials with considerable latitude in how they operate generally and even with respect to how they conduct interrogations of student suspects. Thus, the protection of students' rights need not come at the cost of predictability for authorities or effective school security. Applying Miranda's rules to school-sited interrogation will not mean that administrators and school-based law enforcement officers will have to advise students of their rights before every conversation or inquiry. There are simple means, regularly employed by law enforcement in other settings and easily adapted by administrators, to enable school-sited authorities to pursue desired information without creating barriers to disclosure or compromising students' rights. The recognition that some school settings and law enforcement practices do create genuine risks of coercion, however, means that neither officers nor the school officials with whom they collaborate can assume that Miranda is inapplicable merely because the officials, rather than the officers, question students.

A. POLICE PERFORM A WIDE RANGE OF ROLES IN SCHOOLS TODAY

T.L.O. illustrates the common sense principle that in order

---

143. Miranda v. Arizona, 384 U.S. 436, 441-42 (1966) (granting certiorari "in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow").
to determine the scope of students’ constitutional rights, courts must engage in an accurate examination of the actual conditions in the schools.\textsuperscript{144} As noted earlier, the \textit{T.L.O.} Court rejected arguments in favor of broader latitude for administrators because they were “in tension with contemporary reality” or not “well anchored in reality.”\textsuperscript{145} Thus, before setting forth how \textit{Miranda} should apply to modern school-based interrogation, it is necessary to provide some detail about current school-based policing practices.

The National Association of School Resource Officers has recently claimed that school-based policing is “the fastest growing area of law enforcement.”\textsuperscript{146} A school resource officer (“SRO”) is a “certified law enforcement officer who is permanently assigned to . . . a school or a set of schools.”\textsuperscript{147} As of Fall 2004, the federal government’s COPS in Schools program had provided $748 million to more than 3,000 law enforcement agencies which used that money to hire more than 6,500 school resource officers.\textsuperscript{148} Proponents of school-based policing frequently describe a school resource officer’s job by using the “TRIAD” model.\textsuperscript{149} This model assigns the SRO three roles: teacher, counselor, and law enforcement agent.\textsuperscript{150} Neither the TRIAD model nor even the

\begin{itemize}
\item 145. Id.
\item 146. National Association of School Resource Officers, NASRO Homepage, http://www.nasro.org/about_nasro.asp (last visited Apr. 17, 2006). Both Pinard and Kagan provide similar descriptions of the development of school-based policing. See Pinard, \textit{supra} note 8, at 1075 (discussing the increased presence of law enforcement in public schools); Kagan, \textit{supra} note 8, at 306 (discussing increases in government funding for school police officers).
\item 148. COPS Fact Sheet, September 2004. http://www.cops.usdoj.gov/mime/open.pdf?Item=315 (last visited Apr. 18, 2006). To qualify for federal financial support, a law enforcement agency must commit to having the SRO spend 75% of his or her time to work in and around primary and secondary schools. \textit{Id}.
\item 149. See COMPARISON, \textit{supra} note 12, at 2 (“Most of the 19 programs included in the National Assessment reflect this model, but the level of emphasis that SROs devote to each of the three roles varies considerably across and within programs.”).
\item 150. See Concord, New Hampshire Police Department Website, http://www.ci.concord.nh.us/Police/concordv2.asp?siteindex=P20,05,01,09 (last visited Apr. 18, 2006) (explaining each of the roles of an SRO and their significance in New Hampshire public schools); Wichita, Kansas Official Website, http://www.wichita.gov/CityOffices/Police/Schools/SRO/ (last visited Apr. 18, 2006) (listing the identity of the local Wichita SROs and explaining their role in the community). The Center for the

SRO approach is the exclusive method of school-based policing. In a number of school systems, especially in large urban districts, responsibility for security and law enforcement is in the hands of a special-purpose police force, i.e., a municipal entity staffed by sworn police officers with responsibility solely for school properties and activities.\textsuperscript{151}

The approach advocated in this article is intended to cover school policing in all of its forms. Because of the way it attempts to blend the law enforcement role with other responsibilities and because that blending presents special challenges for \textit{Miranda} analysis, the SRO model will receive more extended attention in the subsequent analysis than other approaches. The recent release of the National Assessment of SRO programs reports funded by the National Institute of Justice makes it possible to move beyond the assumptions and theories of the proponents of school-based policing and to address data about how SROs interact with students and administrators. The authors of the National Assessment describe the existence of a wide range with respect to the nature and balance of SROs' activities. "There is considerable variation in the proportion of time the SROs in the 19 sites included in this study devote to each of the three roles."\textsuperscript{152}

\begin{footnotesize}
\begin{itemize}
\item Prevention of School Violence describes these responsibilities even more precisely as "law enforcement officer, law-related counselor, and law-related education teacher" but also notes that SROs "first and foremost are law enforcement officers." The Center For Prevention of School Violence, http://www.ncdjjdp.org/cpsv/sro/promstratsro.htm (last visited Apr. 18, 2006). \textit{See also COMPARISON, supra} note 12, at 2 (stating that specificity, clarity and the narrowing of officers' leeway in carrying out their roles are "key steps to success" for an SRO program).

\item 151. \textit{See, e.g., Los Angeles School Police Department Website}, http://www.laspd.com/home.htm (last visited Apr. 18, 2006) ("The Los Angeles School Police Department (LASPD) was established in August of 1948 to create a safe and tranquil environment for the students, teachers and staff of the Los Angeles Unified School District."). Los Angeles School Police Department is the fifth largest police department in Los Angeles County. \textit{Id. See also Chicago Public Schools, Press Release, New Safety Enhancements Slated for Chicago Public Schools}, http://www.cps.k12.il.us/AboutCPS/PressReleases/September_2004/Safety_Enhancements (last visited June 7, 2005) (on file with Loyola Law Review) (noting that the City of Chicago assigns two officers from the Chicago Police Department to most high schools). Stefkovich and Miller call attention to another important feature of the modern school environment, the deployment of professional security staff who are not stationed in schools in an official law enforcement capacity, but who operate in a manner much like police officers whether "because of past professional experiences as law enforcement officers, current responsibilities that include assisting with school discipline, safety and law enforcement issues or personal/professional relationships with the police." Stefkovich & Miller, \textit{supra} note 9, at 66.

\item 152. \textit{COMPARISON, supra} note 12, at 15.
\end{itemize}
\end{footnotesize}
SROs in one observed district spent only approximately 10% of their time engaged in law enforcement with 40% spent teaching.\textsuperscript{153} Two SROs in the study spent "nearly 100% of their time doing law enforcement."\textsuperscript{154} Many other SROs fell in between these extremes. One SRO broke up only two fights in one school year and made no arrests. In another district, "SROs make more arrests per officer than do regular patrol officers."\textsuperscript{155}

In several instances identified in the Assessment, the allocation of SRO time and energy is clearly the result of policy decisions made in advance, decisions that reflect and reinforce a culture within a school environment that must be considered when deciding whether \textit{Miranda} applies. One district, where the SROs rarely act in a law enforcement capacity, has a low crime rate, as does the community of which the school is a part. The Juvenile Court discourages the referral of minor cases from the schools.\textsuperscript{156} "From the outset, the school district has considered teaching and mentoring equally if not more important than the SROs' law enforcement responsibilities."\textsuperscript{157} The successful implementation of this model was corroborated by the views of students and teachers. "The SRO's office... is crowded between classes and during all four 20-minute lunch periods with students who want to chat."\textsuperscript{158} Teachers make requests for the SRO to appear in class, as guest teacher, and view the SRO "like another staff person."\textsuperscript{159} In another school, by contrast, the administration attempted to confine the SRO to primarily law enforcement activities, based on the principal's belief that "[b]y high school, kids see the officers as law enforcers and expect them to act as such."\textsuperscript{160}

In other schools, the evidence reflects less forethought before implementing such programs and ineffective communication during their operation. These deficits leave the lines of authority

\textsuperscript{153} CASE STUDIES, \textit{supra} note 2, at 10.
\textsuperscript{154} COMPARISON, \textit{supra} note 12, at 15.
\textsuperscript{155} CASE STUDIES, \textit{supra} note 2, at 140.
\textsuperscript{156} REPORT, \textit{supra} note 12, at 22.
\textsuperscript{157} \textit{Id}.
\textsuperscript{158} \textit{Id}.
\textsuperscript{159} \textit{Id}. See also Andrea G. Bough, Note, \textit{Searches and Seizures in Schools: Should Reasonable Suspicion or Probable Cause Apply to School Resource/Liaison Officers?}, 67 UMKC L. REV. 543, 561 (1999) (listing examples of reference to SROs as members of school staff).
\textsuperscript{160} COMPARISON, \textit{supra} note 12, at 20.
within a school unclear. “Two administrators used their SROs as substitute building administrators, leaving them in charge when the administrators left the building."¹⁶¹ Not only would it be understandable for students to view the officers and the administrators as interchangeable, it would be disingenuous for officers, administrators, or judges to treat such confusion on the students’ part as anything but the predictable result of this particular school-law enforcement collaboration. The Assessment reveals that when such collaboration is sloppily run, the potential for confusion affects all parties. One SRO observed that “[t]he biggest problem was—and still is—that school officials want [School Resource Officers] to be security, but . . . [the officers’ purpose] is education and getting kids to see cops as friends rather than enemies—it’s not security only.”¹⁶² This comment not only highlights the potential for confusion; it makes clear that the dynamics of officer-student relations are central to the school-policing undertaking and, as such, must be central to the regulation of school-based interrogation.

The glimpse inside modern schools offered by the SRO Assessment shows how absurd it is to speak about what “School Resource Officers” or “school administrators” do as if a job title speaks for itself and means the same thing in all schools at all times. Lawyers for a student from the school noted above with the low crime rate and the SRO who teaches more than she patrols would have difficulty establishing a background of coercion or fear, especially if the prosecution elicited the evidence of the culture and operation of the SRO program there and

¹⁶¹. COMPARISON, supra note 12, at 30. This example supports Pinard’s conclusion that “the relational dynamics between law enforcement authorities and school officials have shifted to such an extent that it is no longer possible to distinguish between the law enforcement and public school contexts.” Pinard, supra note 7, at 1096. The role and authority of the liaison officer in the Dilworth case was equally ill-defined, comprised of both law enforcement and routine disciplinary authority. State v. Dilworth, 661 N.E.2d 310, 312-13 (Ill. 1996) (The court defines the law enforcement liaison’s “primary purpose at the school” as “prevent[ing] criminal activity” and notes the liaison had authority to “arrest the offender and transport the offender to the police station. [The liaison] also handled some disciplinary problems. Like the teachers, [the liaison] was authorized to give a detention, but not a suspension.”). In another school, which employed both an SRO trained in the TRIAD approach and a security guard with no such training, the principal was observed referring many students to the security guard for mentoring, apparently because the principal believed that, as a woman, she was naturally better-suited for this role. COMPARISON, supra note 12, at 112.
¹⁶². COMPARISON, supra note 12, at 70.
showed that the officer's behavior in the incident in question was consistent with that scheme. A student from a school where the officers are seen and deployed as law enforcers would be much more persuasive in claiming to have viewed an encounter with an SRO as coercive and arrest-like. Students from the school with the ad hoc lines of authority described in the preceding paragraph could certainly be forgiven for not knowing what to expect when questioned sharply by the SRO, who might at that moment also be the acting principal, and even, perhaps, by the principal who apparently saw herself as interchangeable with the SRO. The diversity of arrangements described within the Assessment undermines any approach to interrogation issues that proceeds from an invariant notion of a school. *T.L.O.*'s categorical approach eschews this vital contextual, school-based and incident-based consideration of the facts, while *Miranda* doctrine has always required it.

**B. INTERROGATION RULES MUST BE ADAPTED IN LIGHT OF THE ROLES LAW ENFORCEMENT OFFICERS ACTUALLY PLAY IN SCHOOLS**

1. **Miranda Applies to the Actions of All Sworn Police Officers Operating at School**

   Courts should not hesitate long before concluding that *Miranda* applies to the members of an external police force or a school-based police force operating within the traditional law enforcement paradigm. As discussed in Part I, this is not because all students are necessarily in custody while in school. The question of *Miranda*’s application precedes that of custody and turns not on the suspect’s status but on the nature of the questioner’s authority. Police officers are not divested of their law enforcement authority when they enter schools; schools employ them precisely because they wield this authority. The TRIAD model of school-based policing does present the question more subtly. The National Assessment provides examples of SROs who function as well-integrated members of an educational team, teaching classes, counseling students and promoting a constructive educational environment. These practices will likely have a significant impact on the ultimate determination of custody in any particular case, but they should not result in a negative answer to the threshold question of whether *Miranda* applies at all. Even more unmistakably than the probation officers in *Fare* and *Murphy*, the SRO is “a peace officer.” The
SRO is not merely "allied with other peace officers" and obligated to report student wrongdoing; the SRO is authorized and even obligated to make arrests for such conduct. Thus, under the test set out above, it would be reasonable for a student questioned by an SRO about suspected criminal conduct to believe that she was the subject of law enforcement activity. It would be quite unreasonable to require students to ignore the words on the badge and uniform that SROs wear—to assume that a student under suspicion would ever forget what the "O" in "SRO" stands for.

The nature of the policing culture at a given school will likely be influential in the determination as to whether a specific encounter between a student and an SRO was custodial or not. In a school where the law enforcement leg of the TRIAD triangle is relatively short and the SRO's efforts are largely devoted to education, counseling, and relationship building, the tenor of most student-SRO interactions will likely reflect this norm. Likewise, in a school where officers are tasked primarily to perform law enforcement functions, student-SRO meetings will be more likely to appear coercive rather than consensual. Of course, it is crucial that neither the officers who question a student nor the judge who later evaluates that questioning assume that every encounter fits the school's norm. Instead, evidence of the norm provides a useful background for evaluating the specific encounter in question and an important part of the reconstruction of the scene that the Supreme Court called for in Thompson v. Keohane.\footnote{163. Thompson v. Keohane, 516 U.S. 99, 99 (1999) ("[T]he crucial question entails an evaluation made after determination of those circumstances: if encountered by a 'reasonable person,' would the identified circumstances add up to custody as defined in Miranda?").} The various factors traditionally considered in custody determinations,\footnote{164. See, e.g., United States v. Ventura, 85 F.3d 708, 710 (1st Cir. 1996) (holding that the "ultimate inquiry concerning custody is whether there was a... restraint on freedom of movement of the degree associated with a formal arrest"); Sprosty v. Buchler, 79 F.3d 635, 640 (7th Cir. 1996) (employing a totality of circumstances test to determine custody).} as well as those peculiar to the school setting, must be overlaid upon this background in order to be properly understood.
2. ATTENTION TO THE SIGNIFICANCE OF RELATIONSHIPS WITHIN THE SCHOOL SETTING REQUIRES SOME MODIFICATIONS TO EXISTING MIRANDA DOCTRINE

The custody determination has always been highly fact-specific, so it requires no structural change in doctrine for courts to accord due significance to school policing culture when determining custody. Two features of the school setting—the nature of the student’s relationship with the school law enforcement officer, and the age of the student—require substantial modifications to existing law. The failure to make such modifications would result in a doctrine that lacks a solid foundation in the reality of the modern schoolhouse.

a. The Nature of the Relationships between a Student and the Law Enforcement Officers Deployed at a School is a Critical Factor in Custody Determinations

In Yarbrough v. Alvarado, the Supreme Court squarely rejected a claim that in determining whether a suspect was in custody at the time of questioning, a court should consider the suspect’s prior experience with law enforcement.165 Explaining this holding, Justice Kennedy wrote:

“In most cases, police officers will not know a suspect’s interrogation history. Even if they do, the relationship between a suspect’s past experiences and the likelihood a reasonable person would feel free to leave often will be speculative.... We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their Miranda rights. The inquiry turns too much on the suspect’s subjective state of mind and not enough on the objective circumstances of the interrogation.”

Although Justice Kennedy did not cite any empirical support

165. Yarborough v. Alvarado, 541 U.S. 652, 668-69 (2004). As discussed in Part III.B.2.b infra, the Court treated this issue quite differently from the other claim before it, that the trial court should have considered the age of the suspect in making its custody determination. The Court rejected that claim, but did so “under the deferential standard” of the habeas statute, which requires that trial court rulings be upheld unless they contradict clearly established law. Id. at 668. The Court rejected the claim regarding prior experience “as a de novo matter.” Id.

166. Alvarado, 541 U.S. at 669 (quoting Stansbury v. California, 511 U.S. 318, 323 (1994)).
for the assertion that interrogating officers are unlikely to be aware of a suspect's interrogation history, it seems plausible with respect to spontaneous interrogations of a suspect previously unknown to the officers personally and not under active investigation for long. Such ignorance, however, is far less likely in circumstances such as those presented in Alvarado, where the encounter with Alvarado was arranged in advance. Having identified Alvarado as a potential suspect, or even merely a witness, in a month-old murder investigation, the detective would have been careless, if not outright incompetent, not to check Alvarado's background to determine the extent and nature of any prior contacts with law enforcement, including whether he had ever been interrogated before. Neglecting such information, the detective would be forsaking potentially effective weapons in the interrogation setting. Knowing the suspect’s history would be essential to identifying his likely approach to the encounter and perhaps also some areas of vulnerability. Justice Kennedy's second listed concern—the difficulty an officer would face in making sense of a suspect's history with law enforcement—is far better founded, and, thus, in many situations, the Alvarado rule may make sense.

The nature of a school police officer's assignment renders both of these concerns inapplicable to the school setting. A school police officer's assignment to a school is quite unlike most police deployments. The school (or even set of schools) to which an officer is assigned is a closed universe. Not only are the same people there every day, but, access by others is tightly controlled. By contrast, even a community policing officer who develops familiarity with the stable and regular inhabitants of her assigned area must contend with the fact that individuals from outside the neighborhood may come through at any time. Schools are not accessible to the wider world in this way. The school police officer has the ability to interact with and comprehend the totality of the school community in ways that cannot be replicated in most other settings. The TRIAD model of school resource policing directs SROs to develop relationships with the school population—students, teachers, and administrators—as much as possible.

These aspects of the school police officer's assignment make it necessary to qualify the Alvarado ruling and require courts to consider pertinent relationships between students and school police officers. The assumptions Justice Kennedy made in
Alvarado are inapplicable to the schoolhouse context. Any school police officer is likely to be aware of a particular student's history with school-based law enforcement, as embodied by herself or any other officer.\textsuperscript{167} Acknowledging the shared history between officer and student is consistent with the Murphy Court's consideration of familiarity in deciding that Miranda ought not to apply to meetings between a suspect and a probation officer. Some of the implications of this argument are worked out through the hypotheticals in Part IV.A. They are represented graphically in Figures 1, 1a, and 1b. Figure 1 presents a field upon which one can map the history between a particular student and the SRO's at school. Other things being equal, the more coercive the prior interactions have been, the more constrained the student is likely to feel during the instant encounter. The maximally cooperative history places the officer alongside the student in a posture consistent with a more consensual and, from the student's perspective, a less constraining encounter (Figure 1a). The maximally coercive history places the officer figuratively on top of the student, in a dominant position (Figure 1b).

\textsuperscript{167} This consideration of the student's history with law enforcement must be limited to the history with the school's SROs. It does not invite consideration of the student's involvement with law enforcement outside of the school context in which the interrogation is taking place.
**Figure 1**

**Figure 1a**

**Figure 1b**
b. A Student-Suspect's Age is an Essential Consideration in the Determination of Custody in School-Based Interrogations

The youth of a student suspect is one of the most salient features distinguishing schoolhouse interrogations from general law enforcement questioning. In Alvarado, however, the Court sent an uncertain signal regarding the significance of youth as a factor in the custody inquiry. Justice Kennedy, writing for the Court, declared that a lower court's failure to consider the suspect's age was not an unreasonable application of clearly established law and affirmed the denial of the habeas petition there at issue. This was a more measured approach than the Court took with respect to the consideration of the suspect's experience with law enforcement discussed in the preceding section. The Court declared the consideration of that factor to be wrong "as a de novo matter." This invites the conclusion that, faced with the issue on direct appeal, the Court might decide that a suspect's age, unlike his experience with law enforcement, might be an appropriate consideration within the custody inquiry. Justice O'Connor, a member of the five-vote majority, wrote in a concurring opinion that "[t]here may be cases in which a suspect's age will be relevant to the Miranda custody inquiry." Justice O'Connor asserted that because Alvarado was nearly eighteen at the time he was questioned, he could be expected to behave more like an adult than like a younger suspect. Justice Breyer dissented to the age ruling on the grounds that ignoring such a patent characteristic as age would overly objectify the "reasonable person" standard and "would produce absurd results." In light of the treatment of the issue in Alvarado, age remains a permissible—although clearly not mandatory—consideration in determining custody with respect to any interrogation of a minor, whether at school or elsewhere.

168. Alvarado, 541 U.S. at 669.
169. Id.
170. Id.
171. Id. at 675.
172. But see C.S.C. v. State, 118 P.3d 970, 978 (Wyo. 2005) (holding that the age of a sixteen-year-old student suspect need not be considered in custody inquiry where the student was repeatedly told that he was not under arrest, was not obliged to answer questions, and could leave at any time).
Writing for the *Alvarado* majority, Justice Kennedy stated that consideration of the suspect’s age (or other individual characteristics) “could be viewed as creating a subjective inquiry,” which would be inconsistent with the objective test the Court has traditionally announced regarding custody. This objectivity is valued because “it gives clear guidance to the police.” Considering the age of a student-suspect questioned at school, whether by a law enforcement officer or school administrator, would not present a significant risk of compromising the clarity the Court has sought to provide to law enforcement. Officers questioning students at school are well aware of the students’ status as minors. As to elementary and middle-school students, their minority is virtually certain and their susceptibility to coercion great. Even as to high school students, the assumption that they are minors is correct in the overwhelming majority of cases. Given their familiarity with students in the schools they serve, SROs are likely to know the age of any student they question, especially if they are investigating a crime or have questioned the student in the past. Outside officers conducting interviews at schools are likely doing so only when they are looking for a specific student and thus are likely to already know the student’s age. Even if they do not, these officers rely on school staff to assist them in establishing contact with the student. These staff members, of course, have access to the student’s records, which will include the age. Seen in this context, courts considering the age of the suspect are not imposing an extra burden of intuition or information on officers but are instead seeing the interrogation in its full context, as it is likely seen by those involved.

The consideration of age is especially important with respect to questioning by police in the school setting. Adolescence is a stage in life during which an individual youth redefines her relationships with authority figures. A student’s development toward maturity and independence can be charted by reference to

174. *Id.*
175. The decision to interview a student at school could be made to take advantage of the student’s minority. Questioning the student at school, the officer not only takes advantage of the student’s compulsory presence at school and the background norm of submission to authority, but also chooses to interact with the student at a time when the student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counsel or to advise the youth to refuse to answer the officer’s questions.
the transformation of his relationships with teachers, principals, and other authority figures, such as SROs. Recent research suggests that youth under the age of fifteen are substantially more likely to be intimidated by authority than are older adolescents and young adults.\(^{176}\) Intensely oriented to the present, early and middle stage adolescents are especially likely to feel the event of interrogation as a terminal point, something from which they will not be able to escape, even if an older individual, subjected to the same circumstances might readily appreciate the transitory nature of the situation. The *Berkemer* Court held that traffic stops do not equate to custody because they are brief and that brevity is something that the stopped individual knows and appreciates.\(^{177}\) Thus, there is no cause for the driver to feel overwhelmed and thus incapable of resisting any pressure that might be perceived from an officer's questions. To the extent that being young is likely to alter a student's time-horizon and impair the ability to appreciate what might seem obvious to the more mature, any custody inquiry that is intended to accurately capture the experience of the questioned youth must give due regard to the student's age and immaturity. Because the investigations in question arise within the school setting, the benefits of considering age do not come at the cost of making unreasonable demands on the police to discern the suspect's vulnerability.

3. **MIRANDA SHOULD APPLY TO QUESTIONING BY SCHOOL ADMINISTRATORS ONLY WHEN THE ACTIONS OF AN ADMINISTRATOR OR LAW ENFORCEMENT OFFICER COMMUNICATE TO THE STUDENT BEING QUESTIONED THAT SHE IS SUBJECT TO THE CONSTRAINTS OF LAW ENFORCEMENT AUTHORITY**

a. The Relationships Between Principals and Students are Radically Different From the Norm at the Time *T.L.O.* Was Decided

The *T.L.O.* Court explained its grant of latitude to school administrators in part by reference to the Court's traditional respect for "the value of preserving the informality of the student-

---

In his concurring opinion, Justice Powell developed this theme even further in explaining why constitutional criminal procedure should have limited application to the school setting:

The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interest between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

The growth of school-law enforcement collaborations and parallel developments with respect to school discipline have reconfigured the role and authority of school administrators. Under the traditional model of school administration, a principal who learned that a student might have violated the criminal law would be responsible for making the decision as to an appropriate disciplinary sanction as well as whether or not to refer the matter to law enforcement. Justice Powell assumed that "the student's welfare," would be a significant consideration in the

---

179. It is telling that Justice Powell, like the T.L.O. majority, chose to invoke teachers rather than principals in his romanticized comparison between school authorities and police officers. T.L.O., 469 U.S. at 339-340 (focusing on the informality of the student-teacher relationship); see also Id. at 349-50 (Powell, J., concurring) (noting the special relationship between student and teacher). Principals have always been responsible for imposing discipline on students. That discipline is typically more drastic than that imposed by teachers. Moreover, unlike teachers, whose sanctions are integrated into a series of ongoing, daily interactions, principals often find their relationships with students defined primarily by the imposition of discipline. As the discipline imposed by administrators has become both more severe and more automatic, the frailty of Powell's analogy to the caring teacher has become more pronounced.
180. T.L.O., 469 U.S. at 349-50 (Powell, J., concurring). Kagan also highlights this quote, but his discussion of T.L.O.'s flaws centers on the court's assumption that "firm boundaries separate schools and the rest of society." Kagan, supra note 6, at 294. Devoted to demonstrating the deviation of modern Fourth Amendment applications of T.L.O. from the administrative search doctrine on which the opinion was premised, Kagan's attention turns to the more elevated level of the policy behind school-law enforcement collaboration. See id. at 296-316 (discussing whether a search policy has a justification beyond ordinary law enforcement). Because of Miranda doctrine addresses different concerns, this article focuses on the ground-level operation of school-based law enforcement. Id.
administrator's exercise of her discretion. Modern principals often find themselves deprived of discretion with respect to either course of action. Zero tolerance policies frequently prescribe mandatory and often harsh disciplinary action without the opportunity for mitigation based on the circumstances of the incident or the student's disciplinary record. Likewise, when police officers are assigned to schools, they frequently become the first and final authority with respect to whether criminal justice intervention is warranted. The views of principals may be ignored, if they are ever sought.

In addition, it is no longer accurate to say, as Justice Powell wrote in T.L.O., that principals have "no obligation to be familiar with the criminal laws." Principals in some jurisdictions are required to report certain forms of criminal conduct to the police, and other laws require that principals be informed by law enforcement or judicial agencies about certain information regarding their students. It is also quite common now for prosecutors' offices to assign individual prosecutors to work with specific schools or schools generally, thus making it easier for administrators to be as familiar with the criminal laws as the modern conception of their job requires. Justice Powell's image

183. See Comparison, supra note 12, at 80 (discussing tensions which arise as a result of having officers in the classroom).
184. T.L.O., 469 U.S. at 350 n.1.
185. See Pinard, supra note 7, at n.58 (providing an extensive list of examples of such requirements).
186. See Kristen Henning, Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?, 79 N.Y.U. L. REV. 520, 247-50 (2004) (providing a discussion of states that either permit or require law enforcement personnel to notify schools when students have been arrested).
of the caring teacher stands in stark contrast with the principal whose relationship with school police was described in the SRO Assessment as follows: "[officers] work closely with school administrators in matters that may involve an arrest . . . . The SRO and assistant principal . . . refer cases to each other 8–10 times a month and collaborate on solving them." Rather than appearing in students' eyes as Head Teacher—the repository of the institution's wishes that the student be educated, principals such as these, must appear to be as much a law enforcement figure as an educator.

b. When Law Enforcement Authority Informs the Questioning, Miranda Should Apply Even to Questions Asked by School Administrators

There is no basis for applying Miranda when school administrators question students and the administrators have the informal, familiar, and supportive relationship with students hypothesized in T.L.O. and have nothing more than an intermittent, albeit collegial, relationship with law enforcement. It is unrealistic, however, to assume that a modern student, especially a student suspected of misconduct, would view a principal as someone looking out for her interests, in the way that the suspects in the Mauro line of cases viewed the relatives or friends who questioned them. Even more dramatic change has

---

188. CASE STUDIES, supra note 2, at 53.
189. See Christopher Edley, Jr. & Johanna Wald, The Hidden Dropout Crisis, CENTER FOR AMERICAN PROGRESS (2004), http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=35101 (last visited Apr. 19, 2006) (stating that the increased pressure on school administrators generated by high-stakes testing has further degraded many administrator-student relationships); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK & ADVOCATES FOR CHILDREN, PUSHING OUT AT-RISK STUDENTS: AN ANALYSIS OF HIGH SCHOOL DISCHARGE FIGURES (2002), http://www.advocatesforchildren.org/pubs/pushout-11-20-02.html (last visited Apr. 19, 2006) (providing evidence which suggests that many student discharges may be examples in which students are forced out); Press Release, ACLU, Minority Students Nationwide are Caught in "School-to-Prison" Pipeline, http://www.aclu.org/racialjustice/edu/15917prs20050623.html (last visited Apr. 19, 2006). The ACLU of South Dakota recently filed a lawsuit against a district in that state alleging that "[through] its discriminatory practices, the Winner School District systematically pushes Native American children out of its schools, often into the juvenile justice system." Id.
190. See In re Jesus T., No. F045909, 2005 WL 1390316 at *2 (Cal. Ct. App. June 15, 2005) (noting that the principal accompanied SROs on trip to students' neighborhood to assist officers in locating suspects who may have painted graffiti at school).
191. See supra notes 143-55 and accompanying text for a discussion of the Mauro
taken place with respect to the second relationship we must examine, that between the police and the school. The increased and highly publicized collaboration between schools and law enforcement makes it natural for students questioned by administrators in the presence of school-based officers to assume that the administrators and law enforcement are in fact working together with respect to the investigation at hand. This does not mean that every exchange between a principal and a student in a school with an SRO is custodial interrogation, even when the officer has participated to some extent in the investigation. It does mean, however, that courts must recognize what schools make little effort to deny in other circumstances: that law enforcement, generally, and school resource officers, specifically, are partners of the administration.

Because custody is a legal status linked to the power to arrest, it is essential to maintain an analytical focus on the role of law enforcement power even when a student is questioned by school officials. Neither the severity of an administrator's tone nor the threat of some sanction if a student opts not to speak makes *Miranda* pertinent. If such questioning is to come within *Miranda*’s ambit at all, it should not be because the questioning is similar to that which might be conducted by police. Instead, it should be because the questioning is conducted within a framework that manifests actual law enforcement authority. A method for classifying the elements of such authority is set out below, after a discussion of alternative approaches to the question.

Questioning by school officials would plainly be exempt from *Miranda*’s requirements pursuant to one often-stated test, which excludes from *Miranda*’s reach questioning by any individual who is not employed by an agency whose “primary mission is to enforce the law.” Professor LaFave has proposed a countervailing and broadly inclusive test bringing within *Miranda*’s ambit “questioning by any government employee . . . whenever prosecution of the defendant being questioned is among the purposes definite or contingent for which the information is elicited.” These two approaches share the flaw of looking at the

---

193. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.10(c), at 624 (2d ed. 1999) (quoting United States v. D.F., 63 F.3d 671 (7th Cir. 1995). The cases that LaFave
question from the perspective of the questioner without due regard for the perspective of the suspect. Citing LaFave, but with a slight adaptation, the Washington Supreme Court has found *Miranda* applicable to questioning by state actors in circumstances in which a reasonable person would view the questioners to be "law enforcement officers' with authority over him or her." This formulation is an improvement on the two approaches already noted in this paragraph because it restores the suspect focus essential to *Miranda* analysis and because, true to *Perkins*, it directs attention to whether the suspect would be reasonable in believing that the questioner wielded law enforcement authority. Even under this approach, however, questioning by school officials would remain outside *Miranda*'s reach, as the officials themselves would not reasonably be seen as law enforcement officers.

Modern law enforcement-education collaborations must be examined through a different lens precisely because law enforcement officers and the coercive authority they represent and deploy often figure prominently in the interrogation process even when the officers do not ask student suspects any questions. Thus, the crucial facts in determining *Miranda*'s applicability to schoolhouse interrogations by school administrators include the nature of the officer’s involvement and his or her background relationships to the questioner and the student suspect. Just as an SRO’s collaboration with school personnel and interactions with students may soften the otherwise coercive or custodial nature of an SRO-student encounter, so may administrator-SRO collaboration transform a principal-student encounter from purely administrative or even tutelary in nature to something highly coercive and potentially custodial, depending upon the circumstances. The complexity of these inter-relationships makes

---

relies on are a dubious foundation for the broad test he proposes. Mathis v. U.S., 391 U.S. 1 (1968), involving questioning by agents from the IRS, looks today like an artifact of post-*Miranda* exuberance. In *Estelle v. Smith*, 451 U.S. 454 (1981), a court-appointed psychiatrist appears to have perhaps misunderstood and certainly to have drastically exceeded his mandate. The need to rectify that overreaching, rather than any broader principle, drives the opinion.

194. State v. Heritage, 95 P.3d 345, 448 (Wa. 2004). In the course of reaching this conclusion, the *Heritage* court abrogated a long-standing and oft-cited intermediate appellate court ruling, *People v. Wolfer*, that essentially adopted the test of *People v. Wright*. *People v. Wolfer*, 693 P.2d 154 (Wa. App. 1984) (adopting approach from *Wright*, 249 Cal. App. 2d at 692). The *Heritage* court went on to find that the suspect in the case before it was not in custody, and that therefore, the absence of warnings did not require suppression. *Heritage*, 95 P.3d at 349.
courts' typical narrow perspective on these issues particularly unhelpful. Often, courts will ask only if the school official was acting as "an instrument or agent of the police," as if only the purely officer-dependent principal would communicate the presence of law enforcement authority within the questioning. In fact, it is the collaborating principal, the one who is routinely vested with the authority of a collaborating law enforcement officer, who figures to be most coercive in students' eyes.

*Murphy, Mauro,* and *Perkins* remain reliable guideposts to resolving these issues. When no officer is involved in any way, questioning by a principal is even further removed from *Miranda's* concerns than was the probation officer's inquiry in *Murphy.* Both the probation officer and the principal have considerable authority over those whom they are charged to oversee. Both can require their subjects to be in their presence and can bring about considerable sanctions for disfavored behavior. Probation officers are generally accorded vast discretion to set the terms by which the probationer must conform while at liberty, and they retain the power to seek revocation and its likely consequence, incarceration. Principals have broad authority with respect to what students may or may not do while at school, and they also exercise the power to keep students after school or to suspend or expel them. Nevertheless, acting exclusively on their own authority, they do not have the power to impose the sort of long-term and indeterminate isolation that brings with it *Miranda's* concerns about coercion.

Even when an officer is involved in orchestrating or otherwise contributing to a principal's questions, *Miranda* concerns are not implicated as long as the officer's involvement is hidden from the student. There is no need or even basis for inquiring into the existence of custody because the student is not subject to intimidation rooted in a fear of law enforcement authority any more than the inmate in *Perkins* was. This observation illustrates another way in which the LaFave test applying *Miranda* to questioning, for which prosecution was

---

196. See supra Part II.C. for a discussion of those three cases.
197. Minnesota v. Murphy, 465 U.S. 420, 440 (1984) (noting that the student's prior familiarity with his probation officer, who questioned him, was relevant to the custody inquiry).
198. See supra Parts II.A., II.C., and II.B. for discussion of *Perkins.*
“among the purposes of the questioner,” fails. The principal acting entirely on her own and the principal discreetly carrying out the wishes of a hidden police officer present the same show of authority to their respective students, and neither example implicates Miranda.

Where a school-based officer is involved in the investigation leading up to the questioning and this involvement is apparent to the student, however, neither Murphy nor Perkins controls. The Supreme Court recognized in Murphy that the simple fact that questions were asked by someone who is not a police officer does not necessarily bring the questioning outside Miranda, provided the conditions of custody existed. A principal involved in collaboration with school-based law enforcement stands in a very different posture than did the suspect's wife in Mauro. Unlike Mauro's wife, the principal has a strong affiliation with the police, one that is known to and likely to influence the student being questioned. In fact, unless the principal actively disavows the collaboration, it is hard to believe that the student would view the questioning as not in fact closely linked to the officer's law enforcement responsibilities.

Like the custodial nature of SRO-student encounters described earlier, the significance of law enforcement authority within incidents of questioning by school administrators can be represented graphically. Figure 2 provides a simple reminder that the analysis of such questioning is more complicated because three different relationships need to be examined here, administrator-student, administrator-officer, and officer-student. The first interaction to be examined in such situations is that between the administrator and the student. Figure 2a marks the way in which a principal's authority may range from tutelary to authoritative. Figure 2b illustrates how, through a variety of

199. See supra note 209 and accompanying text for a discussion of the test recommended by LaFave.
201. Murphy, 465 U.S. at n.5 (“We emphasize that Murphy was not under arrest and that he was free to leave at the end of the meeting. A different question would be presented if he had been interviewed by his probation officer while being held in police custody . . . .”). The court found that Murphy's prior relationship with his probation officer insulated him from psychological intimidation that might overbear his desire to claim the privilege. Id.
202. See supra Part II.C. for a discussion of Mauro.
circumstances, a principal's questioning may become infused with law enforcement authority. If the administrator invokes or even seems to deploy the authority of the law enforcement officer, by stating, for example, "Officer Jones and I are both looking to find out . . .," she transforms the traditional principal-student contact into a law enforcement incident meriting *Miranda* analysis. With each additional measure of law enforcement involvement, indicated by the blocks in Figure 2b, the principal's authority moves away from the tutelary and toward the coercive.

Fully assessing the situation requires one to look at the other two sides of the triangle as well. The relationship between the officer and the administrator is significant, with respect to the extent and tenor of collaboration between them at the school generally and also in this particular investigation. If the officer apprehends the student and brings him to the principal's office, and if this school is one in which the principal and the officer present themselves to the school community as part of a law enforcement team, then even if the officer steps away briefly during question, his or her presence is unlikely to be forgotten by the student. Where an officer with a minimal law enforcement role at a school merely drops by the office during the course of an interview, law enforcement authority adds little to the coerciveness of the setting. Finally, consistent with the discussion of *Alvarado*, the nature of the relationship between the officer and the student must also be considered. A student with a history of coercive encounters with an officer is likely to register the officer's presence during a principal's questioning quite differently from a student with no such history.

203. See supra Part II.B.2. for a discussion of *Alvarado*. 
Figure 2

Figure 2a

Figure 2b
IV. THE CONTEXTUAL APPROACH URGED HERE ADDRESSES THE WIDE RANGE OF SITUATIONS COMMON IN TODAY'S SCHOOLS

A. AN SRO QUESTIONS A STUDENT: HOW RELATIONSHIPS MATTER

The following hypothetical variations on a single student-officer interaction illustrate how the relationship focus set out above offers a workable, contextually valid approach to school-based interrogation by SROs. The hypothetical facts leading up to the encounter with the student suspect are set out in the following paragraphs. The dialogues that follow provide three different ways the encounter might proceed.

John Hardy is an officer with the Metropolitan Police Department. For the last year, he has been designated School Resource Officer for Lincoln Middle School. Occasionally called away from the school to assist with emergencies, he is otherwise at Lincoln from 7 a.m. to 4 p.m. every day that school is in session. He has been trained in the TRIAD model of school policing and tries to make himself a regular and constructive presence in the school environment and at school events. In addition to his law enforcement and safety responsibilities, he assists school personnel by lecturing or otherwise teaching elements of their courses that the teachers believe might benefit from his perspective. He also attends school events such as pep rallies, athletic and academic contests when he can. He takes the counseling component of the TRIAD approach just as seriously as he does the law enforcement component. When he hears of a student causing trouble, he will seek that student out to let him know he (Officer Hardy) is watching. Likewise, when he hears of a student having trouble with bullies or difficulties at home, he will seek that student out as well to see if there is anything he can do to assist or, at a minimum, to let the student know she need not feel alone or abandoned.

Officer Hardy is investigating a series of car break-ins in the school parking lot. His weekly School Safety Report—sent to all students, teachers, and staff and posted on the school website—announces that anyone with information related to these break-ins should contact him. In the course of his investigation, Officer Hardy contacts students wherever he finds them, including the hallway, the cafeteria, and the parking lot. Within three days
after the Safety Report is published, he has focused his suspicion on a group of boys who are known to “hang out” in a certain corner of the parking lot both before and after school. Jimmy Wright is a member of this group of boys. On the afternoon of the third day after the Safety Report went out, Officer Hardy sees Jimmy talking with several other students as they wait in the cafeteria line. Dressed in his Police Department shirt, with his badge on his chest, as he is every day, Hardy approaches the group. He is not armed. He keeps his gun secured in his office. He has never pulled it out at school. He removes it from the office only when leaving school, either to end his shift or to answer emergency calls away from the building.

A STUDENT RESOURCE OFFICER INTERROGATES A STUDENT

VERSION ONE

Officer Hardy has had limited contact with Jimmy Wright. They have rarely spoken to each other. Hardy knows Jimmy’s name, as he does that of virtually all of the students in school. On a few occasions, Hardy has had to direct Jimmy and his friends to disperse from the corner of the parking lot. While the students have not responded cheerily to these actions, they have not caused any trouble either.

Officer Hardy: [Hardy approaches Jimmy in the cafeteria line] “Hey there Jimmy. Got a minute? I’d like to talk to you.”

Jimmy: “It won’t take a minute. I’ve got nothing to say to you.”

Officer Hardy: “Slow down, young man. You don’t even know what I want to talk with you about.”

Jimmy: “It’s got to be those car break-ins. That’s what you’ve been talking to everyone else about, isn’t it?”

Officer Hardy: “So you’ve been researching my conversations. You might be better off putting that sort of energy into your schoolwork. Let’s go down to my office and talk.”

[Hardy points toward the cafeteria door. Jimmy heads in
that direction and Hardy follows close behind him. When they get to Hardy’s office, around the corner from the cafeteria, Hardy opens the door with a key. He directs Jimmy to a seat and then shuts the door, seating himself between Jimmy and the door. There are no windows looking out to the hallways of the school. There is a window which does not open and which looks out on a small courtyard which is not open to students. Hardy’s handcuffs are on his desk.

**Officer Hardy:** I know you’d rather be out there dazzling the young ladies in the lunch line, but as it is right now, I need you to tell me everything you know about the break-ins.

**VERSION TWO**

Officer Hardy has had a fair amount of contact with Jimmy. Hardy taught a unit on Law Enforcement and Community Relations in Jimmy’s Social Studies class. Hardy noticed that Jimmy seldom did his homework but that he was quite bright, if also a little undisciplined during class discussions. Jimmy volunteered to play the Police Chief role in a simulated community meeting that was part of the unit. When he played it straight, he did a good job. Since that time, Hardy has kept an eye out for Jimmy. He has checked in with the Social Studies teacher and has occasionally pulled Jimmy aside to see how he is doing. On two occasions, they have met in Hardy’s office and talked. Jimmy has hinted at problems at home but has usually done so in the nearly wordless way of many teenage boys. Hardy has not pushed the matter, for fear of alienating the boy.

**Officer Hardy:** [Hardy approaches Jimmy in the cafeteria line] “Hey there Jimmy. Got a minute? I’d like to talk to you.”

**Jimmy:** “I don’t think so. Not right now. I’m hungry. I did not have breakfast this morning.”

**Officer Hardy:** “I’m sorry to hear that, but how can you know you don’t want to talk with me when you don’t even know what I want to talk with you about.”

**Jimmy:** “It’s got to be those car break-ins.”
That's what you've been talking to everyone else about, isn't it?"

**Officer Hardy:** "So you've been researching my conversations. I don't remember you putting that kind of effort into your Social Studies assignments when I was helping with that class. I just need you for a few minutes. I checked with the lunch crew. They bought extra burgers today, so I am sure they'll still have some when you get back."

[Hardy directs his eyes toward his office and starts walking that way. Jimmy follows. When they get to Hardy's office, around the corner from the cafeteria, Hardy opens the door with a key. He directs Jimmy to a seat. He then shuts the door, moves around Jimmy and takes a seat behind his desk, facing Jimmy and the door. There are no windows looking out to the hallways of the school. There is a window which does not open and which looks out on a small courtyard which is not open to students. Hardy's handcuffs are on his desk.]

**Officer Hardy:** "I think you know why I asked you to come in. I want you to tell me what you know about the break-ins. Once we're done, you can head back to the cafeteria and grab your burgers. I am sure the young ladies you were talking to in line will save you a seat."

**Version Three**

Officer Hardy has had frequent contact with Jimmy, starting almost immediately after he took on the SRO position. Jimmy is regularly seen walking the halls when he should be in class. While monitoring the halls for "cutters" is not Hardy's job, if he sees a student out during class, he will direct him/her to get to class. Hardy has such encounters with Jimmy weekly. Usually, Jimmy walks toward class without comment, but, occasionally, especially if he has an audience, he will act disrespectfully. When that happens, Hardy will admonish him and, if necessary, send him to the principal's office.
About six weeks ago, Hardy saw Jimmy purchase marijuana from another student just outside the school building during school hours. Hardy approached Jimmy, put a hand on his shoulder and steered him to Hardy’s office where he asked him to hand over the marijuana, which Jimmy promptly did, saying, “It’s just some weed.” He placed Jimmy under arrest and referred the case to the Prosecuting Attorney. Hardy also informed the principal, who suspended Jimmy for five days. About a week after the suspension, Hardy walked outside to his police car at the end of his shift and found an image of a marijuana plant smeared on his rear windshield in mud apparently taken from the wet grounds nearby.

The next day, Hardy had a member of the office staff send a message to Jimmy’s teacher that he was to report to Officer Hardy’s office right away. Jimmy showed up. Hardy closed the door and told Jimmy that he hoped he enjoyed his little joke. Jimmy said he did not know what Hardy was talking about. Hardy told him he did not have to worry, that he was not even going to try to prove that Jimmy and his buddies had marked up the car. He just wanted to make sure Jimmy understood he would not forget this.

**Officer Hardy:** [Hardy approaches Jimmy in the cafeteria line] “Hey there Jimmy. Let’s go to my office for a minute. I want to talk to you.”

**Jimmy:** “Not now. I want to eat.”

**Officer Hardy:** “The sooner we take care of this, the better it will be, for you and me both.”

**Jimmy:** “How’s it going to be better for me to give up my place in line, go down to your office, tell you I don’t know anything about anybody breaking into any cars, then come back here and wait in a longer line and maybe not even have time to finish my lunch before I have to go take some stupid test in my English class?”

**Officer Hardy:** “I didn’t say anything about any break-ins, but you, you’re a smart guy. Smart enough to handle an
English test on a half-empty stomach, if that's where you find yourself a half-hour from now."

[Hardy puts his hand on Jimmy's forearm and steers him out of the line and toward the door of the cafeteria.]

[The setting of the office is the same as in Version One, and, as in that Version, Hardy seats himself between Jimmy and the door]

Jimmy: So, what, you're still mad about your car, so you're going to arrest me for this other stuff? That's messed up.

Officer Hardy: "Who said anything about arrest? Let's just say that I think you know something about these stolen cars and I didn't think you'd be straight with me out there in front of your audience."

Jimmy: "So, I'm not under arrest? Then, I can just walk back to the cafeteria now, is that right?"

Officer Hardy: "What can you tell me about these car break-ins? You know I've been talking to people about them. Your name keeps coming up. I know you and your buddies spend a lot of time out in the parking lot. Maybe that makes it easy for folks to put the finger on you—I don't know."

The three vignettes set out above conclude with statements by Officer Hardy that qualify as interrogation. Thus, a court faced with a Miranda-based Motion to Suppress any statements Jimmy made in response to this interrogation would need to focus its attention on the question of whether or not Jimmy was in custody when interrogated.

Was Jimmy Wright in Custody?

These hypotheticals demonstrate the benefits, even the
necessity, of considering the prior relationship between officer and suspect when deciding the question of custody. The divergent plot paths in the three scenarios can be largely explained by reference to the different histories described in the opening paragraphs of each hypothetical. Keeping to the drama metaphor adopted in Thompson, this history provides essential back-story, framing the understanding, motivation, and expectations of the characters.\textsuperscript{205} Failing to reference this back-story in the course of reconstructing the scene, a court would be ill-equipped to truly understand the encounter.

In Version One, SRO Hardy has no meaningful prior relationship with Jimmy Wright. In Version Two, the relationship is a positive one, seemingly based on Hardy’s genuine concern for the student rather than his authority over him. Finally, in Version Three, the history is marked by confrontation. In all three versions, Jimmy’s initial response to Hardy conveys essentially the same message, i.e., he does not wish to speak to Officer Hardy. Versions One and Three are quite blunt, with One almost defiant and Three fairly dismissive. Version Two contains a milder rejection, offered with an explanation that appears intended not to justify the decision, but to win the officer’s sympathy.

In turn, in Version Two, Hardy does not need to be quite as forceful because he expects Jimmy to trust him or defer to him.\textsuperscript{206} Hardy’s follow-up statements (Row Four) contain a common message, i.e., I am going to ignore your stated interest in not speaking with me, but take different paths to deliver it, each in line with Jimmy’s response. In Version Two, the officer says he is “sorry” that Jimmy missed breakfast, and he asks “how” Jimmy can be sure he does not want to speak with the Officer when he does not know what the Officer wants to talk with him about. In

\textsuperscript{205} See Thompson v. Keohane, 516 U.S. 99, 112 (1995) (recreating in the decision defendant’s interrogation by examining transcripts and calling for a similar type of analysis in other cases). See Film-Term Glossary, http://www.dsiegel.com/film/glossary.html (last visited Apr. 19, 2006) (defining the term backstory). As distinct from biography and backdrop, backstory includes all relevant events to the protagonist and antagonist that occurred before the narrative started. \textit{Id.} In general, it is the period of time the antagonist has spent concocting his plan of takeover, revenge, etc. \textit{Id.} Backstory is the background for the conflict. \textit{Id.}

\textsuperscript{206} Cf. Grasle v. State, 779 So. 2d 334, 336-37 (Fla. Dist. Ct. App. 2000) (holding that statement was involuntary because SRO exploited student-suspect’s trust in him and created misleading impression that SRO would protect student from prosecution).
Version One, Hardy is neither sympathetic nor inquiring but remains conversational “Slow down, young man. You don’t even know . . . .” In Version Three Hardy lacks even the pretense of manners or civility. His aggressive statement that “[t]he sooner we take care of this, the better” leaves little doubt that, one way or another, he intends to get compliance (and answers) from Jimmy.

With his final utterance at the cafeteria combined with his concluding gesture Hardy finally achieves what he wants and the two of them are on their way to the office. Versions One and Two are similar (an apparent attempt at a joke related to Jimmy’s study habits). In Version Three, rather than gently putting Jimmy down, Hardy offers sarcastic, mocking false praise (“smart guy”). He then ominously suggests that Jimmy may not even be permitted to attend his upcoming class, a statement which conveys that the discussion Hardy intends to have with Jimmy is likely to be both lengthy and consequential. That comment contrasts starkly with the way Hardy wraps up this segment of Version Two, where he lets Jimmy know that the conversation should be short and that he will soon be back to what he was doing before, much like a driver pulled over for a traffic stop, as in Berkemer, who expects to be back in the car and on the way again once the ticket is written. On the other hand, Hardy’s “insinuation” in Version Three that Jimmy might not be attending his English class fits within what the Murphy Court recognized above as a hallmark of coercive custodial interrogation.\(^{207}\)

The significance of the scene of the questioning also bears the mark of the prior encounters. In all three versions, Hardy has removed Jimmy from an open public setting, where he was not only visible to but actually engaged with others, to a private setting where he can neither see nor be seen by anyone but Hardy. This contrast with the facts in Berkemer strengthens the argument for custody in the present example.\(^{208}\) With respect to

---

207. Minnesota v. Murphy, 465 U.S. 420, 433 (1984) (stating that “[c]ustodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers’ will and to confess” and that “the coercion inherent in custodial interrogation derives in large measure from an interrogator’s insinuations that the interrogation will continue until a confession is obtained”).

208. Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (“[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”).
Version Two, however, the student's familiarity with the office, and the history of consensual, non-coercive conversations there undermine a custody claim. In fact, one would expect (and a prosecutor could easily prove, if permitted) that Hardy sat at his desk and Jimmy in the chair during these earlier talks. Thus, not only is the office itself familiar to the student, but so is the arrangement.

In Version Three, on the other hand, Jimmy's associations with Hardy's office are not at all benign. In one prior instance, Hardy walked him there, hand on shoulder as in this incident, and arrested him. On another occasion, Hardy delivered the threat that he would be watching Jimmy. In light of this history and the fact that Hardy takes a seat between Jimmy and the door, thereby effectively locking the student in the room, the atmosphere is highly constraining. The physical arrangement, i.e., the staging, is the same in Version One, and that student would certainly feel as if he could not leave. One difference between the two situations is that the student in Version One does not have any particular reason to worry about how Hardy will treat him, whereas, given the history between them, it would be reasonable for a student in the shoes of Version Three Jimmy to consider himself a walking target of Officer Hardy and to see the current incident as Hardy's way of finally taking aim.

This is not to say that back-story is destiny, and that any time an officer approaches a student he has arrested or coercively interrogated in the past, the situation is necessarily custodial. In both of the vignettes in which there was a history between the officer and the student (Version Two and Three) the officer's behavior (use of force, tone and substance of comments) was consistent with the spirit of the prior relationship. Where the facts of the encounter under review by a court are discordant with the prior relationship, that fact itself will likely be quite weighty in the custody determination. Thus, an officer with reason to believe that a student will fear his approach can easily dissipate the fear and the possible custodial nature of the situation by addressing it directly—"Look, Jimmy, I know we've had problems in the past, but I am not here to talk with you about the past.

209. See, Minnesota v. Murphy, 465 U.S. 420, 433 (1984) (noting that the student's prior familiarity with probation officer weighed against finding the person who questioned him and the place of the questioning undermined claim that he was entitled to Miranda's protection).
You are not under arrest. We are just talking. You know that I am trying to catch whoever has been breaking into the cars in the parking lot. I think that you may know something. If you do, I'd like you to tell me.\textsuperscript{210} This statement, by itself, would not be enough to defeat a claim of custody, in that merely telling a suspect he is not under arrest does not necessarily communicate that the suspect is free to terminate the interrogation and leave. Evidence of a statement such as this, however, would certainly undermine a defense claim that the tenor of the prior relationship between the officer and the suspect rendered the situation custodial. Conversely, a student with only benign experience with the officer (Version Two) would likely experience an even greater sense of restraint if the officer approached and spoke to him as Hardy did in Version Three. The discordance between the history and the current situation would communicate a clear message that the officer will insist on answers to his questions.

Discussion: What difference does Miranda make?

These hypotheticals illustrate the priority that the approach urged here places on a student-suspect's experience of an officer's authority. The officer's title and the setting of the interrogation are factors in the inquiry, but neither they nor the abstract objectives behind the placement of officers in schools are determinative. When courts invoke T.L.O. as a basis for liberating SROs from Miranda, they are formally substituting an all-purpose, all-places conclusion for a serious analysis of the extent to which those policy objectives are demonstrably affecting students' experiences. This is unwise as a matter of policy because the assumption that SRO practice is uniform and entirely consistent with the highest aspirations of its proponents is unfounded. The avoidance of this ground-level analysis is also unnecessary as the nature of the facts to be considered and the determinations to be made in such cases are not different in kind or degree from those courts are familiar with in the suppression setting. For example, in Fourth Amendment suppression cases, courts routinely consider evidence intended to establish that a specific neighborhood is a "high crime area," and this fact is then relied on by the government to explain the reasonableness of an officer's interpretation of purportedly

\textsuperscript{210} See In re Douglas S., No. B164432, 2003 WL 22753594 (Cal. Ct. App. Nov. 21, 2003) (finding no custody where SRO told student that he was investigating an arson case and asked him if he knew the person responsible).
suspicous although often ambiguous behavior. The inquiry into the nature of the police culture within a particular school is more susceptible to being proven than the character of a neighborhood. Certainly, the officers cannot claim ignorance of the culture which they play such a large role in establishing.

Under the approach urged here, a court should find that the suspects in Versions One and Two of the hypothetical were not in custody. Version Three, however, presents a long list of factors in support of the conclusion that the student was in custody and therefore Officer Hardy should have read the Miranda warnings before engaging in his final ploy to obtain the information—pretending sympathy for the suspect’s situation, with the implication that with more information he can help the suspect out of his present difficulties. This ratio, two non-custodial, one custodial, overestimates the burden that Miranda is likely to impose on SRO activity. If the conversation had taken place in the hallway, an empty classroom, or a gymnasium, the conversation described in these scenarios would not qualify as custodial. Had Hardy made any genuine effort, at any point in the conversation, to re-direct the tone from the authoritative pitch he first chose, the entire encounter might have played out differently. And, assuming that SROs will have positive relationships with most of the students in their schools, they will only occasionally face situations, such as that shown in Version Three, in which the student-officer history negatively colors an encounter and pushes it toward custody.

B. WHEN A PRINCIPAL ASKS THE QUESTIONS: WHO'S IN THE ROOM, WHAT DO THEY DO, AND WHAT DOES IT MEAN?

The need for a properly triangulated analysis of interrogation by school administrators working with law enforcement is apparent from a recent Florida case, State v. J.T.D. The interrogation concerned an allegation that a student had committed a lewd or offensive touching of another

211. See Illinois v. Wardlow, 528 U.S. 119, 124 (noting that the “fact that the stop occurred in a ‘high crime area’ [is] among the relevant contextual considerations in a Terry analysis”) (citing Adams v. Williams, 407 U.S. 143, 144 (1972)).

212. It does not follow from this that no interrogation can ever be custodial if it occurs in such a location. The example of Orozco v. Texas, in which custody was established in the suspect’s bedroom cautions against looking for any specific type of location which could never be custodial. Orozco v. Texas, 394 U.S. 324, 325 (1969).

student.\textsuperscript{214} The SRO assigned to the school had begun investigating the allegation the previous day, before any school official was involved.\textsuperscript{215} It was an assistant principal, however, who first questioned the student, and she did so in her office.\textsuperscript{216} The SRO was present during parts of the questioning including the moment when the student admitted touching the other student.\textsuperscript{217} The trial court granted the student’s motion to suppress, finding that although the principal was not acting as an agent of law enforcement, the two investigations, i.e., the school and law enforcement investigations were “inextricably intertwined”\textsuperscript{218} and that the student was in custody for \textit{Miranda} purposes at the time of the questioning. The Florida Court of Appeals reversed, stating:

Establishing a blanket rule that excludes the presence of a police officer whenever a school administrator questions a student unless \textit{Miranda} warnings are given turns a blind eye to the threatening world surrounding our schools. The appropriate focus is to examine the actual conduct of the police officer or school official to determine whether that conduct transformed the school official’s interview into a custodial interrogation by law enforcement . . . . By placing the focus upon the actual conduct of the school official and the law enforcement officer, those events calling for immediate action in a school disciplinary setting can be evaluated with the necessary flexibility consistent with the constitutional guarantee \textit{Miranda} warnings provide.\textsuperscript{219}

The \textit{J.T.D.} court was correct to reject a “blanket rule” and also to focus its attention on the “actual conduct” of the school and law enforcement actors rather than merely their job titles.\textsuperscript{220} There is nothing in the opinion, however, aside from this agitated rhetoric, to suggest that the trial court announced any blanket rule. Moreover, the analysis by the Court of Appeals goes seriously awry when the court states that it is unnecessary to make any custody determination because “the clear purpose of

\begin{itemize}
  \item \textsuperscript{214} \textit{J.T.D.}, 851 So. 2d at 794-95.
  \item \textsuperscript{215} \textit{Id.}
  \item \textsuperscript{216} \textit{Id.}
  \item \textsuperscript{217} \textit{Id.} at 794.
  \item \textsuperscript{218} \textit{Id.} at 795; see also \textit{In re G.S.P.}, 610 N.W.2d 651, 659 (Minn. Ct. App. 2000) (holding that \textit{Miranda} applied to joint investigation by school and police).
  \item \textsuperscript{219} \textit{J.T.D.}, 851 So. 2d at 797.
  \item \textsuperscript{220} \textit{Id.} at 796.
\end{itemize}
the interview was to determine whether J.T.D. had breached the student code of conduct by improperly touching a fellow student. What was unmistakably clear to J.T.D. was that the principal and the SRO both wanted to know whether J.T.D. had improperly touched the other student. The opinion refers to no facts by which either the principal or the SRO communicated to the student that they were looking into this as a disciplinary, rather than a criminal, matter. In fact, the SROs presence alongside the principal (one leg of the triangle), even though intermittent, would likely have communicated that this investigation would lead to J.T.D.'s involvement in the criminal or juvenile justice system.

J.T.D.'s reasons to believe he was subject to law enforcement activity which he was not free to ignore become clearer when one focuses on the officer-student leg of the triangle. On prior occasions, the SRO had "warned" J.T.D. that "she had the authority to send him" to the juvenile detention center "based on his behavior." Seeing the officer involved in this current investigation and hearing from the principal that other students had implicated him in serious misconduct, any reasonable student in such circumstances would conclude that the chain of events leading to his placement in the detention center was well under way and could not be interrupted. In other words, he was presently in the initial stages of what would be a lengthy period of restraint at the hands of the authorities. Had the officer not been involved in the student's interrogation at all, for instance, had the officer not been the one to bring him to the office or not returned at all during the questioning, the principal's questioning would not have been cloaked in law enforcement authority.

Likewise, if the officer had not previously raised the specter of the detention center in her interactions with this student, her presence would not have been as intimidating. To accept the position urged by the J.T.D. court is tantamount to saying that a reasonable student in J.T.D.'s position would believe that he was

---

221. J.T.D., 851 So. 2d at 796. See also supra note 209 and accompanying text for a discussion of Professor LaFave's proposed rule. See supra notes 17-25 and accompanying text for a discussion of the R.H. opinions.

222. J.T.D., 851 So. 2d at 795.

223. The opinion does not contain much detail as to the specific questions asked or the tone in which they were asked, and there is no precise description of what the SRO did or said, where she was positioned, for how long she was present and for how long she was gone. All of these facts would be crucial in making any determination of custody.
Miranda and School Interrogation

free to ignore the principal’s questions and go about his business and that if he chose to do so, the officer would do nothing at all to restrain him.

The J.T.D. court was not only misdirected in its focus on the questioner’s intent but excessively credulous in discussing the relationship between the principal and the officer as well. As the trial court noted, “[w]hen J.T.D. made this admission, [the assistant principal] turned the questioning over to [the SRO] who started to read J.T.D. the Miranda warnings.” This sequence of events strongly suggests not merely that the two investigations were “intertwined,” as the trial court had ruled, but that the principal and SRO were purposefully exploiting the principal’s assumed ability to question without warnings and further assuming that, having given this incriminating statement in the officer’s presence, the student would be less likely to assert his rights when the officer later administered them. This sequencing produces troubling echoes of the “confession-first” mode of interrogation found problematic by the Supreme Court in State v. Siebert. To see what this manipulation looks like, consider the following excerpt from a different interrogation at a different school:

I would like to ask you some questions about this gun. You don’t have to answer them if you don’t want to. That’s up to you—or you can wait till your dad gets here or whatever you feel more comfortable—or if you wanna talk now that’s fine, too. You mind if I ask you questions? You’ve been pretty honest about (sic) the counselor and principal here. This (inaudible) BB gun—is that yours or your parents?

This excerpt shows how police can and do use the fact of prior statements to elicit more incriminating statements from students.

The fact that the officer quickly took over the questioning once the student was effectively trapped by the initial admission is not directly relevant to the determination of custody at the moment of the principal’s questioning, as later-occurring events

224. J.T.D., 851 So. 2d at 795.
225. State v. Siebert, 542 U.S. 600 (2004). Because the “principal-first” approach is not per se violative of a suspect’s rights in the way that “confession-first” interrogation is, it may not raise as many alarms. In this example, however, it appears equally calculated to disarm the suspect of any meaningful opportunity or incentive to assert his constitutional rights.
cannot affect the way a suspect would interpret the circumstances of his questioning. Pointing out the way in which the collaboration between school and law enforcement officials can exploit students' submissive status and compromise their position within the criminal and juvenile justice system, however, is an important rebuttal to the suggestion that school-based Miranda claims are illegitimate and unworthy. Moreover, the suspicious timing of the questioning hand-off belies any lingering shred of the notion espoused by Justice Powell that administrators are not well-versed in the criminal law.\(^{227}\)

The J.T.D. court did not believe it was necessary to conduct a true custody analysis because it found the notion of subjecting a principal's actions to such review too alarming.\(^{228}\) Thus, it is impossible to say whether J.T.D. was in custody and should have received warnings. Nevertheless, this discussion illustrates how attention to the actual experience of students interrogated within law-enforcement-saturated schools can result in analysis that does not hide from what is truly occurring in the schools. Like the R.H. dissent discussed in Part I, the J.T.D. court expends great emotion fulminating against straw men, who, it alleges, would turn "a blind eye to the threatening world surrounding our schools."\(^{229}\) Fortunately, we do not face the stark choice of either ignoring student misconduct or refusing to acknowledge the coerciveness of the measures currently in place to address it. All Miranda requires, even under the most expansive interpretation, is that a principal not extract information from a student through the exploitation of law enforcement authority in a manner which creates a risk of coercion equivalent to that attendant upon arrest. The risk of coercion can be eliminated by (1) advising the student of his Miranda rights, (2) conducting the interrogation in a fashion that does not draw on the authority of the law enforcement officer, or (3) avoiding custodial conditions. The officer's involvement in the investigation could be kept a secret to the student. Once such involvement becomes apparent to the student, the principal can take steps to disavow any power-sharing or joint operation. The principal could make clear to the student that he will be permitted to leave the office upon the end of the interrogation. The principal need not set the student up for an ambush and could in fact tell the student that the officer may

\(^{228}\) J.T.D., 851 So. 2d at 795.
\(^{229}\) Id. at 797.
Miranda and School Interrogation

conduct her own questioning or may take action within her own authority in light of the principal’s questions. In fact, such steps would be most respectful of the student’s ability to genuinely exercise her rights.

C. MIRANDA IN SCHOOLS: THE FINAL ANALYSIS?

Shouldn’t principals be spending their time and energy making sure students know how to write rather than making sure they know their rights? It is easy enough to predict this objection and to imagine the vigorous nodding of heads in affirmation as someone raises it at a high school faculty meeting, a school board meeting, or a juvenile court judges’ meeting. The implication that applying Miranda in schools would compromise the safety and learning of the school community is natural but nevertheless ill-founded. The Miranda doctrine already contains an exception which renders admissible, despite the absence of warnings, statements made in response to questions necessary to protect public safety from imminent threats.230 Certainly, any questions directed at discovering the existence or location of weapons on school grounds would qualify under this exception. Consistent with the still-vital aspect of T.L.O. that students’ rights in the school setting should be determined in light of what is appropriate to that setting, it would make sense for courts to adopt a robust understanding of this exception, one that would include the presence of illegal drugs within the definition of threats to public safety. Even at its most expansive, however, this exception would not cover many of the investigations that currently push students from the schoolhouse to the courthouse, such as those involving already-completed acts of assault, threats, or the destruction or theft of property.

Recognizing limits on the prosecutorial use of in-custody statements by students does not leave school authorities or the officers working with them helpless in responding to misconduct.231 The decision to apply Miranda to school-based

230. New York v. Quarles, 467 U.S. 649, 651 (1984) (“We conclude that under the circumstances involved in this case, overriding considerations of public safety justify the officer’s failure to provide Miranda warnings before he asked questions devoted to locating the abandoned weapon.”).

231. This article has not attempted to argue against the presence of police in schools. It does seem curious that in a time of increased worry about students’ ability to pass high-stakes tests districts would be permitting officers, i.e., unlicensed teachers, the opportunity to lead classes on a regular basis. Communities might
interrogation need not have any implications at all for schools' disciplinary processes. The principal in *J.T.D.*, for example, already had sufficient information to justify suspending the student. It was not necessary to extract the student's admission before doing so. Even if the principal sought to impose a long-term suspension, that would only have required that the student receive the opportunity to speak in his own defense. The minimal protections required in *Goss v. Lopez* should not be transformed into an escape from *Miranda*. Even if a particular instance of questioning violated *Miranda*, a student's answers would still be available to school officials seeking to take disciplinary action. If schools began to provide warnings, it is likely that most youths would waive their rights, as most do when questioned by police outside of school. Thus, the amount of information lost due to *Miranda* would be slight. As noted earlier, such information would often be redundant of whatever incriminating information has led the questioner to suspect the student in the first place.

Given that there are various ways for authorities to legitimately avoid the requirement to provide *Miranda* warnings and students are likely to regularly forgo *Miranda*'s protections, why, aside from doctrinal purity, would it be worthwhile for courts to upend the prevailing assumption and apply *Miranda* within the modern schoolhouse setting? The most significant reason is actually a reflection of the insight behind the TRIAD SRO model. The developers of this approach have consciously established the goal of transforming the nature of relations between police and youth. The use of the school setting as the platform for this transformation reflects the recognition that students learn outside the classroom as well as in. *Miranda* warnings where appropriate in the school setting provides a valuable civics lesson: that authority in a democracy should be exercised transparently and with appropriate checks beyond those of self-restraint. Far more than courts or school

determine, however, that any fall-off with respect to instruction is outweighed by the benefits to the entire community from the greater degree of order achieved in schools with a regular police presence. The SRO study discussed within this article offers what is best seen as only a beginning in terms of data with regard to how the police presence affects school environments.

232. *Goss v. Lopez*, 419 U.S. 565, 571 (1975) (holding that students were entitled to due process protection prior to a suspension and should be given notice of changes and an opportunity to be heard).

officials, students will know the nature of their community. They will be the ultimate judges of the truth with respect to their own experiences. If the school-based police achieve the SRO ideal and establish the pervasive yet light, almost benevolent, touch they seek, Miranda's restrictions will rarely be needed. If, on the other hand, school and police officials operate in a united and confrontational fashion toward students, the students will not need a court to clue them in. Rules that pretend that school-based law enforcement can never be unduly coercive will not fool them. The adoption of rules that acknowledge the students' reality, however, is apt to do more than any civics text to demonstrate the legitimacy of authority.