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THE FIFTH AMENDMENT IN PUBLIC SCHOOLS: A RATIONALE FOR ITS APPLICATION IN INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS

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I. INTRODUCTION

Nearly twenty years ago, while delivering the Oliver Wendell Holmes Lectures at Vanderbilt University, Professor Charles Alan Wright observed that law by its nature tends to grow very slowly.[1] As if to prove Professor Wright's observation, courts have bandied about the application of various provisions of the Bill of Rights to public school students for at least sixty years.[2] As early as 1943, in *West Virginia State Board of Education v. Barnette*,[3] the United States Supreme Court declared that "[t]he Fourteenth Amendment . . . protects the citizen against the State . . . and all of its creatures—Boards of Education not excepted. [Boards of Education] have . . . important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."[4] Notwithstanding this pronouncement, later courts have failed to define conclusively the scope of these rights and to extend their full protection to public school students. The fifth amendment stands as an example of this phenomenon. Courts examining the fifth amendment in this context have given diverse opinions, concluding that the amendment apparently does not ap-

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1. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1027 (1969).

2. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (The Supreme Court has upheld the ability of students and teachers to assert first amendment rights for at least fifty years.); *see also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (The due process clause of the fourteenth amendment prevents the states from forbidding the teaching of a foreign language because such teaching implicates both a teacher's right to teach and a parent's right to engage teachers).

3. 319 U.S. 624 (1943).

4. *Id.* at 637.

ply in public schools;[5] that the amendment applies, but only in certain circumstances;[6] and that the amendment fully applies.[7] Other opinions tend to focus rather narrowly upon the giving of *Miranda*[8] warnings, holding that such warnings are not necessary for interrogations conducted by school officials.[9]

Consistent with *Barnette*, a public school student clearly does not forfeit the protection of the fifth amendment merely because he or she enters a public school;[10] the more difficult issue concerns how to *apply* the privilege against self-incrimination to students accused of wrongdoing in the public schools. Accordingly, this Article first examines the factors mandating that students retain the fifth amendment's privilege against self-incrimination while attending public schools, and, second, presents standards, consistent with the fifth amendment, that officials should apply in public school interrogations and disciplinary hearings.

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5. *See, e.g.*, Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, ____, 57 Cal. Rptr. 463, 472 (1967).

6. *See, e.g.*, Picozzi v. Sandalow, 623 F. Supp. 1571, 1581-82 (E.D. Mich. 1986); Pollnow v. Glennon, 594 F. Supp. 220, 222 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 496 (2d Cir. 1985); Stern v. New Haven Community Schools, 529 F. Supp. 31, 37 (E.D. Mich. 1981); Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976); Furutani v. Ewigleben, 297 F. Supp. 1163, 1164-65 (N.D. Cal. 1969); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 550-51 (S.D.N.Y. 1968); Johnson v. Board of Educ., 62 Misc. 2d 929, 932-33, 310 N.Y.S.2d 429, 432-33 (1970); Nzuve v. Castleton State College, 133 Vt. 225, 229, 335 A.2d 321, 324 (1975).

7. Gonzales v. McEuen, 435 F. Supp. 460, 470-71 (C.D. Cal. 1977); Caldwell v. Cannady, 340 F. Supp. 835, 841 (N.D. Tex. 1972); Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (1967); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, ____, 171 S.W.2d 822, 826 (1942), *cert. denied* 319 U.S. 748 (1943).

8. Miranda v. Arizona, 384 U.S. 436 (1966).

9. Betts v. Board of Educ., 466 F.2d 629, 631 n.1 (7th Cir. 1972); Boynton v. Casey, 543 F. Supp. 995, 997 (D. Me. 1982); Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968); Adams v. City of Dothan Bd. of Educ., 485 So. 2d 757, 761-62 (Ala. Civ. App. 1986); People v. Shipp, 96 Ill. App. 2d 364, 366-67, 239 N.E.2d 296, 297-98 (1968); State *ex rel.* Feazell, 360 So. 2d 907, 909 (La. Ct. App. 1978); Birdsey v. Grand Blanc Community Schools, 130 Mich. App. 718, ____, 344 N.W.2d 342, 344-45 (1983); *In re* Brendan H., 82 Misc. 2d 1077, 1078-81, 372 N.Y.S.2d 473, 476-78 (1975); State v. Wolfer, 39 Wash. App. 287, ____, 693 P.2d 154, 158-59 (1984); *see infra* notes 109-27 and accompanying text.

10. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07 (1969) (citing West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943), for the proposition that students do not shed their constitutional rights to free speech at the schoolhouse gate).

II. Recognizing the Fifth Amendment's Privilege Against Self-Incrimination in Public Schools

The initial inquiry, of course, involves whether the fifth amendment's privilege against self-incrimination[11] exists at all within the public schools.[12] Only after determining that students bring the right with them into the public schools can courts determine the related issue of *how*—if at all—the fifth amendment applies to specific types of hearings or interrogations.[13] Determining whether one of the guarantees of the Bill of Rights exists in public schools for the benefit of students requires a three-step analysis. The first step of the analysis requires a determination that the particular amendment involved applies to public school officials through the fourteenth amendment. Next, the court must examine the substance of the amendment involved and determine whether the public school activity under scrutiny is within the scope of the amendment. Finally, the court must determine whether the special relationship between school officials and students makes the amendment under analysis inapplicable in the public school context.[14]

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11. "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

12. *Cf.* New Jersey v. T.L.O., 469 U.S. 325, 333-37 (1985) (determining the application of the fourth amendment in the public school context).

In this Article, the term "public schools" includes only publicly-supported elementary and secondary schools (grades one through twelve, generally). This Article does not address the rights of college or university students in either a public or private setting. For a discussion of constitutional rights in a college setting, see McKay, *The Student as Private Citizen*, 45 Den. L.J. 558 (1968); Seavey, *Dismissal of Students: "Due Process"*, 70 Harv. L. Rev. 1406 (1957); Wright, *supra* note 1.

13. *See* Bartlett, *Self-Incrimination and Public School Students*, 15 J.L. & Educ. 167 (1986) (explaining that the assertion of the fifth amendment can arise in two contexts: the disciplinary hearing and the investigatory interrogation).

The investigatory interrogation raises issues concerning what warnings, if any, officials must give a student to counteract any coercion inherent in the interrogation. Such action implicates the Supreme Court's *Miranda* decision. For a full exploration of these issues, see *infra* notes 109-27 and accompanying text.

14. The Supreme Court employed this three-step analysis in New Jersey v. T.L.O., 469 U.S. 325, 333-37 (1985). Although the Court did not indicate expressly in *T.L.O.* that lower courts should apply this analysis in every case involving an extension of the Bill of Rights to public school students, and although the Court did not designate its reasoning as a "three-

A. Applying the Fifth Amendment to Public Schools and School Officials

The first step in the Supreme Court's analysis requires a determination of whether the fifth amendment's privilege against self-incrimination applies against school boards and school officials. Undoubtedly it does apply to such entities as does the entire Bill of Rights. In *New Jersey v. T.L.O.*[15] the Supreme Court reaffirmed the principle of *Barnette* and held that "the Fourth Amendment applies to the States through the Fourteenth Amendment, and . . . the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment . . . ."[16] Although *T.L.O.* involved the application of the fourth amendment rather than the fifth amendment, nothing in the Court's reasoning in *T.L.O.* indicates an intention to limit this general principle to any one particular constitutional right. In addition, the Court cited *Barnette* favorably in another case dealing with the application of the first amendment to public school officials.[17]

Despite these strong indications that the fifth amendment applies in the public school context, at least one state court case apparently holds that the fifth amendment does not apply in the public schools.[18] This case is inconsistent with the Supreme Court's earlier reasoning in *Barnette* which applied the Bill of

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step" analysis, one reasonably can assume that lower courts will employ this logical scheme in similar cases.

In practice, only the second step presents difficulty. The Supreme Court affirmatively answered the first step (that the particular amendment applies to public school officials) in West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943), and *T.L.O.*, 469 U.S. at 333. Furthermore, the Court apparently disposed of the third step (concerning the impact of the special relationship, if any, between school officials and students upon extending a particular guarantee to public schools) in *T.L.O.* The Court stated in *T.L.O.* that the doctrine of *in loco parentis* "is in tension with contemporary reality and the teachings of this Court," 469 U.S. at 336, thereby, apparently, effectively denying the existence of a special relationship between school officials and students. *But see infra* notes 42-49 and accompanying text.

15. 469 U.S. 325 (1985).

16. *Id.* at 334.

17. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 507 (1969). *But see* Ingraham v. Wright, 430 U.S. 651, 660 (1977) (holding the eighth amendment inapplicable to corporal punishment in public schools).

18. Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, ____, 57 Cal. Rptr. 463, 475-76 (1967).

Rights to public schools.[19] The major problem with the reasoning of the state court decision, however, is found in the analysis, not the holding. The court indicated that the fifth amendment's privilege against self-incrimination is not cognizable in the public schools. Instead of making such a broad holding, the court should have held that the type of conduct involved in the case was not protected. Thus, the critical error in the case is its failure to distinguish between conduct that violates only ordinary school rules and the violation of school rules *that also violates criminal statutes.*[20]

B. Applying the Fifth Amendment's Protections to Public School Investigatory and Disciplinary Hearings

Even though the fifth amendment applies to the states and public schools through the fourteenth amendment, the question remains whether the fifth amendment creates any rights enforceable against public schools and their officials during the conduct of investigations or disciplinary hearings. This question is somewhat more difficult.

The case of *Ingraham v. Wright*[21] fuels the uncertainty. In *Ingraham* the Supreme Court questioned whether the infliction of corporal punishment on children attending public school violated the eighth amendment.[22] After looking at the history of the eighth amendment and prior Supreme Court cases construing the amendment, the Court held that the proscription against cruel and un-

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19. 319 U.S. 624, 637 (1943).

20. Professor Wright stressed the importance of distinguishing, in a fifth amendment analysis, between violations of school rules and violations of school rules that also violates criminal statutes:

> Some violations of university rules, such as taking over a campus building, are also violations of criminal statutes. Other violations of rules, such as cheating, are not . . . . [T]he cheating violation is quite different. The disciplinary proceeding is not itself a "criminal case" within the meaning of the fifth amendment, and since cheating is not a crime, there is no other "criminal case" in which the student's testimony can be used against him. Thus the university may compel the student's testimony in the cheating case if it thinks it is worth the effort to do so.

Wright, *supra* note 1, at 1077 (footnotes omitted). For a full exploration of this aspect of the fifth amendment, see *infra* notes 75-82 and accompanying text.

21. 430 U.S. 651 (1977).

22. *Id.* at 653.

usual punishment was designed to protect those convicted of crimes,[23] not public school children facing corporal punishment.[24]

Eight years later, in *T.L.O.*, the Court considered whether the fourth amendment's proscription against unreasonable search and seizure protected school children from unreasonable searches conducted by school officials. As in *Ingraham*, the Court examined the amendment's history and Supreme Court precedent.[25] Specifically, the Court asked whether "this Court has . . . limited the [fourth] amendment's prohibition on unreasonable searches and seizures to operations conducted by the police."[26] Unlike *Ingraham*, however, the Court in *T.L.O.* concluded that the fourth amendment did apply to searches conducted by school authorities,[27] even though the text of the fourth amendment does not mention schools or school officials.[28]

Although school officials are bound by the Bill of Rights, *Ingraham* and *T.L.O.* together indicate that an amendment in the Bill of Rights is not automatically enforceable in each situation that arises in the public schools. The history and purpose of a particular amendment also are relevant in determining its applicability to a given situation.[29] One cannot determine the viability of the fifth amendment's proscription against self-incrimination in the public schools without first examining prior Supreme Court cases construing the amendment and its history. Presumably, this examination will reveal whether the drafters intended the amendment to apply generally in public schools or if they intended to limit fifth amendment protection to certain types of activity.[30] Accordingly, this Ar-

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23. *Id.* at 666.

24. *Id.* at 665.

25. New Jersey v. T.L.O., 469 U.S. 325, 335-37 (1985).

26. *Id.* at 335.

27. *Id.* at 336-37.

28. In *T.L.O.*, New Jersey argued that the fourth amendment should apply only to law enforcement officers and not to public schools. The Court rejected this argument. *Id.* at 335.

29. *Compare T.L.O.*, 469 U.S. at 334-35 (stating that the fourth amendment applies in public schools as well as to "law enforcement" officers) *with Ingraham* 430 U.S. at 665 (stating that the eighth amendment was designed to protect those convicted of "crimes" and is not applicable to public school students facing disciplinary corporal punishment).

30. The issue in this Article is a narrower question than simply whether the provisions of the Bill of Rights reach public school students and administrators. This Article examines the meaning of the fifth amendment to determine if it has any application to the activities of students and school officials. The Court made this inquiry in *Ingraham* without eroding

ticle examines prior Supreme Court cases to determine whether the Court has limited the fifth amendment's prohibition against self-incrimination to more traditional law enforcement activities or whether fifth amendment protection extends to the questioning of students by school officials.

The fifth amendment, just like the fourth, can apply in civil as well as criminal settings.[31] The Supreme Court and lower courts alike have applied the fifth amendment to grand jury proceedings,[32] prison disciplinary proceedings,[33] federal legislative committee hearings,[34] municipal employee misconduct hearings,[35] state traffic ticket "fixing" investigations,[36] disbarment proceedings,[37] and Internal Revenue Service proceedings.[38] Although the Supreme Court has not rendered an opinion concerning the applicability of the fifth amendment in public schools, it has discussed the availability of the amendment in civil and administrative proceedings in general. The Court has stated:

> The privilege [against self-incrimination] can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*[39]

Furthermore, the Court said, "[I]t is also clear that the availability of the privilege does not turn upon the type of proceeding in which

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the principle that the Bill of Rights applies in the public schools; the Court simply held that the specific activity at issue (corporal punishment) did not violate the eighth amendment.

31. *See T.L.O.*, 469 U.S. at 335 (stating that the fourth amendment generally applies to the activities of civil authorities).

32. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968).

33. *See, e.g.*, Baxter v. Palmigiano, 425 U.S. 308 (1976).

34. *See, e.g.*, Schlohower v. Board of Higher Educ., 350 U.S. 551 (1956).

35. *See, e.g.*, Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation, 392 U.S. 280 (1968).

36. *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967).

37. *See, e.g.*, Spevak v. Klein, 385 U.S. 511 (1967) (plurality opinion).

38. *See, e.g.*, United States v. Goldsmith, 272 F. Supp. 924, 927 (E.D.N.Y. 1967) ("The right of the witness to claim the privilege [against self-incrimination] . . . may not be diluted by denominating the Internal Revenue Service inquisition a civil proceeding.").

39. *In Re* Gault, 387 U.S. 1, 47-48 (1967) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring)) (footnote omitted).

its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites."[40] Such language and precedents make clear that the fifth amendment's privilege against self-incrimination is enforceable against public school officials in disciplinary hearings or in any other public school "proceeding."[41]

C. The Relationship Between Public School Students and Public School Administrators as a Factor Mitigating Against Applying the Fifth Amendment

The third and final step in the three-step analysis[42] implicates the aged *in loco parentis* doctrine.[43] Whatever viability this doctrine once had,[44] the principle is no longer a sufficient reason for failing to apply the Bill of Rights in public schools.

In *T.L.O.*, school officials argued that even if public school officials are bound by the Bill of Rights, and even if the fourth amendment generally applies to civil authorities, school officials are immune from the dictates of the fourth amendment because of the *in loco parentis* doctrine.[45] In rejecting that argument, the

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40. *Id.* at 49; *see also* Baxter v. Palmigiano, 425 U.S. 308 (1976), where the Court said:

> [T]he Fifth Amendment . . . "privileges [an individual] not to answer official questions . . . in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings" . . . . if inmates are compelled in . . . [disciplinary] proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered "whatever immunity is required to supplant the privilege" and may not be required to "waive such immunity."

Id. at 317 (quoting Lefkowitz v. Turley, 414 U.S. 70, 77, 85 (1973)).

41. One has difficulty in trying to distinguish between an investigatory proceeding or disciplinary hearing in a public school which could result in suspension or expulsion and similar proceedings conducted by other governmental administrative bodies. The only possible distinction is based on policy, not precedent.

The precedent discussed thus far refers to testimony that might incriminate in criminal proceedings, not in administrative proceedings. For a discussion of this limitation, see *infra* notes 75-110 and accompanying text.

42. *See supra* note 14.

43. The term *in loco parentis* refers to the legal doctrine that places a party in the position of parent, with all the privileges, rights and responsibilities of a natural parent. *Compare* Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 867, ____, 57 Cal. Rptr. 463, 470 n.11 (1967) (court cites seven cases using the doctrine) *with* New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (doctrine is in conflict with "contemporary reality" when applied to public school students in the context of fourth amendment violations).

44. *See* Wright, *supra* note 1, at 1030.

45. 469 U.S. at 336-37.

Court put to rest this application of the *in loco parentis* doctrine once and for all. The Court stated that such reasoning was "in tension with contemporary reality and the teachings of this Court."[46] The Court further stated that today's public school officials exercise control over students under authority of public educational and disciplinary policies, not because of parental delegation of authority.[47] Accordingly, courts cannot possibly view public school officials as anything but "state" actors when examining their conduct *vis-à-vis* students,[48] and, therefore, school officials are not immune from the dictates of the fifth amendment because of the special nature of their relationship with students.[49]

III. Standards Governing Application of the Fifth Amendment in Public Schools

Concluding that the fifth amendment privilege against self-incrimination applies to official interrogations of public school students and to public school disciplinary hearings begins, rather than ends, the inquiry.[50] Several difficult issues now arise. First, what does "coercive" or "compelled" mean when applied to statements made by students to school officials within the public schools? Second, how does the fifth amendment apply to violations of noncriminal school rules, such as cheating or tardiness for class? Third, when the alleged misconduct violates both a school rule and a criminal statute, can a compelled statement be used to penalize a student by suspending or expelling the student from school, as long as the statement is not used in a criminal prosecution? Fi-

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46. *Id.* at 336. One year later, however, in Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1986), the Court breathed some life back into *in loco parentis*, at least in some circumstances. The Court stated that school authorities act *in loco parentis* when they "protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 3165.

47. *T.L.O.*, 469 U.S. at 336-37.

48. *Id.*

49. Even the California case holding the privilege against self-incrimination inapplicable to public school students did not use the doctrine of *in loco parentis* as supportive rationale for its holding. Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, ____, 57 Cal. Rptr. 463, 470, 475 (1967).

50. *See T.L.O.*, 469 U.S. at 337 ("To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches.").

nally, do *Miranda* warnings have any applicability in public schools when a student is questioned by a school official? Established fifth amendment jurisprudence indicates with some accuracy how courts should and will resolve these issues when fifth amendment doctrine in the public schools comes to fruition.[51]

A. Defining Coercive or Compelled Statements in the Public School Context: The Doctrine of "Substantial Educational Interest"

Students possess the same fifth amendment rights as other individuals.[52] Accordingly, extracting a statement of criminal wrongdoing by whipping a student with a leather strap[53] or by interrogating the student five straight days[54] would be coercive and would violate the fifth amendment. Besides such blatant conduct, however, unique characteristics of the public school setting may require supplementation or modification of fifth amendment doctrine to protect student rights adequately. In addition to conduct considered coercive by traditional fifth amendment jurisprudence, for example, courts should consider a statement "coerced" or "compelled," and thus offensive to the fifth amendment, if a school official extracts the statement from a student under threat of deprivation of any substantial educational interest.

Although the fifth amendment, as construed by Supreme Court decisions, does not preclude a person from *voluntarily* testifying or

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51. *See generally* Wright, *supra* note 1, at 1027-28.

52. Spevak v. Klein, 385 U.S. 511, 516 (1967) (plurality opinion) ("We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others."). Courts may alter the nature of a particular right when applying it to a minor; such practice, of course, is unrelated to whether the minor is also a student.

53. *See* Brown v. Mississippi, 297 U.S. 278 (1936). In *Brown*, the defendants confessed to a murder after "their backs were cut to pieces with a leather strap with buckles on it, and they were . . . made by the . . . deputy definitely to understand that the whipping would be continued unless and until they confessed." *Id.* at 282. Defendants presumably were not students, *Id.* at 281, and the interrogator was a deputy, not a school official, *Id.* at 282. The Court held that the conviction violated the due process clause of the fourteenth amendment. *Id.* at 287.

54. *See* Chambers v. Florida, 309 U.S. 227, 231 (1940) (defendants in murder trial confessed after five days of continuous questioning). The Supreme Court never identified the defendants as students, and the interrogators were law enforcement personnel. *Id.* at 231. The Court held that the method by which the sheriff obtained the confessions violated the due process clause. *Id.* at 241.

giving statements about matters that may tend to incriminate him or her,[55] the amendment does preclude obtaining a statement through coercion.[56] The term "coercion" is an elastic word that may mean different things in different settings. In the public school context, for example, an administrator may suspect a student of wrongdoing[57] and threaten to impose a penalty unless the student makes a statement. The administrator may threaten to suspend or expel the student, to call the police, or to impose a less "severe" penalty such as keeping the student after school. At some point, these threats become coercion, thereby implicating the fifth amendment.

The Supreme Court has held that the state may not threaten to impose economic or *other sanctions* upon a person to induce him or her to forego the fifth amendment right to remain silent.[58] The Court applied this principle to prevent the state from removing a person from office because he or she exercised the fifth amendment right to remain silent during state grand jury proceedings.[59] If an individual succumbs to such a threat and speaks, however, the Court has held that the state cannot use the statement against that person in a later criminal prosecution.[60]

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55. United States v. Monia, 317 U.S. 424, 427 (1943). "Voluntary" conduct is difficult to discern in the abstract. It becomes even more difficult when dealing with students because many students are minors, thus implicating issues of competency and ability to understand the nature of the right not to speak. For a discussion of these issues, see *infra* notes 109-27 and accompanying text. *See generally* Fare v. Michael C., 442 U.S. 707 (1979) (scrutinizing the voluntary nature of a statement made to police by a juvenile).

56. *See* United States v. Monia, 317 U.S. 424, 427 ("The [fifth] Amendment speaks of compulsion.").

57. At this point this Article does not attempt to differentiate between wrongdoing that merely violates a school rule and wrongdoing that violates both a school rule *and* a criminal statute. This section focuses on the meaning of "coercion" or "compulsion" in a general sense. For a discussion of whether coercion or compulsion to speak violates the fifth amendment when the student under investigation violates a school rule alone, see *infra* notes 75-82 and accompanying text.

58. Minnesota v. Murphy, 465 U.S. 420, 434 (1984); Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977).

59. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977). The threatened penalty, removal from four *nonsalaried* state Democratic Party positions, was a noneconomic sanction.

60. Garrity v. New Jersey, 385 U.S. 493, 500 (1967). The Court held that a witness threatened with discharge from employment if he or she remains silent does not waive the privilege by speaking. *Id.* at 497-99. Furthermore, any statements made under such threat are excludable in subsequent criminal prosecutions. *Id.* at 500.

In *Garrity v. New Jersey*,[61] the Supreme Court elaborated upon the type of pressure or threat which is impermissible under the fifth amendment.[62] The Court spoke of "mental" coercion and "subtle pressures" and indicated that "the question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' "[63] The Court held that statements obtained under threat of "removal from office"[64] would implicate the protection of the fifth amendment and that this protection extends to "all" members of our society.[65]

One court has referred to the *Garrity* decision as holding that "it was unconstitutionally coercive to condition the exercise of the fifth amendment privilege against self-incrimination on the loss of substantial economic interests."[66] By slightly changing the last phrase to "loss of substantial *educational* interests," one may derive a workable standard for identifying unconstitutionally coercive conduct within the public school setting.[67] This proposed standard also incorporates the underlying concerns of *Garrity* because threats to deprive educational interests would constitute "subtle pressures"[68] depriving a student of his or her "free choice to admit, to deny, or to refuse to answer."[69]

By defining impermissibly coercive penalties or threats as those which imperil substantial educational interests of the student, such as exclusion from an examination or suspension from school, courts would recognize the significance of a student's property interest in

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61. 385 U.S. 493 (1967).

62. *Id.* at 496; *see also* Spevak v. Klein, 385 U.S. 511, 515 (1967) (plurality opinion) (" '[P]enalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' ").

63. *Garrity*, 385 U.S. at 496 (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).

64. *Id.* at 500.

65. *Id.*

66. Securities & Exchange Comm'n v. Gilbert, 79 F.R.D. 683, 685 (S.D.N.Y. 1978).

67. The courts that have grappled with threats that school administrators have made in order to obtain statements from students have not determined conclusively what constitutes coercion. *See, e.g.*, Stern v. New Haven Community Schools, 529 F. Supp. 31, 37 (E.D. Mich. 1981) (holding that a principal's "breach" of promise not to call police raises issue of voluntariness in responding to questioning, but does not implicate the fifth amendment seriously).

68. *Garrity*, 385 U.S. at 496.

69. *Id.* (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).

education.[70] At the same time, the elasticity of the term "substantial" affords public school officials limited discretion in questioning students about misconduct and disciplinary violations. For example, threatening to keep a student after class or to make a student write a thousand-word theme does not deprive the student of a *substantial* educational interest and thus would not be considered constitutionally coercive under this proposed standard.[71]

The policy promoted by this proposed standard is similar to that pronounced by the Supreme Court in *New Jersey v. T.L.O.*[72] involving fourth amendment searches and seizures. In *T.L.O.* the Court recognized that school officials need "effective methods to deal with breaches of public order," but felt that courts must balance this need against a student's legitimate expectations of privacy.[73] A school official needs to be able to interrogate students and investigate misconduct to maintain order within the public schools. When an administrator threatens deprivation of any substantial educational interest in an effort to extract a statement, or when an administrator deprives a student of such an interest because of the student's silence, however, permissible investigation ends and unconstitutional coercion begins. In subsequent criminal prosecutions courts should exclude statements that a student made under such a threat. If the student subjected to such a threat declined to talk, courts should prevent the school from imposing the threatened sanction.[74]

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70. *See generally* Goss v. Lopez, 419 U.S. 565, 574 (1975) (holding that students have a legitimate entitlement to an education recognizable as a property interest protected by the fourteenth amendment).

71. Not only do the cited examples not threaten a "substantial" interest, they also probably do not threaten *deprivation* of an "educational" interest. The suggested standard would require both that the threatened deprivation be directed at an "educational" interest and that the educational interest involved be "substantial." If either of these two elements are missing, then arguably the kind of coercion condemned by the Supreme Court in *Garrity* is also missing.

Adjurations to tell the truth or explanations of the consequences a student faces for particular misconduct would not violate the proposed standard. *See, e.g.*, Adams v. City of Dothan Bd. of Educ., 485 So. 2d 757, 761 (Ala. Civ. App. 1986).

72. 469 U.S. 325 (1985).

73. *Id.* at 337.

74. *See* Minnesota v. Murphy, 465 U.S. 420, 434 (1984).

A related issue arises if school administrators threaten a substantial educational interest but do not ask the student to waive his or her right to refrain from self-incrimination in subsequent *criminal* proceedings. Such a situation might arise if the school only intends to

B. Applying the Fifth Amendment to Student Misconduct That Violates a School Rule But Not a Criminal Statute

Some student misconduct violates a school rule but does not also violate a criminal statute. Examples of this situation are easy to imagine: smoking in prohibited areas, cheating on an exam, repeated tardiness, and minor classroom disruptions.[75]

The text of the fifth amendment refers only to "criminal case[s],"[76] but the Supreme Court has stated that the fifth amendment privileges an individual to remain silent in any proceeding, civil or criminal, "where the answers might incriminate him in *future* criminal proceedings."[77] Similarly, in a probation revocation case, the Court reaffirmed this limitation:

> The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. If, for example, a residential restriction were imposed as a condition of probation, it would appear unlikely that a violation of that condition would be a criminal act. Hence, a claim of the Fifth Amendment privilege in response to questions relating to a residential condition could not validly rest on the ground that the answer might be used to incriminate if the probationer was tried for another crime . . . . Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding.[78]

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use the coerced statement to discipline the student in school, ostensibly leaving the student free to assert the fifth amendment as to any incriminating statements made to the school official in a later criminal prosecution. For a discussion of this issue, see *infra* notes 88-109 and accompanying text.

75. Examples of the opposing situation, where violation of a school rule *does* violate a criminal statute, include possession of a controlled substance or assault on a teacher or classmate.

76. "No person . . . shall be compelled in any *criminal case* to be a witness against himself . . . ." U.S. CONST. amend. V (emphasis added).

77. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (emphasis added); *see also* United States v. Apfelbaum, 445 U.S. 115, 130 (1980) (stating that a person claiming the privilege must be confronted with substantial and real, not imaginary, incrimination).

78. *Murphy*, 465 U.S. at 435 n.7. The dissent in *Murphy* made the point in a more direct fashion: "If a truthful response might reveal that he has violated a condition of his probation but would *not* subject him to criminal prosecution, the state may insist that he respond and may penalize him for refusing to do so. *Id.* at 441 (Marshall, J., dissenting) (emphasis added) (footnote omitted). Inserting the phrase "public school policy" for "condition of his

Accordingly, the privilege does not apply when a student faces *only* punishment from school officials for violation of a school rule. Although the Supreme Court has not considered this issue in the public school context, most lower courts are in accord.[79]

In summary, the nature of the infraction, not its public school setting, determines whether the fifth amendment privilege against self-incrimination is available.[80] A school administrator in some situations may use coercive threats or corporal punishment to obtain admissions, or may draw adverse inferences from the student's silence.[81] Such conduct is permissible constitutionally if the infraction concerned *only* the violation of a school policy and thus did not implicate a criminal statute or the fifth amendment.[82]

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probation" in Justice Marshall's dissent shows the strength of the analogy to violation of noncriminal public school rules.

79. *See, e.g.*, Picozzi v. Sandalow, 623 F. Supp. 1571, 1581-82 (D.C. Mich. 1986) (stating that a person may assert the privilege in a civil proceeding, but the privilege only protects that person from criminal exposure); Boynton v. Casey, 543 F. Supp. 995, 997 n.3 (D. Me. 1982) (holding that, where possession of marijuana violated a school policy but was not a criminal offense in Maine, questioning a student concerning marijuana use did not involve answers that might incriminate the student); Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976) (holding that where student is not a criminal defendant and the state does not seek to make evidentiary use of silence in a criminal proceeding, the school can penalize silence as indication of guilt without violating the fifth amendment). *But see* Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S. 2d 899, 905-06 (1967) ("commenting" that a child cannot be deprived of fifth amendment rights in an administrative proceeding, implying that the fifth amendment applies in a misconduct situation involving only cheating on a high school exam).

80. *See* Wright, *supra* note 1, at 1077.

81. *Cf.* Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976) (stating that the fifth amendment does not forbid adverse inferences against inmates in disciplinary proceedings).

82. A public school administrator may not threaten or physically abuse students with complete immunity just because the fifth amendment is not involved. The school board, local custom, good sense, relative openness of the public schools, and fear of a civil action for damages may impose limits on an administrator's authority in such cases. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 657, 670-71 (1977) (holding that although the eighth amendment is not implicated in a situation where a child is paddled by school administrator, even though injury results, the child may have a civil cause of action for assault in the appropriate state court).

C. Asserting the Fifth Amendment Privilege in the School Disciplinary Setting When Violation of a School Rule is Also a Violation of a Criminal Statute: The "Public Trust" Doctrine of Gardner v. Broderick

In those situations where violation of a school rule *also* violates a criminal statute—thereby implicating the protections of the fifth amendment—applying the fifth amendment in a "blanket" fashion may pose a problem. Although a student may assert the fifth amendment in any proceeding where the misconduct may subject the student to criminal prosecution, school officials may seek the statements *solely* for school disciplinary purposes and not for use in a subsequent criminal prosecution. If school officials do not ask a student to waive the privilege, leaving him or her free to assert it in a future criminal prosecution, or if officials grant the student immunity from criminal prosecution, perhaps school officials then may compel the student to speak under penalty of being suspended or expelled for remaining silent. The implications of this suggestion are significant. If courts accept this proposition, then a school administrator who suspects a student of misconduct could suspend or expel that student for remaining silent in the face of questioning about the offense, as long as the student remains free to assert the privilege against self-incrimination in any subsequent criminal prosecution. A prosecuting attorney who fears difficulty in obtaining a criminal conviction conceivably could forego criminal charges in order to allow the public school an opportunity to deal with the student free of fifth amendment restraints. In essence, administrators could remove "problem" students from school not for the offense they are suspected of committing, which might present proof problems, but for failure to cooperate with the school's investigation of misconduct.

A line of Supreme Court cases deals with the imposition of noncriminal penalties in the administrative context for exercising the fifth amendment privilege.[83] *Minnesota v. Murphy*[84] may be the

83. This line of cases begins with Garrity v. New Jersey, 385 U.S. 493 (1967), and concludes with Minnesota v. Murphy, 465 U.S. 420 (1984). Justice Brennan discussed the scope of these cases in his dissent in Baxter v. Palmigiano, 425 U.S. 308, 328-34 (1976) (Brennan, J., dissenting), and Justice Marshall analyzed them again in *Murphy*, 465 U.S. at 441-49 (Marshall, J., dissenting).

most instructive of these cases because the majority directly addressed the issue in a footnote,[85] and the dissent amplified the majority's discussion.[86] In *Murphy*, the Court considered the fifth amendment rights of a probationer and stated that

> a state may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination . . . . [N]othing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated.[87]

The dissent elaborated upon the above language and indicated that three possible situations actually were involved: 1) if a truthful answer might lead to parole revocation but not to criminal prosecution, the state may insist upon a response and penalize the failure to talk by revoking parole; 2) if a truthful answer might lead to criminal liability, the probationer may refuse to answer and the state may not attempt to coerce an answer; 3) if a truthful answer to a question might lead to *both* a criminal penalty and probation revocation, the state still may insist upon an answer, but only in return for an express guarantee of immunity from criminal prosecution.[88]

The third situation that the dissent addressed is comparable to public school situations in which a truthful answer concerning student misconduct might lead both to deprivation of a substantial educational interest and to criminal penalties. For example, the sale of illegal drugs on campus would violate both formal school

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84. 465 U.S. 420 (1984).

85. *Id.* at 434 n.7.

86. *Id.* at 442 (Marshall, J., dissenting).

87. 465 U.S. at 435-36 & n.7 (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977)).

88. *Id.* at 442 (Marshall, J., dissenting). The fifth amendment, as currently construed, requires prosecutors to grant only "use" immunity (permitting the state to prosecute a person for any crime provided only that his compelled statement is not used against him) rather than transactional immunity (preventing prosecution of a person for any occurrence about which he speaks) in the administrative hearing. Lefkowitz v. Cunningham, 431 U.S. 801, 809 (1977).

policy and the state's criminal statutes. If the above proposition from *Murphy* is applied in this situation, schools may suspend or expel a student who refuses to talk to his high school principal about the violation of the school policy as long as the student possesses immunity from the criminal prosecution.[89]

In the absence of further analysis, the line of cases just discussed indicates that school officials may compel students accused of criminal conduct to incriminate themselves in school disciplinary proceedings if they are granted use immunity from criminal prosecutions. Imposing such noncriminal penalties upon a student, however, is inconsistent with the fifth amendment and also is poor public policy.

A deeper analysis of this issue requires an examination of the development of fifth amendment doctrine in this area. Admittedly, at least two cases hold that penalizing a student's silence in school disciplinary situations is consistent with the fifth amendment in general and with Supreme Court cases interpreting the fifth

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89. Even before the Supreme Court's decision in *Murphy*, some courts held that public school administrtors could compel a student to speak in school disciplinary hearings, even when criminal charges were pending, as long as the student remained free to assert the fifth amendment in the criminal prosecution. *E.g.*, Furutani v. Ewigleben, 297 F. Supp. 1163, 1164-65 (N.D. Cal. 1969); *see also* Nzuve v. Castleton State College, 133 Vt. 225, 232, 335 A.2d 321, 326 (1975) (generally adopting the reasoning of *Furutani*, but noting that stipulated college procedures granted Nzuve a right to remain silent at student disciplinary hearings without silence being used against him). These cases drew upon the Supreme Court decision in Garrity v. New Jersey, 385 U.S. 493 (1967), as authority for their reasoning. *Furutani*, 297 F. Supp. at 1165; *Nzuve*, 133 Vt. at 232-33, 335 A.2d at 326.

Also, some cases support the related proposition that authorities may use a student's silence against him or her in a school disciplinary hearing as an inference of guilt, as long as they do not carry the inference of guilt over into a criminal prosecution. These cases generally have not involved situations where the student also faced criminal penalties for the in-school misconduct. *See, e.g.*, Boynton v. Casey, 543 F. Supp. 995, 997 n.3 (D. Me. 1982) (student's possession of marijuana was not a criminal offense under state law); Morale v. Grigel, 422 F. Supp. 988, 1003 (D.N.H. 1976). These cases draw upon the Supreme Court decision in Baxter v. Palmigiano, 425 U.S. 308 (1976), as authority for their holding. *Boynton*, 543 F. Supp. at 997 n.3; *Morale*, 422 F. Supp. at 1003. *Baxter* held that the fifth amendment does not forbid adverse inferences against parties to *civil actions* when they refuse to testify in the civil action and that a state that grants immunity from criminal prosecution may draw whatever inference the circumstances warrant from silence in the civil hearing. *Id.* at 318. The *Baxter* opinion was specific in contrasting this situation to a criminal case where neither the judge nor the prosecutor may suggest that the jury infer guilt from the defendant's silence. *Id.* at 319. *But cf.* Caldwell v. Cannady, 340 F. Supp. 835, 840-41 (N.D. Tex. 1972) (holding that an adverse inference drawn from a student's silence at a school disciplinary hearing cannot be used against the student).

amendment in particular.[90] Both cases rely on *Garrity v. New Jersey*[91] to reach this conclusion.[92] The reasoning of these cases, however, is inconsistent with an important aspect of *Garrity* and its progeny.

In *Garrity*, police officers had testified at a state investigation into alleged traffic ticket "fixing" after supervisors told them that failure to testify could subject them to removal from office. The testimony they gave under threat of removal from their jobs subsequently was introduced against them in criminal prosecutions arising from the investigations, and the police officers were convicted.[93] The Supreme Court reversed the convictions, holding the statements inadmissible because they were obtained under coercion in violation of the fourteenth amendment.[94]

Relying upon *Garrity* as authority for the proposition that school administrators may compel students to give up their privilege against self-incrimination in the school disciplinary setting so long as the students still may assert it in a later criminal proceeding overlooks a critical distinction between police officers, who are state agents, and students. Justice Fortas made a similar distinction in his concurrence to *Garrity*'s companion case, *Spevak v. Klein*.[95] He indicated that the state could discharge a police officer for failure to answer questions in a disciplinary hearing concerning his conduct because of the officer's employment relationship with the state.[96] *Spevak*, however, involved a disbarment proceeding against a lawyer. Justice Fortas concluded that, because a lawyer is not an agent of the state, presumably the state's interest was not as significant as it was with a state agent. Accordingly, the attorney's fifth amendment rights should not be diminished in any degree.[97] One year later, in *Gardner v. Broderick*,[98] Justice Fortas's

90. Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969); Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975).

91. 385 U.S. 493 (1967).

92. *Furutani*, 297 F. Supp. at 1165; *Nzuve*, 133 Vt. at 232-33, 335 A.2d at 326 (The court in *Nzuve* cited *Furutani* as well as *Garrity* to support its holding.).

93. *Garrity*, 385 U.S. at 494-95, 500.

94. *Id.* at 500.

95. 385 U.S. 511 (1967) (plurality opinion).

96. *Id.* at 519-20 (Fortas, J., concurring).

97. *Id.* ("I would distinguish between a lawyer's right to remain silent and that of a public employee . . . . The special responsibilities that [the lawyer] assumes as licensee of the

analysis became the Court's opinion. Writing this time for the majority, and referring to his concurrence in *Spevak*,[99] Justice Fortas indicated that the state could, in an administrative hearing, fire a state employee for refusing to answer questions that were "specifically, directly and narrowly" related to their official duties.[100] The state possessed such power, he continued, because the state employee is a "trustee of the public interest."[101] The same day that the Court decided *Gardner*, Justice Fortas put the final touches on this aspect of fifth amendment doctrine in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation*.[102] Using the term "public trust," Justice Fortas wrote that "public employees . . . subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."[103] This doctrine limits the class of individuals who may be penalized at administrative hearings for refusal to respond to questioning to those persons in a position of "public trust," such as public employees, in situations where officials do not ask them to relinquish their fifth amendment rights and ask them questions that specifically, directly, and narrowly relate to that public trust.[104]

State and officer of the court do not carry with them a dimunition, however limited, of his Fifth Amendment rights.").

In commenting on Justice Fortas's concurrence in *Spevak*, Justice Brennan wrote, "[Justice Fortas] wrote separately because he was of the view that state employees enjoyed a lesser protection. He agreed with the result [in *Spevak*], however, because Spevak . . . was not a state employee." Baxter v. Palmigiano, 425 U.S. 309, 329 n.2 (1976) (Brennan, J., concurring in part and dissenting in part).

98. 392 U.S. 273 (1968).

99. *Id.* at 278 n.5 (citing Spevak v. Klein, 385 U.S. 519 (1967) (Fortas, J., concurring in the judgment)).

100. *Id.* at 278.

101. *Id.* at 277-78.

102. 392 U.S. 280 (1968).

103. *Id.* at 285.

104. The "public trust" doctrine of *Gardner* and *Sanitation Men* presently may be under attack in the Supreme Court. Although the Court may not seek to eliminate the doctrine, it may ignore it or broaden it to the point where it has little meaning. For example, five years after *Sanitation Men* the Court, without specifically addressing the point, seemed to affirm Justice Fortas's public trust doctrine. Lefkowitz v. Turley, 414 U.S. 70, 84 (1973) ("[G]iven adequate immunity, the State may plainly insist that *employees* either answer questions . . . or suffer the loss of employment." (emphasis added)). In 1976, however, Justice White's

The significance of *Gardner* and *Sanitation Men* in the public school setting, and the factor overlooked by the courts in both *Furutani* and *Nzuve*, is that public school students are not employees of the state. They hold no position of "public trust" and, accordingly, stand in the position described by Justice Fortas in his *Spevak* concurrence as persons who should suffer no "diminution, however limited of [their] Fifth Amendment rights."[105]

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majority opinion in Baxter v. Palmigiano, 425 U.S. 308 (1976), did not mention "public trust" or "public employee," rather it alluded to "important state interests" served by disciplinary proceedings in prisons other than conviction for crime. *Id.* at 319. *Baxter* held that the fifth amendment did not forbid adverse inferences from silence in prison disciplinary hearings. *Id.* at 317. Despite the fact that *Baxter* involved the infliction of penalties partially based on the accused's assertion of the fifth amendment privilege against self-incrimination, *Baxter* is distinguishable from *Gardner* and *Sanitation Men.* The probationer in *Baxter* was not granted immunity and did not face criminal prosecution. *Id.* One thus could argue that *Baxter* represents a shift from the "public trust" doctrine to a doctrine of "important state interests," but the factual differences between *Baxter* and *Gardner-Sanitation Men* make such a sweeping conclusion problematic.

The significance of using an "important state interests" standard rather than a "public trust" standard to compel testimony from a public school student when immunity is granted should be obvious. To establish that a student is in a position of "public trust" as defined in *Gardner* and *Sanitation Men* is virtually impossible because those cases dealt with public employees. A public school, however, often will be able to argue convincingly that it has "important interests" in compelling the testimony of a student suspected of drug dealing within the school, for example (or in penalizing the alleged student drug dealer by expulsion if he or she refuses to talk). Indeed, a lesser "important state interests" standard very likely may sound the death knell of the fifth amendment privilege against self-incrimination in the context of school investigations and disciplincfi]and a criminal statute. This section focuses on the meaning of "coercion" or "compulsion" in a general sense. Fent to convict a student criminally, the state might grant immunity and then allow the school to expel the alleged student wrongdoer based on his or her silence (or inferences drawn from that silence) at school disciplinary hearings or on his or her own "coerced" self-incrimination. For public policy arguments against such a lesser standard and in support of the "public trust" standard *see infra* notes 108-10 and accompanying text.

105. *Spevak*, 385 U.S. at 520 (Fortas, J., concurring). One district court has acknowledged that such a distinction exists for public school students. In *Caldwell v. Cannady*, 340 F. Supp. 835 (N.D. Tex. 1972), the district court, without citing any case, stated in dicta:

> The Court holds that one cannot be denied his Fifth Amendment right to remain silent merely because he is a student . . . . This is highly distinguishable from the duty placed upon a policeman to explain his own conduct at a disciplinary hearing or face automatic removal from the force. A policeman is a representative of a body charged with law enforcement whose conduct must be absolutely unblemished and above reproach. He is in a position of *trust* which he has voluntarily chosen to assume, and in which he is under no pressure to remain.

Id. at 841 (emphasis added); *accord* Gonzales v. McEuen, 435 F. Supp. 460, 471 (C.D. Cal. 1977).

The "public trust" rationale, if extended to the public school setting, would prevent a public school from imposing any penalty upon students who refuse to talk to school officials about misconduct that violates both a school rule and a criminal statute, even if prosecutors grant the student immunity or refrain from using the statements in future criminal prosecutions.[106] Additionally, the rationale would prevent courts from admitting against the student in a civil or criminal proceeding any statements made under such coercion.[107]

The fact that *Sanitation Men*, *Gardner*, and *Garrity* are established precedent is not the only reason to extend the "public trust" rationale to public schools when prosecutors grant immunity from criminal prosecution to the suspected wrongdoer. Significant public policy arguments also support implementing the "public trust" rationale in the public schools and affording public school students the greatest constitutional protections in school disciplinary hearings and investigations.

If a student facing serious charges of wrongdoing loses the privilege against self-incrimination in the public school setting because a prosecutor grants use immunity in subsequent criminal prosecutions, one might ask what lesson the student is learning. If, as Justice White said in *Murphy*, "every schoolboy is familiar with the concept, if not the language, of the [fifth amendment],"[108] a student forced to incriminate him or herself in a school disciplinary setting will feel unfairly treated regardless of how he or she is treated in the criminal prosecution. In dissent in *T.L.O.*, Justice Stevens commented on this very point:

> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal lib-

106. Obviously, failing to grant immunity while still threatening to impose penalties for failure to talk would be constitutionally infirm, even when the individual involved is in a position of public trust.

107. Minnesota v. Murphy, 465 U.S. 420, 434 (1984).

108. *Id.* at 437.

> erty, they cannot help but feel that they have been dealt with unfairly.[109]

Justice Brennan also has criticized attempts to diminish constitutional rights afforded students in public schools. He wrote, "Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."[110]

The issue, therefore, is not solely one of legal analysis. Presumably the Court should apply principles of public policy in reaching a decision in this area. The better resolution of this issue, consistent with both the case law and public policy, requires the application of the "public trust" rationale proposed in this Article, thereby allowing public school students to assert the fifth amendment in school when their alleged misconduct violates both a school rule and a criminal law, even though they have been granted use immunity by the local authorities.

D. The Need For Miranda *Warnings in the Public School Investigatory and Disciplinary Setting*

Although the issue of *Miranda* warnings[111] in public schools resurfaces from time to time,[112] the law on this point is quite well established. The law requires advising people of their constitutional rights to remain silent and to counsel only in connection with inherently coercive custodial interrogations.[113] In addition,

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109. New Jersey v. T.L.O., 469 U.S. 325, 373-74 (Stevens, J., dissenting) (citations omitted).

110. Doe v. Renfrow, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting from denial of certiorari).

111. Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court held that authorities must advise suspects in custody, *prior* to interrogation, that they have the following rights: 1) the right to remain silent, because anything the suspect says may be used against him or her; 2) the right to have counsel present during interrogation; and 3) if the suspect is indigent, the right to court-appointed counsel. *Id.* at 478-79.

112. Students raised the issue of *Miranda* warnings in school disciplinary hearings and investigations as early as 1968 and as recently as 1986. *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968) (involving a university student); Adams v. City of Dothan Bd. of Educ., 485 So. 2d 757 (Ala. Civ. App. 1986).

113. Minnesota v. Murphy, 465 U.S. 420, 430 (1984) (citing Roberts v. United States, 445 U.S. 552, 560 (1980)).

the Supreme Court has held that the *Miranda* requirements do not apply to pretrial statements in situations *other than* criminal cases.[114] Accordingly, because questioning a student in the public school is not a "custodial" interrogation, the school need not give *Miranda* warnings.[115] If a student "voluntarily" speaks to a school official about potentially criminal conduct, the absence of *Miranda*

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114. Baxter v. Palmigiano, 425 U.S. 308, 315 (1976). This Article assumes that the fifth amendment's privilege against self-incrimination applies to those school proceedings where a student's misconduct involves the violation of a criminal statute. The major relevant *Miranda* issue is whether a student would volunteer a statement about misconduct if he or she is aware of his or her fifth amendment rights. *See supra* notes 75-82 and accompanying text. A related issue concerns whether officials may use a student's "voluntary" statements in the *school's* disciplinary proceedings against the student, even if they are excludable in a criminal proceeding.

115. Wright, *supra* note 1, at 1077. Lower courts considering this issue almost unanimously concur. *See* Betts v. Board of Educ., 466 F.2d 629, 631 n.1 (7th Cir. 1972); Pollnow v. Glennon, 594 F. Supp. 220, 224 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 496 (2d Cir. 1985); Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968); Adams v. City of Dothan Bd. of Educ., 485 So. 2d 757, 761 (Ala. Civ. App. 1986); *In re* Feazell, 360 So. 2d 907, 908-09 (La. App. 1978); Birdsey v. Grand Blanc Community Schools, 130 Mich. App. 718, ____, 344 N.W.2d 342, 344 (1983); *In re* Brendan H., 92 Misc. 2d 1077, 1079, 372 N.Y.S.2d 473, 476-77 (1975); State v. Wolfer, 39 Wash. App. 287, ____, 693 P.2d 154, 158 (1984).

The Supreme Court in *T.L.O.* stressed that school administrators are state actors, exercising public rather than parental authority when they impact upon the constitutional guarantees of freedom of expression, due process, and search and seizure. New Jersey v. T.L.O., 469 U.S. 325, 326 (1985). As a result, one can argue strongly that courts should consider a school official's questioning of a student about criminal misconduct to be "custodial" interrogation, particularly when the student is questioned in the principal's office and feels that his or her freedom to leave at will has been curtailed. *See* Miranda v. Arizona, 384 U.S. at 478 (*Miranda* rules apply while in custody or "deprived of . . . freedom . . . in any significant way.").

For purposes of triggering the *Miranda* warnings, however, the Court construed "custody" narrowly to include only formal arrest or restraint on freedom of movement comparable to formal arrest. *See* Minnesota v. Murphy, 465 U.S. 420, 430-35 (1984) (exploring various aspects of *Miranda*, including factors to consider in determining if one is in custody); California v. Beheler, 463 U.S. 1121, 1124 (1983); *see also* United States v. Parr-Pla, 549 F.2d 660, 663 (9th Cir.), *cert. denied*, 431 U.S. 972 (1977) (holding that *Miranda* does not apply to private interrogations); Boynton v. Casey, 543 F. Supp. 995, 998 (D. Me. 1982) (holding that denying a student "permission to leave" does not transform questioning by a school official into a custodial interrogation).

Given the Court's analysis in *Murphy*, as well as the weight of authority cited above, the prospects for a successful argument favoring *Miranda* warnings in the public school setting are doubtful, even though *T.L.O.* stressed that school administrators are state actors, and even though a student being questioned by school officials probably does not feel free to leave during questioning.

warnings therefore is not likely to bar the use of any statements in either a school disciplinary hearing or a criminal proceeding.[116]

Determining that school officials need not give *Miranda* warnings to students prior to questioning does not resolve entirely whether such statements are "volunteered."[117] The general rule is that a person must assert the privilege in a timely fashion or the statements will be considered volunteered and the privilege waived.[118] The Supreme Court has identified three exceptions to this general rule.[119] The first exception excludes statements made during custodial interrogation in the absence of *Miranda* warnings; this exception is based upon the assumption that custodial interrogation is inherently coercive.[120] The second exception arises when authorities tell the person they question that exercising the privilege will be penalized.[121] The final exception flows out of *Marchetti v. United States*[122] and is limited to situations not addressed in this Article.[123]

Whether *Miranda* warnings are given or not,[124] how can one conclude that the student—often a minor—"knowingly and intelli-

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116. *Murphy*, 465 U.S. at 430-35; *see also* Betts v. Board of Educ., 466 F.2d 629, 631 n.1 (7th Cir. 1972) (holding that *Miranda* warnings are not a requisite of due process but a condition of admissibility in a criminal prosecution of statements obtained while in custody or otherwise significantly deprived of freedom).

117. In *Miranda*, the Court recognized that when a person speaks after receiving *Miranda* warnings, a judge still must determine whether that person "knowingly and intelligently waived his privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 475 (1966). The Court reaffirmed that analysis in 1979 in Fare v. Michael C., 442 U.S. 707, 724 (1979) (dealing with police interrogation of a minor in a murder investigation).

118. *Murphy*, 465 U.S. at 429.

119. *Id.*

120. *Id.* at 429-35.

121. This Article discusses the situation in which officials threaten a student with deprivation of a significant educational interest if the student does does not talk. *See supra* notes 52-74 and accompanying text. The Article concludes that any statements induced by such a threat would not be considered voluntary even if the student involved did not raise the fifth amendment. This conclusion is drawn from and is consistent with this second exception found in *Murphy*, 465 U.S. at 429-41.

122. 390 U.S. 39 (1968).

123. *Marchetti* dealt with federal taxes imposed upon gamblers; *see Murphy*, 465 U.S. at 429-41.

124. Notwithstanding the discussion in the text concerning *Miranda* not applying in school interrogations, the better practice seemingly would be for school administrators to give *Miranda* warnings, or, alternatively, simply to turn the matter over to the police or

gently" waived his or her privilege not to speak? Supreme Court decisions in somewhat analogous situations guide this inquiry.

First, the Court has stated at least twice that "every schoolboy is familiar with the concept, if not the language, of the [fifth amendment]."[125] Second, the Court has suggested a case-by-case analysis to determine if a juvenile has waived his or her fifth amendment rights, considering the "totality of the circumstances."[126] "Circumstances" to consider include age, experience, education, background, intelligence, and the juvenile's capacity to understand the nature of his or her fifth amendment rights and the consequences of waiving those rights.[127]

Presumably courts should apply the *Fare* standards to students who make incriminating statements when questioned by school officials. The problem, however, is that *Fare*'s "totality of the circumstances" test somewhat begs the question and asks school administrators to judge a particular student's background and capacity without giving any real guidance.[128]

In conclusion, because courts do not consider the questioning of a student by a school official to be custodial, *Miranda* warnings prior to the questioning are not required. Further, current Supreme Court jurisprudence assumes that all school children are familiar with the concepts of the fifth amendment[129] and, arguably, therefore any statements are presumed to be intelligent waivers, exercised with full "knowledge" of one's rights. To the extent that a particular student in a specific situation claims lack of capacity to waive his or her rights knowingly, courts should examine each case on an individual basis to see if the student had the requisite capacity given the "totality of the circumstances." Accordingly, al-

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juvenile authorities if potential criminal sanctions are involved. *See* Wright, *supra* note 1, at 1077.

125. Minnesota v. Murphy, 465 U.S. at 437 (quoting Michigan v. Tucker, 417 U.S. 433, 439 (1974)).

126. Fare v. Michael C., 442 U.S. 707, 724-25 (1979); *accord* State v. Wolfer, 39 Wash. App. 287, ___, 693 P.2d 153, 157 (1984).

127. *Fare*, 442 U.S. at 724-25.

128. In *Fare*, the dissent, written by Justice Marshall and joined by Justices Brennan and Stevens, criticized the majority's "totality of the circumstances" test for failing to supply adequate guidance. *Id.* at 731 n.2 (Marshall, J., dissenting).

129. Justice Marshall's dissent acknowledged this assumption with approval. Minnesota v. Murphy, 465 U.S. at 452-53 (Marshall, J., dissenting).

though a prudent policy seeking to avoid controversy and litigation might require officials to give *Miranda* warnings prior to questioning a student about conduct that is potentially criminal, such warnings apparently are not the current constitutional requirement.

IV. Conclusion

The current state of the fifth amendment in public schools is far from consistent. Certainly, students bring the fifth amendment with them when they enter the schoolhouse door. The fifth amendment departs, however, if students face questions about purely school rules or policies that reasonably do not implicate a criminal prosecution. Further, the fifth amendment does not require school officials to give *Miranda*-type warnings prior to questioning a student, even if the questions concern potentially criminal conduct.

What, then, does the fifth amendment offer to our public school students? Clearly, if student misconduct violates a school rule *and* a criminal statute, school administrators may not use coercive conduct to compel a student to incriminate him or herself. This Article suggests that courts should consider a school official's conduct coercive when the administrator threatens deprivation of substantial educational interests if the student does not cooperate. If prosecutors extend immunity from criminal prosecution to the students, Supreme Court cases in related areas suggest that students do not lose any of their fifth amendment protections. Officials may grant immunity to compel any individuals in positions of "public trust," usually state employees, to speak or suffer penalties. Because students are not generally in such positions of "public trust," they should be able to remain silent without fear of sanctions in the form of deprivation of a substantial educational interest.