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## From Backpacks to BlackBerries: (Re)Examining New Jersey v. T.L.O. in the Age of the Cell Phone

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## **FROM BACKPACKS TO BLACKBERRIES: (RE)EXAMINING NEW JERSEY V. T.L.O. IN THE AGE OF THE CELL PHONE<sup>†</sup>**

### ABSTRACT

*When the U.S. Supreme Court decided New Jersey v. T.L.O., cellular phones had yet to emerge in American society and public schools. Contemplating a world of physical possessions and tangible objects, the T.L.O. Court determined that public school students may expect only a minimal amount of privacy in their backpacks, purses, and other belongings while at school. The Court used these diminished privacy expectations to establish a heavily reduced standard of Fourth Amendment protection against unreasonable searches conducted by teachers and administrators.*

*The pervasiveness of cell phones in today's schools, however, has arguably swayed the balance. As students, like the rest of society, increasingly rely on their cell phones for a vast range of private purposes, they have demanded a reevaluation of the heavily abridged safeguards the T.L.O. Court prescribed. Calls for heightened Fourth Amendment protection in students' cell phones arise in an era when school authorities often search the stored contents on these phones (including call histories, text messages, photos, and information accessed on the Internet) in the name of maintaining an orderly educational environment. The mounting uncertainty over the privacy students can expect in their cell phones against school officials' intrusions has left schools vulnerable to widespread opposition and rights-based litigation. Students often reflexively believe that they should have more privacy rights in their cell phones than the established standard provides. This Comment develops a legal argument that lends support to this intuition.*

*With an eye toward respecting students' heightened expectations of privacy in their cell phones, this Comment advances the novel argument that the capabilities, characteristics, and uses of these devices have confounded the justification for reduced Fourth Amendment standards upon which the T.L.O. Court relied. First, the capabilities of cell phones and the uses to which students put them demand the recognition of heightened privacy expectations in these devices. Moreover, the complexity of cell phones increases the degree*

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<sup>†</sup> This Comment received the 2011 Mary Laura "Chee" Davis Award for Writing Excellence.

*of intrusion students are forced to accept upon any search of their contents, reaffirming the need for greater safeguards to respect students' privacy interests. Finally, school officials do not have a sufficient interest to justify these extensive intrusions upon students' heightened expectations of privacy without more protective Fourth Amendment safeguards in place. In light of these deficiencies, this Comment proposes a number of heightened measures, including the reinstatement of probable cause and the requirement of parental notice and consent, that may feasibly be implemented in the school environment to better protect students' privacy rights in a new frontier of the Fourth Amendment's application to public schools.*

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## INTRODUCTION

Writing in 1985, the U.S. Supreme Court could not have conceived of the characteristics and capabilities of cellular phones when it diminished the standard of Fourth Amendment protection public school students could expect in their belongings. In *New Jersey v. T.L.O.*, the Court abrogated the Fourth Amendment's typical requirement that a government official obtain a warrant justified by probable cause before engaging in a search of an individual's person or belongings, holding instead that a public school official need only "reasonable suspicion" to justify an intrusion into a student's purse or backpack.<sup>1</sup> The Court's reasoning, however, contemplates a bygone era that predated the ubiquity of increasingly sophisticated cell phones in the school environment.

The tremendous features and functions of these devices—and the personal and extensive uses to which students put them—have arguably confounded the balance *T.L.O.* struck between students' privacy expectations and school officials' disciplinary needs. The emergence of the cell phone has accordingly given rise to calls for heightened safeguards to protect students' (and their families') Fourth Amendment rights in their phones against a *T.L.O.* standard that may inadequately reflect these interests.<sup>2</sup> Moreover, as students balk at the low safeguards, school officials face legal uncertainty (and potential liability) in a crucial, modern area of school authority.<sup>3</sup> The need to clarify a heightened standard is particularly pressing in light of public schools' needs to respond to a number of cell-phone-related issues, including the troubling modern phenomenon of "cyberbullying," an umbrella term encompassing a host of methods by which students harm each other emotionally and relationally through their cell phones and other electronic devices.<sup>4</sup>

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<sup>1</sup> 469 U.S. 325, 339–45 (1985).

<sup>2</sup> See, e.g., Katherine Leal Unmuth, *Phone Search by High School Angers Parent*, DALL. MORNING NEWS, Aug. 2, 2010, at B1; Suzanne Ito, *Pa. School District Pays \$33,000 to Settle Cell Phone Search Lawsuit*, ACLU BLOG OF RIGHTS (Sept. 17, 2010, 3:34 PM), <http://www.aclu.org/blog/free-speech/pa-school-district-pays-33000-settle-cell-phone-search-lawsuit>; Tara Parker-Pope, *Should Schools Search Cellphones?*, N.Y. TIMES WELL BLOG (July 6, 2010, 10:25 AM), <http://well.blogs.nytimes.com/2010/07/06/should-schools-search-cellphones/>; Jake Whittenberg, *Schools' Anti-Bullying Plan Includes Cell Phone Search*, KING5.COM (Aug. 23, 2010, 5:39 PM), <http://www.king5.com/news/education/New-anti-bullying-plan-includes-cell-phone-search-101313244.html>.

<sup>3</sup> See, e.g., *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 639–41 (E.D. Pa. 2006) (finding that a school administrator's search of a student's cell phone violated the Fourth Amendment); Ito, *supra* note 2 (discussing a lawsuit brought on behalf of a student alleging a violation of her Fourth Amendment rights after school administrators confiscated and searched her cell phone).

<sup>4</sup> See discussion *infra* Part I.B.

This Comment develops the argument that the distinctive characteristics of students' cell phones necessitate a reexamination of the standard, to this point governed by *T.L.O.*, guiding public school officials' searches through the contents of these devices.<sup>5</sup> While courts and scholars have just begun to explore the privacy implications of cell phones in other Fourth Amendment contexts, the question has yet to be scrutinized under the *T.L.O.* framework and in the public school context. In anticipation of the debate, this Comment presents a case for students' rights in an era when technology has strained the established legal structure, arguing that students' privacy expectations in their cell phones demand greater protection than *T.L.O.* provides.

Part I of this Comment describes the prevalent use of cell phones among students and in the public school environment, explains school officials' corresponding need to search these devices' contents, and provides a model scenario to illustrate the problem. In Part II, this Comment surveys the legal landscape governing school searches and notes a growing body of case law expounding on the issue of cell phone searches by law enforcement authorities in other areas of Fourth Amendment doctrine.

Part III advances the argument that the pervasiveness of cell phones upsets the careful balance struck by the *T.L.O.* Court between students' privacy expectations and school officials' interests, which the Court used to justify a reduced standard of protection under the Fourth Amendment. A renewed examination of students' privacy interests in their cell phones demonstrates that school officials should observe heightened safeguards before searching these devices. Part IV of this Comment then suggests safeguards that could feasibly be implemented in the public school environment.

## I. THE PRESENCE AND PROBLEMS OF CELL PHONES IN PUBLIC SCHOOLS

This Comment's argument addresses a specific and increasingly common situation facing school administrators: a search through the contents of a student's cell phone based on some degree of suspicion that the student has violated school rules or criminal law. This Part first establishes the prevalence of cell phones in public schools, then explains the problems associated with

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<sup>5</sup> This Comment's scope is limited to public primary and secondary schools in the United States, and it does not address searches by school officials in public institutions of higher education, such as colleges or universities. For a discussion of students' Fourth Amendment rights in public higher education, see generally 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(d), at 531–38 (4th ed. 2004).

this phenomenon and the reasons school officials have for searching the contents of these devices, and finally outlines a model situation facing teachers and administrators.

A. *The Uses and Ubiquity of Cell Phones in Schools*

Without a doubt, students' cell phones pervade the public school setting. According to a 2010 study conducted by the Pew Internet & American Life Project, 75% of American teenagers between the ages of twelve and seventeen carry cell phones, a figure that increased from 45% in 2004.<sup>6</sup> Inevitably, these cell phones find their way inside school walls, regardless of schools' attempts to prohibit them.<sup>7</sup> More than three-fourths of teenagers bring their cell phones to school, despite that 86% of teenagers report that their schools have banned the devices from classrooms during school hours.<sup>8</sup> Moreover, students use their cell phones frequently during the school day. Fully half of students reported sending or receiving text messages during class at least several times per week.<sup>9</sup>

As cell phones have become the norm in schools, their capabilities and features have continued to evolve. Cell phones, as traditionally defined, are small, mobile telephones capable of communicating with other phones via conventional vocal interactions or text messages and often function as cameras that can produce and store digital pictures or videos.<sup>10</sup> The Internet provides additional methods of communication. Internet users can send messages and files to each other via electronic mail (known almost universally as e-mail); can post messages, pictures, and videos on social networking sites such as Facebook, Twitter, or YouTube;<sup>11</sup> and can engage in instant-message

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<sup>6</sup> Amanda Lenhart et al., *Teens and Mobile Phones*, PEW INTERNET & AM. LIFE PROJECT 2, 16 (Apr. 20, 2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf>.

<sup>7</sup> For a discussion of school policies banning cell phones and the effects of these bans on students' privacy rights, see *infra* Part III.A.3.

<sup>8</sup> Lenhart et al., *supra* note 6, at 82.

<sup>9</sup> *Id.* at 84. "Text messaging" allows cell phone users to communicate with one another by transmitting short written messages, or text messages, between devices. Katharine M. O'Connor, Note, *o OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages*, 2010 U. ILL. L. REV. 685, 688.

<sup>10</sup> SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 8, 19 (2009).

<sup>11</sup> This Comment does not address the information or material students place on the publicly accessible areas of their social networking profiles. For example, personal Facebook websites include a "wall" onto which text and photos can be placed for *anyone visiting that particular site* (typically a student's acquaintances) to read or view. See FACEBOOK, <http://www.facebook.com/facebook> (last visited Sept. 13, 2011). These public postings are quite different from text messages, e-mails, phone calls, or other forms of more private communication available through cell phones, and these postings may not be protected by the

conversations (allowing contemporaneous, text-based communication) through a variety of websites.<sup>12</sup> Until recently, these Internet-based forms of communication and file sharing were accessible exclusively through personal computers. The increasing sophistication of cell phone technology, however, has allowed many—if not most—cell phones on the market to access the Internet via high-speed connections and provide massive storage space for high-quality pictures, videos, or music.<sup>13</sup> These highly sophisticated cell phones, often referred to as “smartphones,” constitute an enormous and ever-increasing share of the cell phone market in the United States.<sup>14</sup> Modern cell phones, even so-called standard cell phones,<sup>15</sup> have essentially allowed

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Fourth Amendment at all. *See* *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); *United States v. Gines-Perez*, 214 F. Supp. 2d 205, 225–26 (D.P.R. 2002) (finding no expectation of privacy, a prerequisite for Fourth Amendment protection, in information made widely available to others on the Internet), *vacated per curiam on other grounds*, 90 F. App’x 3 (1st Cir. 2004). For a more detailed discussion of individuals’ Fourth Amendment rights in their social networking websites, see generally David Hector Montes, Note, *Living Our Lives Online: The Privacy Implications of Social Networking*, 5 I/S: J. L. & POL’Y FOR INFO. SOC’Y 507 (2010).

<sup>12</sup> *See* HINDUJA & PATCHIN, *supra* note 10, at 19; BARBARA C. TROLLEY & CONSTANCE HANEL, CYBER KIDS, CYBER BULLYING, CYBER BALANCE 40 (2010).

<sup>13</sup> Apple’s iPhone 4, HTC’s myTouch 4G Slide, and BlackBerry’s Torch models—all among the newest models of smartphones available on the market as of September 2011—connect to the Internet using high-speed connections and store at least four gigabytes of information with an option to upgrade to thirty-two gigabytes, a capacity easily encompassing thousands of text messages, photos, videos, music files, and other applications or information. *See BlackBerry Torch 9850 Specs & Torch 9860 Specs*, BLACKBERRY, <http://us.blackberry.com/smartphones/blackberry-torch-9850-9860/#!phone-specifications> (last visited Sept. 13, 2011); *iPhone 4*, APPLE, <http://www.apple.com/iphone/features/> (last visited Sept. 13, 2011); *T-Mobile myTouch 4G Slide*, HTC, <http://www.htc.com/us/products/mytouch4gslide-tmobile?view=1-1&sort=0#tech-specs> (last visited Sept. 13, 2011).

<sup>14</sup> In the third quarter of 2010, more than 20 million smartphones were sold in the United States. *See* Nick Bilton, *The Race to Dominate the Smartphone Market*, N.Y. TIMES BITS BLOG (Nov. 1, 2010, 3:26 PM), <http://bits.blogs.nytimes.com/2010/11/01/apple-and-google-excel-in-u-s-smartphone-growth/>. That number was an increase from approximately 14.5 million in the previous quarter and 9.7 million in the second quarter of 2009. *See* Matt Hamblen, *OS War Has Android on Top in U.S. Smartphone Sales*, COMPUTERWORLD (Aug. 12, 2010, 3:47 PM), [http://www.computerworld.com/s/article/9180624/OS\\_war\\_has\\_Android\\_on\\_top\\_in\\_U.S.\\_smartphone\\_sales](http://www.computerworld.com/s/article/9180624/OS_war_has_Android_on_top_in_U.S._smartphone_sales). As of mid-2011, there were approximately 82 million smartphones in circulation in the United States. Ellen Gibson, *Mobile Shopping: More Buzz than Buy So Far*, SEATTLE TIMES (Sept. 1, 2011, 3:56 AM), [http://seattletimes.nwsourc.com/html/business/technology/2016074590\\_apusmobileshoppingstandstill.html](http://seattletimes.nwsourc.com/html/business/technology/2016074590_apusmobileshoppingstandstill.html).

<sup>15</sup> Because smartphones and standard cell phones now possess many of the same functions and capabilities, the Ohio Supreme Court (for example) has refused to draw an analytical distinction between them in evaluating the privacy interests in cell phones generally. *See* *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009) (noting that even standard cell phones can “store and transfer data and allow users to connect to the Internet”). Similarly, this Comment will refer to cell phones as a collective category rather than distinguish between smartphones and standard cell phones.

students to carry to school “portable microcomputers” with all the salient characteristics of a personal computer.<sup>16</sup>

It is these sophisticated devices that students are increasingly carrying with them into schools. Studies have indicated that cell phone users, including students, use their phones to communicate with others via the Internet, seek online information, produce and store photographs or videos, shop, bank, create documents, store medical records, or search for information regarding personal or political interests.<sup>17</sup> A large majority of students use their cell phones to create and store images, and 54% use their phones to record and store videos.<sup>18</sup> Moreover, 31% of students use their cell phones for instant messaging on the Internet, 21% access their e-mail accounts through their cell phones, and nearly one-fourth use their cell phones to access their own and others’ accounts on social networking sites.<sup>19</sup>

Cell phones with sophisticated characteristics and capabilities are prevalent among students inside school walls. The pervasiveness of these devices, however, has given rise to new concerns for teachers and administrators as they seek to investigate disputes or accusations and maintain order in the school environment.

### *B. The Rise of Content Searches by School Officials: Cyberbullying and Other Harms*

As cell phones have become a predominant mode of interaction between students and have the capacity to store the evidence of so many aspects of a student’s daily life, school officials often see the need to search the contents of these devices in investigating accusations, suspicions, or disputes.<sup>20</sup> One of the primary social problems giving rise to the need to search a cell phone’s content is the phenomenon of cyberbullying.<sup>21</sup> In the public school context,

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<sup>16</sup> See Bryan Andrew Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1171–72 (2008) (quoting Adriana de Souza e Silva, *Interfaces of Hybrid Spaces*, in THE CELL PHONE READER 19, 19 (Anandam Kavoori & Noah Arceneaux eds., 2006)) (internal quotation mark omitted).

<sup>17</sup> See Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1572–75 (2004) (citing studies indicating the uses of Internet access through phones).

<sup>18</sup> Lenhart et al., *supra* note 6, at 56.

<sup>19</sup> *Id.*

<sup>20</sup> See Marc Freeman, *New Warnings on Technology Set in Schools*, SUN-SENTINEL (Fort Lauderdale, Fla.), Aug. 31, 2011, at 1B; Unmuth, *supra* note 2; Parker-Pope, *supra* note 2; Whittenberg, *supra* note 2.

<sup>21</sup> See, e.g., Sharon Salyer, *Mukilteo Schools May Check Students’ Cell Phones*, HERALDNET (Jan. 24, 2011), <http://www.heraldnet.com/article/20110124/NEWS01/701249945>; Whittenberg, *supra* note 2.

cyberbullying involves students “being cruel to others by sending or posting harmful material or engaging in other forms of social cruelty using the Internet or other digital technologies, such as cell phones.”<sup>22</sup> Cyberbullying may take a variety of forms. For example, cyberbullying may involve heated text-message exchanges that lead to threats or physical violence.<sup>23</sup> It may also take the form of ongoing insults through posts, calls, e-mails, or text messages directed at a single victim.<sup>24</sup> Other instances of cyberbullying have involved impersonation, where one student takes another’s cell phone and sends harmful messages or images to others while acting as the cell phone’s owner.<sup>25</sup> Cyberbullying may even include “cyberstalking,” or often-anonymous onslaughts of communications directed at someone through text messages, phone calls, or e-mails.<sup>26</sup>

One peculiar use of cell phones and other personal electronic devices known as “sexting” deserves brief description as a frequent mechanism of cyberbullying. *Sexting* refers to the “transmission of sexually charged materials” (typically photos) between students through text messages or other forms of file transmission,<sup>27</sup> usually in the context of a romantic relationship.<sup>28</sup> Sexting often becomes a vehicle for cyberbullying, as many students who receive “sexts” eventually forward these photos or messages to other unintended recipients out of either intrigue or spite, leading to wide dissemination of extremely private material and the humiliation of the original sender.<sup>29</sup> These incidents are not isolated. Nineteen percent of teenagers have sent a nude or seminude image to someone via text message or e-mail, and

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<sup>22</sup> NANCY E. WILLARD, CYBER-SAFE KIDS, CYBER-SAVVY TEENS 10 (2007). Notably, Willard’s 2007 conception of cyberbullying assumes Internet communications to be an alternative to cell phone communications. The emergence of cell phones incorporating Internet access, however, has blurred the distinction Willard makes, allowing students to access Internet communication options through their cell phones. *See supra* notes 11–16 and accompanying text.

<sup>23</sup> *See* NANCY E. WILLARD, CYBERBULLYING AND CYBERTHREATS 5–6 (2007).

<sup>24</sup> *See id.* at 6–7.

<sup>25</sup> *See id.* at 8.

<sup>26</sup> *See id.* at 10.

<sup>27</sup> Dawn Zinga, *Boundaries in Cyber-Space: Media and Stakeholders as Policy Shapers*, in TRUTHS AND MYTHS OF CYBER-BULLYING 105, 113 (Shaheen Shariff & Andrew H. Churchill eds., 2010).

<sup>28</sup> *See* WILLARD, *supra* note 22, at 9–10.

<sup>29</sup> *See id.* at 9. Cyberbullying involving this kind of material has led to tragedy in some cases. For example, eighteen-year-old Jessica Logan, a public school student, took a nude photograph of herself using her cell phone and sent the image to her then-boyfriend. Cindy Kranz, *Family Wants Tougher Laws: Sexting Suicide*, CINCINNATI ENQUIRER, Mar. 22, 2009, at A1. Upon splitting up, the student who received the image sent it to several other students, and eventually, the image had been sent to the cell phones of hundreds of students at multiple schools in the area, leading to taunts and insults directed at Logan. *Id.* Humiliated, Logan committed suicide. *Id.*

31% have received such an image.<sup>30</sup> Tellingly, 29% report that they have had a sexted image shared with them knowing the material was intended to stay between the sender and the original recipient.<sup>31</sup>

School administrators' interests in searching the contents of students' cell phones commonly involve the use of these devices as instruments of cyberbullying.<sup>32</sup> The most frequent modes of cyberbullying—including phone calls, text messages,<sup>33</sup> instant-message conversations, e-mails, and social networking websites<sup>34</sup>—can be and are perpetrated via cell phones, and thanks to the increasing sophistication of cell phone technology, the evidence of cyberbullying through these methods can typically (and even exclusively) be accessed by searching these devices' stored content or using the devices to access the owners' personal Internet data.<sup>35</sup> In response to incidents of cyberbullying, school officials often need to search the content accessible through students' cell phones.<sup>36</sup>

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<sup>30</sup> *Sex and Tech: Results from a Survey of Teens and Young Adults*, NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY 11, [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf) (last visited Sept. 13, 2011). These figures are even greater in the context of sexually suggestive messages, such as instant messages or text messages; 38% of students reported sending such messages, and nearly half (48%) reported having received such messages. *Id.*

<sup>31</sup> *Id.* Again, the figure is higher in the context of sexually suggestive messages, as 39% reported receiving such messages despite knowing the message had originally been private. *Id.*

<sup>32</sup> See sources cited *supra* note 21.

<sup>33</sup> See Amanda Lenhart, *Cyberbullying 2010: What the Research Tells Us*, PEW INTERNET & AM. LIFE PROJECT (May 6, 2010), <http://www.pewinternet.org/Presentations/2010/May/Cyberbullying-2010.aspx>.

<sup>34</sup> See MARCI FELDMAN HERTZ & CORINNE DAVID-FERDON, CTNS. FOR DISEASE CONTROL & PREVENTION, *ELECTRONIC MEDIA AND YOUTH VIOLENCE* 7 (2008), available at <http://www.cdc.gov/violenceprevention/pdf/EA-brief-a.pdf>.

<sup>35</sup> This Comment does not address the question of whether third parties, including recipients of messages or e-mails, can reveal this information to school officials against the sender's wishes; this Comment confronts only the question of whether a school official can search the cell phone of the *sender*. The Fourth Amendment likely provides no protection when the *recipient* of a communication reveals its content. See *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that . . . the confidence placed in the third party will not be betrayed.”).

<sup>36</sup> A recent anecdote illustrates the point. In early 2010, two Florida students engaged in a heated text-message exchange that led to a violent physical altercation. See Laura C. Morel, *Beaten Deerfield Beach Teen Josie Lou Ratley Recovering at Home*, MIAMI HERALD, June 2, 2010, at B3. The evidence of the students' exchange was exclusively accessible by reviewing the stored messages on each student's cell phone. See *id.* The need is particularly acute and sensitive in the context of sexting, where students use their cell phones to produce, store, and send extremely private communications or photos, thereby requiring a review of the cell phone's contents in the course of any investigation into the conduct, which often constitutes a violation of school rules. See, e.g., Scott Burton, *Kelso School District Bans Sexting*, KGW.COM (Feb. 8, 2011, 6:06 PM), <http://www.kgw.com/news/local/Kelso-School-District-Bans-Sexting-115539049.html>.

Many school districts have proposed controversial policies regarding cell phone searches that reflect this need to investigate cyberbullying incidents, emphasizing the timely importance of the question this Comment addresses. Before the 2010–2011 school year, for example, a Washington school district proposed a policy allowing school principals to search cell phone contents “when they suspect students may be using their phones to harass others via e-mail, text message or by sending photos,” activities that constitute violations of school rules.<sup>37</sup> Similarly, a Florida school district adopted new 2011–2012 handbook language holding students “responsible for any inappropriate, immoral, unethical, dangerous, destructive, hateful or threatening behavior” committed through “a technological device.”<sup>38</sup>

Of course, the need to investigate cyberbullying does not exhaust the list of reasons school officials have for searching students’ cell phones. Cell phones may be involved in the violation of any number of school rules or policies, including theft of the cell phone itself, use of the cell phone to call or text other students when such activity is prohibited (during class, for example), or use of the cell phone’s communication or photo functions to help others cheat on examinations.<sup>39</sup> Moreover, the text messages, stored photos, or other stored files on or accessible from cell phones could constitute evidence of darker social ills like drug possession, use, or dealing.<sup>40</sup>

As this Comment will explore, school officials’ searches of cell phones will inevitably give rise to Fourth Amendment concerns due to the personal (and often extremely private) nature of the contents of the cell phone that is the subject of the search, and the resultant controversy has produced uncertainty as students worry about their privacy and school officials fret over argumentative parents and potential lawsuits. The following section explores a model case to illustrate the scenario commonly facing schools and provide a basis for analyzing the Fourth Amendment issues involved.

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<sup>37</sup> Whittenberg, *supra* note 2.

<sup>38</sup> Freeman, *supra* note 20 (quoting SCH. DIST. OF PALM BEACH CNTY., FLA., STUDENT & FAMILY HANDBOOK 2011–2012, at 51 (2011), available at [http://www.palmbeachschools.org/Students/handbook/documents/2011-2012\\_Student\\_Handbook\\_Final\\_English\\_to\\_PRINT.pdf](http://www.palmbeachschools.org/Students/handbook/documents/2011-2012_Student_Handbook_Final_English_to_PRINT.pdf)) (internal quotation mark omitted).

<sup>39</sup> See Bernard James, *Legal Update: Safe Schools, Cell Phones, and the Fourth Amendment*, PEPPERDINE U. SCH. L. (2009), <http://law.pepperdine.edu/academics/faculty/publications/James-NASROCellPhoneLaw.pdf>.

<sup>40</sup> See, e.g., *United States v. Garcia-Aleman*, No. 1:10-CR-29, 2010 WL 2635071, at \*12 (E.D. Tex. June 9, 2010) (recognizing cell phones as “tools of the drug trade”).

### C. A Model Scenario<sup>41</sup>

Chris Pupil, a junior at City High School, carries a cell phone with him (and often uses it) during school hours despite a City School District policy that prohibits cell phones. Pupil can use his cell phone, an iPhone 4, to call or text message his friends and acquaintances, as well as browse the Internet and check his e-mail account, hold instant-message conversations with others, and access his message inbox on Facebook.<sup>42</sup> The iPhone also takes high-resolution photos and stores thousands of songs and videos.<sup>43</sup>

Over the past month, Pupil and several friends have been playing pranks on another student in the school, John Student, by creating identical degrading text messages on each person's cell phone and then sending them all at once during lunch hour. The clog of incoming text messages jams Student's phone, and the device's screen often remains frozen on whatever message Pupil and his friends decided to send that day unless Student removes his phone's battery and reboots the device. Pupil and his friends have also found it humorous to surreptitiously take embarrassing photos of Student during the school day and then text them to Student days or weeks later. Though Student, a shy teenager with few friends, originally played along, the pranks are beginning to bother him. Student tells a friend about the situation. The friend suggests telling a faculty member at City High, but Student refuses to involve authorities. The friend takes matters into his own hands and tells Margaret Principal, City High's assistant principal, that Student is being cyberbullied by students in the school, including Pupil.

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<sup>41</sup> This model scenario draws from several cases and situations involving school officials' searches of students' cell phones. *See, e.g.*, Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 627 (E.D. Pa. 2006) (describing a search by a school official of a cell phone confiscated without any suspicion); Richard Hartsock, Note, *Sext Ed.: Students' Fourth Amendment Rights in a Technological Age*, 37 N. KY. L. REV. 191, 204-07 (2010) (analyzing a similar scenario to the model case presented here, but emphasizing sexting); Unmuth, *supra* note 2 (detailing a school official's search of a student's cell phone in response to a dispute involving electronic communication); Ito, *supra* note 2 (describing the confiscation and search of a cell phone); Parker-Pope, *supra* note 2 (presenting psychologist Elizabeth Englander's similar hypothetical involving a cell phone search in the context of a cyberbullying investigation); Whittenberg, *supra* note 2 (explaining a school policy allowing principals to search students' cell phones based on a suspicion that the student has engaged in cyberbullying against another student in violation of school rules). The model presented here customizes the situation for analytical clarity throughout this Comment.

<sup>42</sup> The "message" function of Facebook mirrors e-mail in that it allows private messages to be sent between one Facebook user and another, *see The New Messages*, FACEBOOK, <http://www.facebook.com/about/messages/?setup> (last visited Sept. 13, 2011), as opposed to the more public "wall" function, which allows everyone who visits a particular personal website to see the message shared between the two users, *see supra* note 11.

<sup>43</sup> *See iPhone 4*, *supra* note 13.

Principal begins her investigation of this alleged cyberbullying, which is specifically prohibited in school antibullying policies, by calling Pupil into her office, informing him of the allegations, and asking for his cell phone. Pupil denies the accusation and refuses to give Principal his phone, but he hands it over when Principal threatens to give him in-school suspension. Principal dismisses Pupil but keeps the cell phone in her possession. Principal, a technological neophyte, proceeds to examine the contents of the cell phone. She first turns it on, then after several clicks through many of the phone's applications (happening upon several stored photos and notes), finally stumbles upon the text-message inbox. She scrolls through several hundred of the messages, finding some that were directed toward Student. In the process, she comes across a number of other messages, including one from Pupil's father telling him private information regarding a family member, one from his mother saying that the family did not have enough money to send him on a spring-break trip with his friends, and one from Pupil's girlfriend regarding an issue in their relationship. Hoping to find stored e-mails of Pupil's cyberbullying activities directed at Student, Principal then accesses the Internet through his cell phone and enters his e-mail account (which Pupil's cell phone automatically remains logged into). Principal finds no stored e-mails to Student but runs across an e-mail thread between Pupil and a friend making several disparaging remarks about faculty members at the school, including Principal herself.

Later that day, Principal calls Pupil back into her office, returns the phone to him, and serves him a three-day in-school suspension based on the evidence found on his phone for violating City High's antibullying policy. Principal also tells him she is personally offended by the remarks he made about her through e-mail and is reconsidering her earlier intention to recommend Pupil for several college scholarships.

With the help of his parents, Pupil commences a lawsuit against Principal and City School District, alleging a violation of his Fourth Amendment right to be free from unreasonable searches and claiming monetary damages.

Though this scenario may be somewhat extreme, versions of it happen often in public schools around the country,<sup>44</sup> fueling increasingly frequent calls for a reexamination of the Fourth Amendment protections allowed to students,

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<sup>44</sup> See *supra* note 41.

at least in their cell phones.<sup>45</sup> To understand the problems with these protections, the next Part will review the current Fourth Amendment landscape for public schools and note the problems in applying established Fourth Amendment doctrine to cell phones.

## II. THE LEGAL LANDSCAPE AND A NEW FRONTIER FOR THE FOURTH AMENDMENT IN SCHOOLS

In constructing the Fourth Amendment, the Founders had a central purpose in mind: to require law enforcement authorities to state specifically what they intended to seize or search and have sufficient evidence to justify the intrusion.<sup>46</sup> While the concept of unjust invasions by state authorities had crystallized into the general words “unreasonable searches and seizures” in some early state constitutions,<sup>47</sup> the Founders found the searches of a few specific places and objects particularly objectionable.<sup>48</sup> Thus, while the finalized Fourth Amendment incorporated the broad “unreasonable” language, it clarified the places and objects the Founders had in mind:

The right of the people to be secure in their *persons, houses, papers, and effects*, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>49</sup>

Until the mid-twentieth century, the Supreme Court accordingly limited its Fourth Amendment analysis to these four enumerations and refused to recognize protection in items that did not fall squarely into those categories.<sup>50</sup>

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<sup>45</sup> See, e.g., *School Administrators Violate Colorado Law, Constitutional Rights by Searching Students' Text Messages*, ACLU OF COLO. (Oct. 10, 2007), <http://aclu-co.org/news/school-administrators-violate-colorado-law-constitutional-rights-by-searching-students-text-mes>.

<sup>46</sup> See generally WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at 602–13 (2009) (discussing early state delegations' debates and decisions that influenced the language of the Fourth Amendment).

<sup>47</sup> E.g., *id.* at 605–06 (quoting MASS. CONST. pt. I, art. XIV) (internal quotation marks omitted).

<sup>48</sup> See *id.* at 607, 687–88, 691–97.

<sup>49</sup> U.S. CONST. amend. IV (emphases added).

<sup>50</sup> See, e.g., *Olmstead v. United States*, 277 U.S. 438, 463–66 (1928) (finding no Fourth Amendment protection in the phone wires outside an individual's house because the wire did not qualify as any of the enumerated categories listed in the Fourth Amendment), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967). To be fair, it should be noted that the Court insinuated in several early cases that the Fourth Amendment could protect interests beyond a narrow definition of the expressed categories. See, e.g., *Gould v. United States*, 255 U.S. 298, 304 (1921) (observing that the Fourth Amendment “should receive a liberal construction, so as to prevent stealthy encroachment upon . . . the rights secured” therein); *Boyd v. United States*, 116 U.S. 616, 635 (1886) (arguing that the language of the Fourth Amendment “should be liberally

After prolonged wrestling with issues related to telephone-based communication, however, the Court in *Katz v. United States* finally determined that the spirit of the Fourth Amendment extended beyond these antiquated classifications and protected any object in which an individual expects a certain degree of privacy.<sup>51</sup> This concept, known since as the “reasonable expectation of privacy,”<sup>52</sup> protects objects or places in which an individual has a subjective belief in her personal privacy that society is “prepared to recognize as legitimate.”<sup>53</sup>

As case law since *Katz* has clarified, the Fourth Amendment’s constraints are implicated only when government authorities conduct searches<sup>54</sup> involving places in which the individual has a reasonable expectation of privacy.<sup>55</sup> If such an expectation exists in the particular object searched, the question becomes whether the government official conducted the search in an unreasonable manner.<sup>56</sup> In a typical case, if a particular search is found to implicate the Fourth Amendment, officials must demonstrate the reasonableness (and thus constitutionality) of the invasion by showing that they obtained, from a magistrate judge, a warrant that was supported by

construed”). As the *Olmstead* Court asserted, however, these recommendations could not “justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects.” 277 U.S. at 465.

<sup>51</sup> *Katz*, 389 U.S. at 351–52 (“[T]he Fourth Amendment protects people, not places. . . . [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”).

<sup>52</sup> The phrase “reasonable expectation of privacy” was actually coined by Justice Harlan in his *Katz* concurring opinion, *see id.* at 360 (Harlan, J., concurring), and was officially adopted to describe the concept in later cases, *see Smith v. Maryland*, 442 U.S. 735, 740 (1979) (noting that the Fourth Amendment inquiry “normally embraces” Justice Harlan’s reasonable-expectation-of-privacy analysis from *Katz*).

<sup>53</sup> *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

<sup>54</sup> This Comment addresses *searches*, which are analytically distinct from *seizures*. *See generally* 1 JOHN WESLEY HALL, SEARCH AND SEIZURE §§ 1.7–.15, at 15–31 (3d ed. 2000) (discussing the different analyses for searches and seizures). As John Wesley Hall clarifies, “[s]earches and seizures are separate constitutional events” because while searches implicate a person’s privacy interests, seizures affect only possessory interests. *Id.* § 1.7, at 15.

<sup>55</sup> *See, e.g., Hudson*, 468 U.S. at 530 (holding the Fourth Amendment inapplicable to a particular search because the subject of the search had no expectation of privacy in the given situation); *see also* Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 825 (1992) (“It is clear that the Fourth Amendment does not apply unless one has a legitimate expectation of privacy in what is being searched.”); Stillwagon, *supra* note 16, at 1185–86 (“It is important to remember that before reaching the issue of applicable exceptions to the warrant requirement, a court may find a search valid if there was not a reasonable expectation of privacy in the object, thus eliminating the initial need for a warrant altogether.”).

<sup>56</sup> THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 1.2.1.2, at 8–9 (2008).

probable cause that the search would turn up evidence of a crime.<sup>57</sup> If they cannot make this required showing, the individual may vindicate her rights by suppressing the illegally obtained evidence<sup>58</sup> and claiming monetary damages for the violation of her Fourth Amendment protections.<sup>59</sup> The latter remedy is “[c]hief among” those available to public school students alleging such violations.<sup>60</sup>

At times, however, the Supreme Court has found that the reasonableness command of the Fourth Amendment<sup>61</sup> permits particularly defined exceptions to the warrant requirement, thus allowing government officials under certain circumstances to search protected interests without a warrant—and sometimes without probable cause.<sup>62</sup> For example, the Court has recognized that a law enforcement officer does not violate the Fourth Amendment by conducting a warrantless search of an automobile if she has probable cause to search it and if obtaining a warrant would be impracticable due to the vehicle’s ability to move quickly away from the scene.<sup>63</sup> As the next section will explain, the Court found that searches of students and their belongings by public school officials also constitute an exception to the typical Fourth Amendment safeguards.

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<sup>57</sup> See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (stating that warrantless searches are presumptively unreasonable). Probable cause to justify a search “exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed and that evidence bearing on that offense will be found in the place to be searched.” *Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009) (citation omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (alterations in original)).

<sup>58</sup> In most cases, if a court finds that an individual’s Fourth Amendment rights were violated, the evidence procured as a result of this violation becomes inadmissible at a criminal proceeding. See, e.g., *United States v. Crews*, 445 U.S. 463, 470 (1980) (excluding “any ‘fruits’ of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, [or] items observed or words overheard in the course of the unlawful activity” (footnote omitted)); see also CLANCY, *supra* note 56, § 1.2.3, at 13.

<sup>59</sup> Pursuant to 42 U.S.C. § 1983, defendants may recover monetary damages from or request injunctions against government entities that violated their Fourth Amendment rights. See CLANCY, *supra* note 56, § 13.8, at 654.

<sup>60</sup> Beci, *supra* note 55, at 826; accord LAWRENCE F. ROSSOW & JACQUELINE A. STEFKOVICH, *SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS* 53 (3d ed. 2006). Indeed, many Fourth Amendment cases involving public school officials have been founded upon § 1983 claims. See, e.g., *Redding*, 129 S. Ct. at 2633.

<sup>61</sup> The Court has acknowledged that “[t]he touchstone of the Fourth Amendment is *reasonableness*.” *United States v. Knights*, 534 U.S. 112, 118 (2001) (emphasis added).

<sup>62</sup> See *Katz v. United States*, 389 U.S. 347, 357 (1967) (observing that the presumptive rule on warrantless searches is subject to “specifically established and well-delineated exceptions”).

<sup>63</sup> *Carroll v. United States*, 267 U.S. 132, 153 (1925).

A. New Jersey v. T.L.O.: *A Balancing Act and a Standard for Public Schools*

The Fourth Amendment analysis of any search of students' belongings by school officials begins with the Supreme Court's 1985 decision in *New Jersey v. T.L.O.*<sup>64</sup>

The *T.L.O.* Court considered the case of a high school student who claimed that her Fourth Amendment rights had been violated when her school's assistant vice principal, Theodore Choplick, searched her purse. A faculty member had spotted the student smoking a cigarette in a school bathroom in violation of school rules and reported the student to Choplick.<sup>65</sup> The student denied smoking in the bathroom, so Choplick asked to see the student's purse.<sup>66</sup> Inside the purse, Choplick found cigarettes, and upon removing them, he noticed a stack of "rolling papers" that he believed to be associated with marijuana use.<sup>67</sup> Based on this finding, he searched further and found marijuana, a pipe, several dollar bills, an index card with a list of individuals who owed the student money, and two other notes that implicated her in dealing marijuana.<sup>68</sup> Choplick notified the student's mother and turned the evidence over to police.<sup>69</sup> Before a New Jersey juvenile court, the student moved to exclude the evidence found in her purse because Choplick's actions—first searching the purse itself for cigarettes, and then conducting a second search of the purse and its pockets for evidence of marijuana possession—violated her Fourth Amendment rights.<sup>70</sup> The court denied the motion and found her delinquent.<sup>71</sup> The student appealed the ruling in New Jersey state courts, and the New Jersey Supreme Court eventually held Choplick's search unreasonable in violation of the Fourth Amendment because it had been initiated without sufficient suspicion that a search of the student's purse would turn up evidence of wrongdoing.<sup>72</sup>

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<sup>64</sup> 469 U.S. 325 (1985).

<sup>65</sup> *Id.* at 328.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 329.

<sup>71</sup> *Id.* at 329–30.

<sup>72</sup> *Id.* at 330–31.

The U.S. Supreme Court reversed and deemed Choplick's search reasonable under the Fourth Amendment.<sup>73</sup> In doing so, the Court carved an exception to the warrant and probable cause requirement that still guides school officials' searches of students' belongings.<sup>74</sup>

The reasonableness command of the Fourth Amendment is crucial to the reasoning of Justice White's opinion for the majority. As White stated initially, the legality of *any* search depends "on the reasonableness, under *all the circumstances*, of the search."<sup>75</sup> Using a well-established balancing test typically employed to illuminate the opposing interests at stake,<sup>76</sup> White evaluated students' expectations of privacy in their belongings against school officials' interests in searching through these belongings. On one hand, students retained "legitimate expectations of privacy" in their belongings at school,<sup>77</sup> though as Justice White suggested and as his fellow justices in the majority made explicit, students' privacy expectations were far lower than those of the general population, at least during the school day.<sup>78</sup> On the other hand, Justice White acknowledged that school officials needed the relatively unencumbered ability to maintain "discipline in the classroom and on school grounds" in the unique environment of schools,<sup>79</sup> expressing particular concern for "drug use and violent crime" among students.<sup>80</sup>

With this balance between competing interests in mind, the Court decided that the Fourth Amendment allowed not only the elimination of the warrant requirement but also an abrogation of the typical probable cause requirement.<sup>81</sup> The warrant, Justice White reasoned, was "unsuited to the school environment" because "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules . . . would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>82</sup> Furthermore, the relaxed privacy expectations of students

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<sup>73</sup> *Id.* at 333. The Court quickly dispensed with a threshold question in deciding that public school officials, although agents of state governments rather than the federal government, were still subject to the strictures of the Fourth Amendment. *Id.* at 333–34.

<sup>74</sup> See Jon M. Van Dyke, *The Privacy Rights of Public School Students*, 32 U. HAW. L. REV. 305, 305–06 (2010) (noting the continuing application of the *T.L.O.* approach).

<sup>75</sup> *T.L.O.*, 469 U.S. at 341 (emphasis added).

<sup>76</sup> *Id.* at 337 (citing *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967)).

<sup>77</sup> *Id.* at 338–39.

<sup>78</sup> *Id.* at 348 (Powell, J., concurring).

<sup>79</sup> *Id.* at 339 (majority opinion).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 340–41.

<sup>82</sup> *Id.* at 340.

and the pressures of the school setting demanded a reduction in the level of individualized suspicion (normally probable cause) needed to justify a search.<sup>83</sup>

These typical requirements annulled, White established a two-pronged test for evaluating the reasonableness of school officials' searches of students' belongings.<sup>84</sup> First, a school official's search must be "justified at its inception," meaning that the school official needs "reasonable grounds for suspecting that the search will turn up evidence" of a violation of school rules or of criminal activity.<sup>85</sup> Second, the search must be "reasonably related in scope to the circumstances which justified the interference."<sup>86</sup> As White emphasized, the ultimate consideration here is whether "the measures adopted" by the school official to execute the search are "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."<sup>87</sup>

White applied this standard of reduced Fourth Amendment protections to uphold the reasonableness of Choplick's search. Because the student denied the offense for which she was accused, the presence of cigarettes in her purse would support the contrary eyewitness report of a faculty member; therefore, Choplick's search was justified at its inception because he reasonably believed the search would turn up evidence of a violation of school rules.<sup>88</sup> White then found that Choplick's second search of the purse for marijuana paraphernalia did not extend beyond a reasonable scope.<sup>89</sup> The discovery of rolling papers upon removing the cigarettes gave rise to the suspicion of a new, more serious infraction—possession of an illegal substance—and a complete search of the student's purse, including the purse's interior pockets, was therefore justified.<sup>90</sup>

### *B. The Balancing Act Continued*

By 2002, the Supreme Court had twice recognized and confirmed students' lowered expectations of privacy in addressing the constitutionality of drug-testing programs conducted in public schools. In *Vernonia School District 47J v. Acton*, the Court upheld mandatory urinalysis testing of student athletes in

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<sup>83</sup> See *id.* at 340–41.

<sup>84</sup> See *id.* at 341–43.

<sup>85</sup> *Id.* at 341–42.

<sup>86</sup> *Id.* at 341.

<sup>87</sup> *Id.* at 342.

<sup>88</sup> *Id.* at 345–46.

<sup>89</sup> *Id.* at 347.

<sup>90</sup> *Id.*

part because, per *T.L.O.*, students—and student athletes in particular—retained lower privacy expectations than adults.<sup>91</sup> The Court similarly approved of another drug-testing scheme in *Board of Education v. Earls*, where school officials tested all students who participated in school-sponsored extracurricular activities.<sup>92</sup> While searches consisting of drug-testing programs<sup>93</sup> are factually distinct and call for a separate line of analysis,<sup>94</sup> *Acton* and *Earls* merit mention both for their recognition of students' reduced expectations of privacy<sup>95</sup> and for an additional factor the two cases consider: the degree of intrusion. In each case, the students were subjected to only “negligible”<sup>96</sup> or “minimal[]”<sup>97</sup> intrusions upon their already truncated privacy

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<sup>91</sup> 515 U.S. 646, 654–57 (1995) (recognizing students', and particularly student athletes', reduced privacy expectations as the first of three factors for determining the constitutionality of a drug-testing scheme).

<sup>92</sup> 536 U.S. 822, 830–32 (2002) (recognizing the diminished privacy expectations of any student that participates in extracurricular activities as the first of three factors in analyzing the drug-testing program).

<sup>93</sup> Any governmental action that invades an individual's legitimate privacy expectations constitutes a “search” implicating Fourth Amendment protection, even if the particular invasion is not a search in the conventional sense. See CLANCY, *supra* note 56, § 1.2.1.1.1, at 4–5.

<sup>94</sup> Indeed, the Court has formed a distinct cache of cases challenging programmatic intrusions upon privacy interests conducted without any individualized suspicion whatsoever. See *Illinois v. Lidster*, 540 U.S. 419 (2004) (traffic checkpoint); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (drug-testing program); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (traffic checkpoint); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (traffic checkpoint); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (drug-testing program). Examples of these suspicionless searches are mandatory drug-testing programs like those promulgated by school officials in *Acton* and *Earls*. Notably, the suspicionless-search analysis—which considers the nature of the privacy interest, the degree of the challenged intrusion, and the character of the governmental need and the program's effectiveness in meeting it, see *Acton*, 515 U.S. at 654, 658, 660—stems, in large part, from the fringes of *T.L.O.* In particular, a footnote from the *T.L.O.* majority opinion recognizing that “the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion,” 469 U.S. at 342 n.8 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)) (internal quotation mark omitted), has provided fodder for cases justifying suspicionless searches in particular situations, see, e.g., *Von Raab*, 489 U.S. at 665 (recognizing the “longstanding principle” that individualized suspicion is not “an indispensable component of reasonableness in every circumstance” (citing *T.L.O.*, 469 U.S. at 342 n.8)). Similarly, Justice Blackmun's statement that reduced safeguards may be substituted for the warrant and probable cause requirement when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,” *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment), has been repeated by cases eliminating the warrant and probable cause requirement entirely, see, e.g., *Earls*, 536 U.S. at 829 (citing the “special needs” language to engage in a balancing inquiry and ultimately justify a drug-testing program conducted without a warrant or any individualized suspicion).

<sup>95</sup> Importantly, neither *Acton* nor *Earls* goes as far to say that students' expectations of privacy *in general* have been reduced from the level recognized in *T.L.O.* In fact, Justice Thomas, writing for the *Earls* majority, may not have been *in* the majority had he attempted to fully generalize the reduced expectation of privacy he attributed to students participating in extracurricular activities. Justice Breyer, who commanded the “critical fifth vote” in *Earls*, LAFAYE, *supra* note 5, § 10.11(c), at 529, emphasized in concurrence that he joined the majority and upheld the drug-testing program only because it “avoids subjecting the entire school to testing,” *Earls*, 536 U.S. at 841 (Breyer, J., concurring).

<sup>96</sup> *Acton*, 515 U.S. at 658.

<sup>97</sup> *Earls*, 536 U.S. at 834.

expectations, and this determination played into each case's ultimate holding. Though the "degree of intrusion" factor is somewhat specific to the drug-testing analysis,<sup>98</sup> the slight infringements in *Acton* and *Earls* present an intriguing juxtaposition with the intrusion in the Court's most recent school-search case, *Safford Unified School District # 1 v. Redding*.<sup>99</sup>

In many respects, *Redding* involved a similar scenario to Choplick's search in *T.L.O.* An eighth-grade student was called into the office of the school's assistant principal, Kerry Wilson, after Wilson had received a report that the student was involved in the distribution of pills to other students in the school.<sup>100</sup> The student denied any involvement in the alleged activity.<sup>101</sup> Wilson proceeded to search her backpack and outer clothing, and upon finding no evidence of any illegal substance, Wilson directed her to the nurse's office for a further search.<sup>102</sup> In the nurse's office, the student was instructed to remove all her clothing except for her underwear, which again turned up no evidence of the suspected activity.<sup>103</sup> The student described the search to her mother, who then sued the school district for a violation of the student's Fourth Amendment rights.<sup>104</sup>

In rejecting the reasonableness of Wilson's search in *Redding*, the Supreme Court engaged in a fairly straightforward application of the two-pronged test set out in *T.L.O.*<sup>105</sup> The Court first found that the search was justified at its inception due to the various indications giving rise to reasonable suspicion of the allegation that the student possessed drugs.<sup>106</sup> The Court rejected the search, however, on the grounds that the search did not remain within a reasonable scope based on the objective of the search, violating the second *T.L.O.* prong.<sup>107</sup> Essentially, due to the relatively weak power of the drugs Wilson believed she would find and the lack of any reason to believe the drugs were in the student's undergarments, the school's interest in searching the

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<sup>98</sup> See *Acton*, 515 U.S. at 658 (observing that the "character of the intrusion" is the second factor in the analysis of a drug-testing program's constitutionality).

<sup>99</sup> 129 S. Ct. 2633 (2009).

<sup>100</sup> *Id.* at 2638.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* Redding was also asked to pull out her bra and underwear, revealing her breasts and pelvic area to some extent. *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at 2640–43.

<sup>106</sup> See *id.* at 2641.

<sup>107</sup> See *id.* at 2642.

student did not justify the intensely private nature of the intrusion.<sup>108</sup> True to *T.L.O.*, the Court once again measured the student's privacy expectations and the degree of intrusion against the government interest at stake. This time, however, the Court found the government's interest wanting.

Justice White's balancing inquiry pitting the student's particular expectation of privacy against a school administrator's interest in maintaining school order (or, as each of the cases in this section entail, in investigating drug possession or use) has carried through recent cases. The *T.L.O.* two-pronged test based on this balancing analysis still governs any suspicion-based school search<sup>109</sup>—including an administrator's search through a student's cell phone.<sup>110</sup>

### C. *The Puzzling Question of Cell Phones and the Fourth Amendment*

Before analyzing the problems with the reduced *T.L.O.* standard in light of the emergence of cell phones in public schools, it should be recognized that the debate over the proper approach to these devices has begun in various other areas of Fourth Amendment doctrine in the past few years. While several courts have grappled with the question of how the Fourth Amendment should treat cell phones, the law is far from settled. This section briefly reviews the ways courts have analyzed cell phones in other Fourth Amendment contexts.

As a starting point, it is clear that individuals enjoy a reasonable expectation of privacy in their cell phones, and thus a search of those cell phones implicates Fourth Amendment concerns and requires a warrant based upon probable cause—unless, of course, one of the exceptions to the warrant requirement applies.<sup>111</sup> The question has become, however, whether cell

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<sup>108</sup> See *id.* at 2642–43 (noting that “the content of the suspicion failed to match the degree of intrusion” because the suspected facts provided no “indication of danger to the students from the power of the drugs or their quantity, [or] any reason to suppose that [the student] was carrying pills in her underwear”).

<sup>109</sup> Van Dyke, *supra* note 74, at 305–06.

<sup>110</sup> See, e.g., Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 640–41 (E.D. Pa. 2006) (analyzing a cell phone search by a school official under the *T.L.O.* two-prong test).

<sup>111</sup> See *United States v. Cole*, No. 1:09-CR-0412-ODE-RGV, 2010 WL 3210963, at \*16 (N.D. Ga. Aug. 11, 2010) (“Courts have recognized that individuals retain a reasonable expectation of privacy in the information stored in their cell phones . . .” (citing *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007))); see also *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) (“A personal computer is often a repository for private information the computer’s owner does not intend to share with others. ‘[F]or most people, their computers are their most private spaces.’” (alteration in original) (quoting *United States v. Gourde*, 440 F.3d 1065, 1077 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting))); *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (finding a reasonable expectation of privacy in information stored on a personal computer).

phones (or similar devices, such as laptop computers) may be searched without full Fourth Amendment protections if an exception *does* apply.<sup>112</sup>

Thus far, many courts have come down against demanding higher safeguards for searches of cell phones and similar devices. In *United States v. Arnold*, for example, the Ninth Circuit rejected a defendant's argument that his laptop computer was entitled to greater protection than the border exception to the warrant requirement provided.<sup>113</sup> Similarly, in *United States v. Murphy*, the Fourth Circuit disregarded the argument that cell phone searches require a warrant due to their increased storage capacity under the search-incident-to-arrest exception,<sup>114</sup> in part because it would be too troublesome for officers at the scene to discern the difference between cell phones with large storage capacities and those with smaller capacities.<sup>115</sup> A litany of lower courts have fallen in line.<sup>116</sup>

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<sup>112</sup> See, e.g., *United States v. Burgess*, 576 F.3d 1078, 1087–90 (10th Cir.) (discussing, without deciding, whether hard drives and a laptop could be searched and seized pursuant to the “automobile exception”), *cert. denied*, 130 S. Ct. 1028 (2009); *Finley*, 477 F.3d at 259–60 (finding that an exception for searches incident to lawful arrests permitted an officer's search of a cell phone's contents).

<sup>113</sup> 533 F.3d 1003, 1010 (9th Cir. 2008). Border searches are generally justified as a matter of what is essentially homeland security. See *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (reasoning that “[i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity,” which justifies privacy intrusions without the typical safeguards at the border); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (“[S]earches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border . . .”). In *Arnold*, the Ninth Circuit noted the sovereignty justification for border searches and specifically rejected the idea that a laptop, due to its large storage capacity, fell into the border exception's “particularly offensive” search category, which would have caused the search to be unreasonable. 533 F.3d at 1010.

<sup>114</sup> 552 F.3d 405, 411 (4th Cir. 2009); accord *Finley*, 477 F.3d at 259–60 (categorizing cell phones as containers searchable without a warrant when found on an individual's person pursuant to a lawful arrest based upon probable cause); *People v. Diaz*, 244 P.3d 501, 507–09 (Cal. 2011) (refusing to recognize the argument that cell phones have tremendously large storage capacities and would be, therefore, categorically distinct from tangible containers in the search-incident-to-arrest context). The exception for searches incident to arrest upholds the reasonableness of searches of an individual's person and immediate surroundings without a warrant, as long as the individual has been detained upon probable cause. See *Chimel v. California*, 395 U.S. 752, 762–63 (1969). This doctrine is based primarily on the need for officers to both preserve evidence and prevent harm to themselves by securing any weapons the arrestee might possess. See *United States v. Robinson*, 414 U.S. 218, 235 (1973).

<sup>115</sup> *Murphy*, 552 F.3d at 411.

<sup>116</sup> See, e.g., *United States v. Stringer*, No. 10-05038-01-CR-SW-GAF, 2011 WL 3847026, at \*8 (W.D. Mo. July 20, 2011) (concluding that cell phones may be searched without higher safeguards than those provided by the search-incident-to-arrest exception); *United States v. Garcia-Aleman*, No. 1:10-CR-29, 2010 WL 2635071, at \*12 (E.D. Tex. June 9, 2010) (“Recently, several district courts have held that officers may search the contents of a cell phone (just as it allows searches of closed containers) seized during a traffic stop as long as there is probable cause to believe the phone contained evidence of a crime.”); *United States v. Valdez*, No. 06-CR-336, 2008 WL 360548, at \*2–4 (E.D. Wis. Feb. 8, 2008) (finding cell phones searchable

Some courts have determined, however, that cell phones are categorically and analytically distinct from the tangible objects envisioned by the cases that originally established the traditional Fourth Amendment exceptions. The Tenth Circuit, for example, reflected in dicta that “laptop computers, hard drives, flash drives or even cell phones” could very well deserve “preferred status” under the automobile exception to the warrant requirement due to their “unique ability to hold vast amounts of diverse personal information.”<sup>117</sup> Likewise, the Ohio Supreme Court held the search of a lawfully arrested individual’s cell phone unreasonable due to the unique characteristics of the devices.<sup>118</sup> Other courts have similarly upheld the analytically distinct nature of cell phones in various Fourth Amendment contexts.<sup>119</sup>

While the young debate over the privacy implications of cell phones is worth recognizing, these cases provide only limited guidance in the public school context, as many courts have made clear to limit their analysis to the particularities of the exception in question.<sup>120</sup> Though the issue is pressing, courts have not yet considered the validity of cell phone searches under the framework of the *T.L.O.* exception for public schools, the subject to which this Comment now turns.

### III. QUESTIONING THE *T.L.O.* EXCEPTION IN THE CONTEXT OF CELL PHONES

The ultimate effect of *T.L.O.* has been to except school officials from the Fourth Amendment’s warrant and probable cause requirement. As described above, Justice White based this exception, and the two-pronged standard that

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without a warrant under the search-incident-to-arrest exception); *United States v. Curry*, No. 07-100-P-H, 2008 WL 219966, at \*10 (D. Me. Jan. 23, 2008) (same).

<sup>117</sup> *Burgess*, 576 F.3d at 1090 (dictum). The Supreme Court has held that if a law enforcement officer has probable cause to search an automobile, she does not violate the Fourth Amendment by conducting a warrantless search of that automobile due to the vehicle’s ability to move away from the scene. *See United States v. Ross*, 456 U.S. 798, 825 (1982) (“If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”).

<sup>118</sup> *See State v. Smith*, 920 N.E.2d 949, 952–55 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010).

<sup>119</sup> *See, e.g., United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at \*8–9 (N.D. Cal. May 23, 2007) (holding that cell phones provide a higher expectation of privacy than afforded under the search-incident-to-arrest exception to the warrant requirement due to the vast amounts of private information capable of being stored on them).

<sup>120</sup> *See United States v. Cole*, No. 1:09-CR-0412-ODE-RGV, 2010 WL 3210963, at \*17 n.24 (N.D. Ga. Aug. 11, 2010) (distinguishing cases that considered cell phone searches under the inventory and incident-to-arrest exceptions to the warrant requirement because they were “not relevant . . . to the Court’s analysis of the independent automobile exception to the warrant requirement”); *see also United States v. Arnold*, 533 F.3d 1003, 1010 (9th Cir. 2008); *Garcia-Aleman*, 2010 WL 2635071, at \*10 (analyzing cell phone searches under the search-incident-to-arrest exception); *People v. Diaz*, 244 P.3d 501, 506–07 (Cal. 2011) (same).

replaced the normal requirement, on a balancing act weighing students' reduced expectations of privacy in their belongings at school against school officials' needs to quell significant disruptions in a unique environment.<sup>121</sup>

The *T.L.O.* standard equally applies to cell phone searches in public schools and would almost inevitably uphold a routine, suspicion-based search. Recall the scenario outlined in Part I.C, in which Chris Pupil sued City School District and Margaret Principal, the assistant principal at City High School, for violating his Fourth Amendment rights by searching the contents of his cell phone. The apparent outcome of *Pupil v. City School District* serves as an illustrative starting point for understanding the problems with the application of the *T.L.O.* standard to cell phones.

A court hearing the case would dutifully apply the two-step analysis outlined in *T.L.O.* for analyzing searches of students' belongings by school officials.<sup>122</sup> Thus, the court would first consider whether Principal's search of the phone was justified at its inception. In this case, Principal had heard a report from a reliable third party, a friend of John Student, that Pupil had acted in ways that violated school antibullying policies. Principal almost certainly had reasonable suspicion that a search of Pupil's phone would turn up evidence of this violation. Accordingly, it is difficult to argue that Principal's search was not justified from the beginning.<sup>123</sup>

As for the reasonable-scope requirement, it is somewhat unclear how a court would find.<sup>124</sup> It is easy to imagine, however, that a court in Pupil's case would uphold the reasonableness of the search's scope, despite that it involved reading several private text messages and e-mails stored on or accessible through the cell phone, as well as coming across some photos and notes. The *T.L.O.* Court upheld the search of a student's purse, including an examination of the purse's interior compartments and of a notecard and two notes found inside them, as within a reasonable scope because the places searched were broadly related to the objective of the search.<sup>125</sup> Under this directive, it would

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<sup>121</sup> See discussion *supra* Part II.A.

<sup>122</sup> See, e.g., *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 640–41 (E.D. Pa. 2006) (applying the *T.L.O.* two-part test in determining whether a school official unconstitutionally searched through the contents of a student's cell phone).

<sup>123</sup> Cf. *Hartssock*, *supra* note 41, at 207–08 (applying *T.L.O.*'s reasonable suspicion prong in the same fashion to a similar problem).

<sup>124</sup> To date, no court has answered the specific question of whether a school authority maintained a reasonable scope in the search of a cell phone.

<sup>125</sup> See 469 U.S. 325, 347 (1985).

seem that a court would similarly uphold the reading of Pupil's stored text messages and e-mails, and likely even the incidental viewing of his photos and notes, because Principal's adopted measures for conducting the search—looking through the stored contents accessible on the phone—were most likely reasonably related to the search's objective of finding evidence of cyberbullying. This evidence could conceivably have been in the form of text messages, e-mails, photos, or other forms of communication; therefore, a search of the phone would reasonably—even necessarily—entail a search of several different storage locations. It is difficult to envision a counterargument that would rely on *T.L.O.*'s flexible definition of reasonable scope.<sup>126</sup>

Thus, a court applying the *T.L.O.* two-part test would almost certainly uphold the constitutionality of Principal's search. In doing so, however, the court would accept three fundamental assumptions of *T.L.O.*'s analysis that are crucial to justifying the minimal safeguards provided by this test—assumptions that cell phones arguably confound, tipping the balance in favor of increased safeguards to more effectively protect students. First, the *T.L.O.* Court assumed that students' legitimate expectations of privacy *could* be lower in terms of the tangible items they brought into schools, an assumption challenged by the unique capabilities and characteristics of cell phones. Second, the Court assumed that school officials could actually limit their searches to tangible locations reasonably related to the search's objectives. Cell phones, however, defy this assumption and destroy the effectiveness of the second *T.L.O.* prong in limiting the intrusion effected by the school official's search. Finally, the Court contemplated imminent dangers associated with tangible objects that necessitated immediate investigations by school authorities. The dangers posed by cell phones, however, many times do not constitute such dire emergencies, decreasing the reasonableness of urgent measures in response. The ultimate

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<sup>126</sup> Arguably, a court could construe the second prong of the *T.L.O.* test narrowly to find Principal's search unreasonable. A result rejecting the constitutionality of this kind of search, however, is highly unlikely given the deference courts typically allow to schools, *see Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (acknowledging that courts must always give a "high degree of deference . . . to the educator's professional judgment"), and what many scholars have deemed a pro-school attitude in the courts, *see Beci, supra* note 55, at 844 ("In the school setting, the goal of enforcing public safety has dominated [the balance between students' rights and school interests]."); James, *supra* note 39 ("[T]hose arguing against the validity of content searches of confiscated phones assume a heavy burden of persuasion because current judicial attitudes uphold school policies that are designed to uncover and prevent misconduct by students . . ."). Ultimately, as Professor Mary Graw Leary has recognized, "[i]t would seem that the combination of the low standard in *T.L.O.* combined with the decreased privacy rights and understandings of privacy for these youth, may combine to allow access to vast amounts of personal data" in a cell phone search at school. Mary Graw Leary, *Reasonable Expectations of Privacy for Youth in a Digital Age*, 80 *Miss. L.J.* 1035, 1088–89 (2011).

effect: Cell phone searches invade upon students' expectations of privacy to a degree the schools' interests cannot justify, and thus are unreasonable under the Fourth Amendment without greater safeguards. This Part will explore these three assumptions in turn.

A. *The Case for Heightened Privacy Expectations in Cell Phones in Public Schools*

One fundamental assumption Justice White made in reducing students' Fourth Amendment protections is that students carried only tangible items with them to school. Indeed, the *T.L.O.* Court made clear the types of objects it had in mind. White recognized that students reasonably carried textbooks, car and house keys, money, and "the necessities of personal hygiene and grooming," as well as purses, wallets, and occasionally "highly personal items" like letters or diaries.<sup>127</sup> In concurrence, Justice Blackmun hinted that the goal of search and seizure in public schools was to respond quickly to the distracting "havoc" caused by a "water pistol or peashooter" and their more dangerous counterparts.<sup>128</sup> Implicit in the court's conception of items on students' persons during the school day was the assumption that the items and information students carried were necessarily *limited*—students could carry only a finite amount (based, perhaps, on the size of their backpacks), and these items were correspondingly limited in the information they conveyed about the particular student or that student's associations, personal interests, or family life.<sup>129</sup> Considering items of this nature, Justice White felt comfortable recognizing a reduced expectation of privacy for students.<sup>130</sup>

As this section argues, however, this assumption is challenged by the characteristics and capabilities of cell phones, ultimately increasing students' privacy interests in these devices.

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<sup>127</sup> *T.L.O.*, 469 U.S. at 339.

<sup>128</sup> *Id.* at 352 (Blackmun, J., concurring in the judgment).

<sup>129</sup> Cf. Chelsea Oxton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157, 1199 (2010) (arguing that the search-incident-to-arrest exception to the warrant requirement has been wrongly construed by many courts as allowing authorities to search the contents of cell phones, because the standard was created "with a world of tangible evidence in mind . . . before the widespread use of cell phones").

<sup>130</sup> See *T.L.O.*, 469 U.S. at 338–39.

### 1. *The Capabilities and Characteristics of Students' Cell Phones*

Courts<sup>131</sup> and commentators<sup>132</sup> are beginning to recognize that cell phones are simply different from the tangible objects that have thus far been subject to Fourth Amendment searches. As the Ohio Supreme Court recently acknowledged, for example, “there are legitimate concerns” with allowing searches of cell phones without the typical Fourth Amendment safeguards because these devices “allow for high-speed Internet access and are capable of storing tremendous amounts of private data.”<sup>133</sup> Justice Werdegar on the California Supreme Court has also noted these concerns, writing that, while the Fourth Amendment has allowed for reduced safeguards in some contexts based on a balance of competing interests, “[t]oday, in the very different context of mobile phones and related devices, that balance must be newly evaluated.”<sup>134</sup>

The argument encompasses two interwoven characteristics of cell phones. First, cell phones’ storage *capacities* for all kinds of files “dwarf[] that which can be carried on the person in a spatial container.”<sup>135</sup> Second, the *type* of information contained on students’ cell phones is often more personal than anything students would have carried (or would have been able to carry) to school in tangible containers.<sup>136</sup>

The quantity of information available to school administrators in searching students’ cell phones is vastly greater than that available in tangible objects like purses or backpacks. Even standard cell phones, which are somewhat less sophisticated than the popular iPhone, BlackBerry, or Droid models, are “capable of storing a wealth of digitized information” that could not have been found in any physical object carried by a student.<sup>137</sup> With such a tremendous amount of varied information available on cell phones, the sheer number of privacy intrusions of which school administrators are capable increases when these officials conduct searches of the devices.<sup>138</sup> To recall the model scenario,

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<sup>131</sup> See, e.g., *State v. Smith*, 920 N.E.2d 949 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010).

<sup>132</sup> See, e.g., Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 40–44 (2008).

<sup>133</sup> *Smith*, 920 N.E.2d at 954.

<sup>134</sup> *People v. Diaz*, 244 P.3d 501, 513 (Cal. 2011) (Werdegar, J., dissenting).

<sup>135</sup> *Id.* at 516.

<sup>136</sup> Cf. Gershowitz, *supra* note 132, at 41–42 (noting the capacity to hold text messages, call histories, pictures, e-mails, and potentially obscene videos).

<sup>137</sup> See *Smith*, 920 N.E.2d at 954; Leary, *supra* note 126, at 1085–86.

<sup>138</sup> See Leary, *supra* note 126, at 1085 (asserting that students’ expectations of privacy in their cell phones at school may be shifting because “the amount of information available to a school official engaged in [a search] has grown significantly”); Stillwagon, *supra* note 16, at 1199 (noting that cell phone searches “reveal

for example, in searching for evidence of cyberbullying on Pupil's cell phone, Principal scrolled through several hundred of his text messages, read many of his e-mails, and viewed several personal photos and private notes.<sup>139</sup> The amount of information accessible on the cell phone necessarily increases Pupil's expectation of privacy; Pupil has a far greater amount of individual privacy interests in the phone that are potentially invaded by Principal's search than he would have were Principal to search a tangible container like a backpack.

Concomitant with the quantity of information cell phones can store is the personal nature of that information. Cell phones store records of conversations and communications between students, incredibly detailed high-resolution photos, and audio or video files.<sup>140</sup> These methods allow students to "store highly personal information" and "record their most private thoughts and conversations on their cell phones,"<sup>141</sup> sometimes in ways students could not have in their tangible purses and backpacks—particularly because cell phones allow students (and searching administrators) to access their Internet accounts and review their Internet activities.<sup>142</sup> A search of a cell phone thus may reveal incredibly private e-mails, bank accounts, or privately held religious or political affiliations,<sup>143</sup> as well as information regarding students' personal relationships, sexual orientation, or medical records.<sup>144</sup> Moreover, a cell phone search could reveal information about a student's family members that would not have found its way into backpacks or purses—a privacy interest of particular importance given the often-close relationship between parents and school administrators in schools and in the community. Again using the model scenario as an example, Principal's search of Pupil's iPhone revealed several private e-mails (most of which Pupil would rather Principal not have seen due to their sensitive nature), as well as photos and notes indicating Pupil's extracurricular activities, which he may not have wanted Principal to come across.<sup>145</sup> Principal also discovered a text message from Pupil's mother admitting a family financial situation; such information is often considered

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information from several aspects of the owner's life" and should demand heightened Fourth Amendment protection in the absence of a warrant and probable cause requirement).

<sup>139</sup> See *supra* Part I.C.

<sup>140</sup> See Gershowitz, *supra* note 132, at 41–42.

<sup>141</sup> *People v. Diaz*, 244 P.3d 501, 516 (Cal. 2011) (Werdegar, J., dissenting).

<sup>142</sup> See Gershowitz, *supra* note 132, at 42; Mulligan, *supra* note 17, at 1576.

<sup>143</sup> See *Diaz*, 244 P.3d at 513 (Werdegar, J., dissenting) ("Never before has it been possible to carry so much personal or business information in one's pocket or purse.").

<sup>144</sup> See Gershowitz, *supra* note 132, at 44.

<sup>145</sup> See *supra* Part I.C.

extremely private, and it is easy to imagine his mother's embarrassment upon realizing that Principal was now privy to the circumstances, as well.

The increased quantity and more personal quality of information stored on cell phones arguably should afford students a heightened legitimate expectation of privacy in their contents<sup>146</sup> because a school officials' search thereof necessarily entails an intrusion into a deeper and broader base of privacy interests than a search of a tangible object could have, and the privacy interests at stake are often more serious than the interests at stake in searching a mere purse or backpack.<sup>147</sup> Indeed, as one commentator has argued, "a 'look' into a cell phone's memory can reveal 'a subjective picture' of our life"<sup>148</sup> to a far greater extent than previously imagined in the tangible objects students carried with them in *T.L.O.*'s time. Students should enjoy a correspondingly higher expectation of privacy in their phones than Justice White was willing to recognize in students' belongings at school,<sup>149</sup> particularly given what some suggest are schools' duties to instill in students a respect for rights in a society increasingly driven by technology.<sup>150</sup>

## 2. *Cell Phones, Protected Speech, and Heightened Privacy Expectations*

The case for a higher expectation of privacy than currently afforded under the *T.L.O.* standard also encompasses expressive concerns embodied in the First Amendment. As courts have recognized, many of the communications students make on their electronic communication devices constitute expression protected by the First Amendment against governmental abridgement, particularly if the expression does not significantly affect the school environment (and therefore presumptively lies beyond school officials'

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<sup>146</sup> See *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (finding that cell phones' "ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain"), *cert. denied*, 131 S. Ct. 102 (2010).

<sup>147</sup> See Stillwagon, *supra* note 16, at 1199.

<sup>148</sup> *Id.* at 1201 (quoting Hilary Hylton, *What Your Cell Knows About You*, TIME (Aug. 15, 2007), <http://www.time.com/time/health/article/0,8599,1653267,00.html>) (internal quotation marks omitted).

<sup>149</sup> *Cf. Smith*, 920 N.E.2d at 955 (holding that "because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents" under the search-incident-to-arrest exception to the warrant requirement).

<sup>150</sup> See, e.g., Beci, *supra* note 55, at 833 ("Undoubtedly, the approaches tomorrow's leaders will take toward the [Fourth A]mendment will be shaped by the lessons they learn as today's school children. Students learn about the liberty, privacy, and security guaranteed by the Fourth Amendment more through actions than words." (footnote omitted)).

control).<sup>151</sup> Indeed, cell phones often contain records of political conversations, religious activities, and other private communications, all of which constitute traditionally protected speech.<sup>152</sup> The storage of this often-sensitive protected expression on students' cell phones supports the argument that students enjoy a heightened expectation of privacy in the devices' contents.

Courts<sup>153</sup> and scholars<sup>154</sup> have often alluded to the traditional relationship between the First Amendment and the Fourth Amendment, arguing that the two provisions were designed at least to work together, if not directly complement each other. As the D.C. Circuit has recognized, the Fourth Amendment was adopted in part "to provide citizens with the privacy protection necessary for secure enjoyment of First Amendment liberties."<sup>155</sup> The U.S. Supreme Court has also contemplated this relationship, at times suggesting that the presence of materials protected by the First Amendment gives rise to the need for rigorous, even heightened, Fourth Amendment protection. The Court has suggested that settings and materials falling under the protection of the First Amendment invoke the warrant requirement "because we examine what is 'unreasonable' [under the Fourth Amendment] in

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<sup>151</sup> See, e.g., *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 930–31 (3d Cir. 2011) (en banc) (finding that a school district violated a student's First Amendment rights when it disciplined the student for off-campus expression that did not work a substantial disruption in school); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc) (recognizing the "rather unremarkable proposition" that students' speech originating outside the school is protected by the First Amendment unless it creates a substantial or foreseeable disruption in school); *Doninger v. Niehoff*, 527 F.3d 41, 48–50 (2d Cir. 2008) (recognizing that students' electronic speech, at least when it originates outside the school, may be protected by the First Amendment); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39–40 (2d Cir. 2007) (same); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863–67 (Pa. 2002) (same). The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>152</sup> Notably, students' speech that disrupts the school environment may not be protected by the First Amendment. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) ("[C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."). The issue here, however, is that cell phones will inevitably contain at least some protected speech that does *not* disrupt the school environment, and students will therefore almost always have First Amendment protection in at least some of the contents of their cell phones. See *id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.")

<sup>153</sup> See, e.g., *Roeden v. Kentucky*, 413 U.S. 496, 504–06 (1973).

<sup>154</sup> See, e.g., CLANCY, *supra* note 56, § 11.3.6.2, at 511; Mulligan, *supra* note 17, at 1587.

<sup>155</sup> Reporters Comm. for Freedom of the Press v. AT&T Co., 593 F.2d 1030, 1054 (D.C. Cir. 1978).

the light of the values of freedom of expression [protected by the First].”<sup>156</sup> The theory, as Judge Kozinski has clarified, is that too low a standard under the Fourth Amendment for a governmental search of an object implicating protected expression would serve to “chill” the protected expression until the low standard has the effect of a governmental abridgement of speech, thus eviscerating the First Amendment’s freedoms.<sup>157</sup>

Many commentators argue that this relationship between the amendments supports the idea that when a particular government agent’s search will turn up communications or speech-related documents constituting expression protected by the First Amendment, the government must then justify its search according to a heightened level of suspicion or a more exact degree of particularity.<sup>158</sup> As Professor Akhil Amar has asserted, for example, the presence of First Amendment concerns in a search should give rise to “special Fourth Amendment safeguards” such as “heightened standards of justification prior to searching.”<sup>159</sup> Similarly, Professor Daniel Solove has suggested that such concerns regarding the object or material to be searched (if the search falls into an exception to the warrant requirement) should be infused into the *reasonableness balance* that justifies the exception, such that the search’s reasonableness “must be determined not only by reference to the reasonable expectation of privacy test but also based on the extent to which First Amendment activities are implicated.”<sup>160</sup> The idea that the presence of First Amendment materials may affect the reasonableness balance of a Fourth Amendment exception has some basis in Supreme Court precedent, as well. In *Roaden v. Kentucky*, for example, the Court acknowledged that a particular Fourth Amendment intrusion was unreasonable “because prior restraint of the

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<sup>156</sup> *Roaden*, 413 U.S. at 504; *accord* *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (“[P]rior cases . . . insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search.”).

<sup>157</sup> *United States v. Seljan*, 547 F.3d 993, 1018 (9th Cir. 2008) (Kozinski, C.J., dissenting). Chief Judge Kozinski observed that “[t]he Founding generation recognized that the seizure of private papers . . . undermines freedom of speech” and that “the chill on speech that would result from failing to protect personal correspondence” would “compel every one in self-defence to write even to his dearest friends with the cold and formal severity with which he would write to his wariest opponents.” *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 626 (W. H. Lyon, Jr. ed., Little, Brown, & Co. 14th ed. 1918) (1836)) (internal quotation marks omitted)).

<sup>158</sup> See, e.g., Patrick P. Garlinger, Note, *Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. REV. 1105, 1145 (2009).

<sup>159</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 806 (1994).

<sup>160</sup> Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 131 (2007).

right of expression . . . calls for a higher hurdle in the *evaluation of reasonableness*” of the intrusion in question.<sup>161</sup>

While no consensus exists regarding exactly how the Fourth Amendment should provide extra safeguards for protected expression, many courts and scholars agree that First Amendment material should require a more scrupulous level of protection under the Fourth Amendment, at least when both the warrant *and* probable cause requirements are abrogated in a particular context.<sup>162</sup> The argument applies easily to school searches of cell phones. Given that students’ cell phones contain tremendous amounts of more private expressive material than Justice White imagined, greater First Amendment protections are implicated against the chilling of students’ speech. When infused into the reasonableness balance struck in *T.L.O.*, the presence of these First Amendment concerns support a higher expectation of privacy in students’ cell phones than has been previously recognized. Students learn that they have a constitutional right to express themselves,<sup>163</sup> and it flouts reason to simultaneously teach this First Amendment protection and subject a primary vehicle for such expression—students’ cell phones—to so low a Fourth Amendment standard.

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<sup>161</sup> *Roaden*, 413 U.S. at 504 (emphasis added). In *Roaden*, the Court was addressing the seizure by law enforcement authorities of objects that constituted expressive material protected by the First Amendment. *Id.* at 503–04.

<sup>162</sup> Notably, the Fourth Circuit has held that under the border exception to the Fourth Amendment requirements, the presence of First Amendment materials does not affect the analysis. *See* *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir. 2005). The court based its rejection of the First Amendment argument, however, on the particular justifications of the border exception (which include the need to maintain national security above almost any other competing concern). *See id.* *Ickes* also based its holding on a Supreme Court case, *id.* at 507 (citing *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 (1986)), in which the Court declined to give expressive material a higher standard *than probable cause* for warrant requirements, *see P.J. Video*, 475 U.S. at 874. However, as one commentator has pointed out, “the Court has never held that the First Amendment could not force a heightening of Fourth Amendment protections that otherwise would *fall below*” the usual warrant *and* probable cause requirements. Garlinger, *supra* note 158, at 1144.

<sup>163</sup> *See J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 854 (Pa. 2002) (“[F]ree speech is of special value in the school setting. Schools offer a laboratory-like setting that encourages diverse thoughts.”); Patrick Richard McKinney II, Note, *On the School Board’s Hit List: Community Involvement in Protecting the First and Fourth Amendment Rights of Public School Students*, 52 HASTINGS L.J. 1323, 1342 (2001) (“[T]he inculcative function of the school prepares students to become productive members of society. Inculcation involves passing on to students a set of norms, social and moral aims, [and] civic goals . . .”).

### 3. *The Question of School Regulation: Phone Bans and the Expectation of Privacy*

While students should enjoy a heightened expectation of privacy in their cell phones in schools, some argue that this expectation is erased—or, at the very least, reduced—by many school policies that prohibit cell phones from the premises during school hours.<sup>164</sup> Pursuant to these policies, school administrators regularly confiscate cell phones on sight.<sup>165</sup> These rules, the argument goes, thus reduce or eliminate students' privacy expectations in their cell phones at school.

Intuitively, this seems correct. If an object can be taken away simply for its use or open possession, then how can students enjoy any expectation of privacy in that object? This postulation, however, gives rise to the important distinction between the *physical object* of a cell phone and the *contents* therein. While students likely should expect very little privacy in the physical possession of their cell phones given school policies prohibiting it, the ability of a school administrator to physically take the phone does not destroy a student's expectation that the cell phone's contents remain private.<sup>166</sup> Indeed, as a federal court has recently held, lawful confiscation of a cell phone pursuant to school rules did not justify the subsequent search of the cell phone's contents under the Fourth Amendment.<sup>167</sup> The violation of the school's prohibition of cell phones did not diminish the student's expectation of privacy in its contents.<sup>168</sup>

Thus, school policies banning the mere possession or use of cell phones decrease students' expectations of privacy in the cell phones themselves, but in a typical case, the confiscation of a cell phone pursuant to these policies has no logical connection to a search of the contents.

Some school policies may also clarify, using *T.L.O.*'s language, that students' cell phones are subject to search when an administrator has mere

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<sup>164</sup> See, e.g., *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 630 (E.D. Pa. 2006) (considering a school policy prohibiting cell phones from classrooms and allowing their confiscation if seen by school officials); Ito, *supra* note 2 (same).

<sup>165</sup> See, e.g., *Klump*, 425 F. Supp. 2d at 630.

<sup>166</sup> Cf. *United States v. Burgess*, 576 F.3d 1078, 1089 (10th Cir.) (“[A] notable distinction may exist between authority to seize a computer and authority to search its contents.”), *cert. denied*, 130 S. Ct. 1028 (2009).

<sup>167</sup> See *Klump*, 425 F. Supp. 2d at 640–41.

<sup>168</sup> See *id.*

reasonable suspicion to do so.<sup>169</sup> Arguably, under this type of policy, students should expect less privacy in the contents of their cell phones because the school has effectively given students “advance notice” that their devices’ contents can be searched.<sup>170</sup> Indeed, in situations in which students are given such notice of decreased privacy, school officials have typically been justified in searching the areas about which notice was given.<sup>171</sup>

The theory underlying these decreased privacy expectations, however, indicates why students retain a heightened expectation of privacy in their cell phones’ contents, regardless of the notice their schools give them. As Professor Wayne LaFave observes, if schools give students advance notice that lockers are subject to search when a particular student is suspected of violating school rules, students must expect reduced privacy in these lockers because the notice “provides the student with an opportunity to limit the effect of the intrusion by not keeping highly personal materials in the locker.”<sup>172</sup> The same theory may apply to any other physical containers students can carry into school. In other words, the basis of a reduced expectation of privacy in certain objects at school is that students can somehow search-proof these items or leave particularly personal items at home to limit the intrusiveness of any potential search.

The reasoning dissipates when applied to students’ cell phones. By their nature, cell phones are all-inclusive. Students do not carry a different phone into school with them than those they carry during other aspects of their lives, and they do not have any way of separating out the personal contents of a cell phone to avoid subjecting these materials to potential search. Commonly among students, to use a cell phone is to store large amounts of personal information on it. In the model scenario, for example, Pupil’s phone contained photos of his extracurricular activities, hundreds of texts unrelated to the suspicion for which it was searched, and several similar e-mails,<sup>173</sup> all of which were inseparable from the phone itself. While students certainly could delete the personal contents of the phone (and on their e-mail accounts or Internet browser histories) before entering school doors or leave their phones at home,

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<sup>169</sup> See, e.g., Freeman, *supra* note 20; Whittenberg, *supra* note 2.

<sup>170</sup> Cf. LAFAVE, *supra* note 5, § 10.11(b), at 506–07 (noting that school policies providing “advance notice” of searches decrease students’ privacy expectations in lockers).

<sup>171</sup> See William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 765 (1974) (“[W]hen the balance between privacy and law enforcement interests is extremely close, a regulation giving the student advance notice of a possible search may tend to swing the balance away from the student’s interest in privacy.”).

<sup>172</sup> LAFAVE, *supra* note 5, § 10.11(b), at 507.

<sup>173</sup> See *supra* Part I.C.

this seems an unreasonable price to pay considering the vital role cell phones now play in students' personal, social, family, and extracurricular lives.

Ultimately, school policies that give students notice of a lesser expectation of privacy in their cell phones wrongly assume that students can limit the information stored on the devices to that in which they are willing to give up their privacy expectations. As students cannot effectively search-proof their phones, however, these policies should do nothing to reduce students' expectations of privacy in the contents thereon.

#### 4. *Distinguishing Diaries*

It may also be contended that Justice White contemplated tangible items with the same type of privacy implications as cell phones by acknowledging that students may carry "photographs, letters, and diaries" with them in their purses or backpacks.<sup>174</sup> Arguably, then, the privacy interests of cell phones are indistinguishable from the privacy interests considered in *T.L.O.*'s calculus, and students do not have any higher of an expectation of privacy in their cell phones than they would in these admittedly private, tangible objects. This argument is unconvincing, however, for two reasons.

First, though Justice White contemplated in dicta these personal items in reducing privacy expectations, he distinguished these items from those that students had to carry by necessity. While "[s]tudents at a *minimum* must bring to school . . . supplies needed for their studies, . . . keys, money, and the necessities of personal hygiene and grooming," he wrote, "students *may* carry on their persons" the far more private items listed above.<sup>175</sup> Implicit in this distinction is the idea that, should students choose to carry these non-necessary items, they must expect less privacy because they could have chosen to leave them at home and are effectively on notice that—by virtue of these items' presence in school—administrators may search through them if justified according to the *T.L.O.* standard. As established above, however, a student cannot distinguish the private and non-private contents of her cell phone; mere "advance notice" should not reduce a student's privacy expectations in these complicated, all-purpose devices. A cell phone renders a highly personal item (like a diary) indivisible from less personal information, and Justice White's assumption of this separability should fail to justify a lowered expectation of privacy in today's cell phones.

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<sup>174</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

<sup>175</sup> *Id.* (dictum) (emphases added).

Second, even accepting *arguendo* that Justice White's mention of diaries refutes the heightened privacy students expect in the contents of their cell phones, the argument still ignores the concept that the *quality* of personal information cannot be separated from the *quantity* of such information on these devices in recognizing students' heightened privacy expectations.<sup>176</sup> The increased expectations are not based merely on the idea that the information stored on a cell phone is often of a more personal nature than that which could (or would) have been stored in tangible containers at school but also on the concurrent argument that there is simply a greater amount and variety of this kind of information accessible to a searching official. A diary is limited in capacity and use, whereas a cell phone combines the functions of a massive diary, an extensive photo album, a notebook containing thousands of records of communications, and a variety of other features. Students may expect a greater degree of privacy in the combination of these features because there are *more* privacy interests at stake than Justice White considered.

### *B. The Impossibility of a Reasonable Scope*

The unique characteristics and capabilities of cell phones thus support a more robust expectation of privacy than *T.L.O.* allowed in contemplating the tangible objects students brought to school in 1985. These heightened expectations of privacy upset the delicate balance struck by Justice White and the *T.L.O.* majority, which considered only students' purses and backpacks, and the types of contents that could reasonably be found therein. Cell phones also confound the *T.L.O.* balance in another way. This section argues that the increased sophistication of cell phone contents, functions, and interfaces potentially subjects students to a greater degree of intrusion upon their privacy expectations.

As the previous section indicated, cell phones store a wide variety of personal information, most of which is generally accessible to an equal degree on the phone. As the Tenth Circuit has recognized in the analogous context of laptop computers, "Because computers can hold so much information touching on many different areas of a person's life, there is a greater potential for the 'intermingling' of documents and a consequent invasion of privacy when [government authorities] execute a search for evidence on a computer."<sup>177</sup> This

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<sup>176</sup> See discussion *supra* Part III.A.1.

<sup>177</sup> *United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001); accord *Leary*, *supra* note 126, at 1085–86 (noting that physical objects necessarily limit the scope of an invasion—as in *T.L.O.* and *Redding*, where the

heightened potential intrusion into the often-jumbled private contents of students' cell phones becomes particularly acute in the hands of school administrators, who may be unfamiliar with the latest models and interfaces of cell phones and lack training in conducting such sophisticated searches. Thus, the potential is high that school officials will come across an enormous amount of information, straying outside the reasonable-scope command of *T.L.O.* and effecting an intrusion upon students' privacy expectations far greater than intended.

Indeed, in requiring school authorities to confine their search of students' belongings to a reasonable scope,<sup>178</sup> the *T.L.O.* Court assumed that school officials were in fact *capable* of doing so. As a practical matter, however, it may be unreasonable to expect that administrators can navigate through an iPhone's contents to locate incriminating evidence without viewing a wide swath of unrelated, highly personal items. The operation of cell phones, though often advertised as user-friendly, may be impossibly unfamiliar to those (undoubtedly including many school officials) who do not own the latest models or have not been trained to search them. In the model case, for example, Principal scrolled through hundreds of texts unrelated to the reasons for the investigation and unintentionally stumbled through various storage locations within the cell phone, simply out of lack of experience in using the iPhone's interface.<sup>179</sup> The *T.L.O.* Court, contemplating an obsolete era of tangible possessions, believed that school officials had the expertise (or at least the common-sense ability) to pick through the contents of students' physical belongings and consciously limit the scope of their intrusions into students' private places. The increasing complexity of cell phones renders this assumption untenable.

The primary concern with the potential inability of school officials to confine a cell phone search to a reasonable scope is that it generally raises the degree of intrusion students are forced to accept. As the cases from *T.L.O.* to *Redding* suggest, the degree to which school officials will invade upon a students' privacy throughout the course of a search, in addition to the pure privacy a student expects, may affect the calculus in a given case. In *Acton* and *Earls*, for example, the intrusion was "negligible"<sup>180</sup> and "minimal[]." <sup>181</sup> In

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intrusion was limited to items that could fit within a purse or backpack—in ways that content stored digitally cannot).

<sup>178</sup> *T.L.O.*, 469 U.S. at 341.

<sup>179</sup> See *supra* Part I.C.

<sup>180</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995).

*Redding*, on the other hand, the strip search was “degrading” and a far greater intrusion into the student’s privacy, as is any strip search.<sup>182</sup> These holdings indicate that, when students are subject to greater intrusions upon their legitimate expectations of privacy, Fourth Amendment safeguards must be heightened in response. Indeed, as the Supreme Court noted in *Redding*, the particular intrusiveness of the strip search in question made it “categorically distinct, requiring distinct elements of justification on the part of school authorities.”<sup>183</sup> If the government interest does not meet these more rigorous burdens to justify the search,<sup>184</sup> then the search is unreasonable. In the case of cell phones, there is great potential for the invasion of multiple privacy interests unrelated to the objectives of the search. This potential supports the notion that higher Fourth Amendment standards should be imposed upon cell phone searches in the public school environment, given the amount of privacy interests at stake and the reduced standard that *T.L.O.* established.<sup>185</sup>

### C. Schools’ Insufficient Interests to Justify Cell Phone Searches

Due to the unique characteristics of cell phones and the difficulty in conducting constitutional searches of them without higher and more particularized safeguards in place, students’ privacy interests in the contents of these devices against school officials’ searches are far stronger than Justice White recognized in *T.L.O.* That established, this section now looks to the opposite side of the *T.L.O.* balancing equation and argues that schools’ needs to search the contents of students’ cell phones no longer match the degree of intrusion upon these heightened expectations of privacy.

As an initial point, while the *T.L.O.* majority based the reduced Fourth Amendment standard for justifying searches on the need for school officials to exercise discretion in preserving “order and a proper educational environment,”<sup>186</sup> the opinion made clear the particular “ugly forms” of

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<sup>181</sup> Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002).

<sup>182</sup> Safford Unified Sch. Dist. # 1 v. Redding, 129 S. Ct. 2633, 2641–43 (2009).

<sup>183</sup> *Id.* at 2643.

<sup>184</sup> In *Redding*, the heightened burdens that school officials failed to meet seemed to be a higher—or at least more exact—degree of suspicion to justify the intrusiveness of requiring a student to undress to her underwear and expose the private parts of her body. *See id.* at 2641–43.

<sup>185</sup> *Cf.* United States v. Carey, 172 F.3d 1268, 1275 (10th Cir. 1999) (finding under the search-incident-to-arrest exception to the warrant requirement that, when “officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site,” higher safeguards are needed).

<sup>186</sup> New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

disciplinary problems about which it was truly concerned: drug use and violent crime.<sup>187</sup> The Court thus indicated that the social problems allowing the school's interest to match a student's expectation of privacy involved tangible objects that, if not confiscated upon an immediate search of a student's person or belongings, would continue to pose an imminent danger (or at least an illegal distraction) to the school.<sup>188</sup> In the majority of cases in which a school official will need to search a student's cell phone, however, the school official is not justified by the same immediate concerns because the digital files stored on cell phones simply do not pose an imminent tangible danger to other students or the school environment. In the model scenario, for example, Principal suspected that Pupil's cell phone contained evidence of cyberbullying,<sup>189</sup> an activity that may pose relational and emotional harm to the targeted student but certainly does not necessitate the same immediate search in which Principal would have had to engage if Pupil was suspected of possessing a gun or knife. When a school official's highly intrusive search of a student is missing the threat of grave and imminent danger (or at least significant disruption) to other students or the school environment, the intrusion is difficult to justify.<sup>190</sup>

Even accepting Justice White's reasoning on its face and allowing that school officials must possess the discretion to quickly search students' possessions to quell *any* significant disruptions to the school environment, the application to cell phones still fails to some extent because the confiscation of a cell phone arguably neutralizes any threat the phone may have to maintenance of school order. In many situations—for example, when a student observably uses the cell phone during class time—the student's ability to use the phone in the offensive way ceases when the school official takes possession of the phone, and a search of the phone's contents is not logically justified to maintain order in the school.

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<sup>187</sup> *Id.*

<sup>188</sup> Justice Blackmun also expressed concern about water pistols and peashooters—or, more generally, about tangible items that could cause distractions in the classroom but did not necessarily constitute illegal and dangerous possessions like drugs or weapons. *See id.* at 352 (Blackmun, J., concurring in the judgment).

<sup>189</sup> *See supra* Part I.C.

<sup>190</sup> *See Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2642–43 (2009) (finding the school official's search unjustified in part because the object of the search did not reasonably pose any “danger to the students”); *see also* LAFAVE, *supra* note 5, § 10.11, at 64 (4th ed. Supp. 2010) (noting that a factor missing from the facts in *Redding* was an indication of immediate danger from the power of the drugs that the student was suspected of possessing).

Realistically, of course, these two arguments may ignore some situations in which a school administrator is faced with searching a cell phone for evidence of drug activity, such as a few incriminating text messages, a photo of an item of drug paraphernalia, or perhaps a personal note stored on the phone listing individuals that owe money to the cell phone's owner.<sup>191</sup> Here, it seems, neither of the arguments posited above apply. As *T.L.O.* arguably emphasizes schools' need to quell drug use, the school officials' legitimate interests recognized in *T.L.O.* do not seem to be mitigated in a search of a cell phone's contents for exactly that purpose. Moreover, searches for evidence of drugs, according to the *T.L.O.* majority, seemed a sufficient government purpose to justify an immediate intrusion of the baseline level of privacy expectations students maintain in their tangible belongings.<sup>192</sup> Thus, it is difficult to argue that a school's interests have diminished when searching cell phones for evidence of drug use, possession, or dealing.

The fact that schools maintain an important interest in this situation, however, does not repair the damage cell phones work to the *T.L.O.* balance. While schools' interests may not have *decreased* in investigating drug use, these interests have also not *increased* to match the heightened expectations of privacy students enjoy in their cell phones and the more significant intrusion upon those expectations that a search of the devices would entail. Indeed, the governmental interest in searching cell phones for evidence of drug activity is the same specific interest considered in *T.L.O.* Though this interest then exceeded students' privacy expectations in their tangible belongings, thus justifying a standard far less than the normal Fourth Amendment requirements, the interest now falls short of the heightened privacy students expect in their cell phones, and the reduced Fourth Amendment standard remains inadequate to protect students' altered privacy expectations in these devices. Ultimately, even in drug-investigation scenarios, schools' interests do not justify the low standards established by the *T.L.O.* Court. The balance has changed, and the *T.L.O.* standard is insufficient to protect students' rights.<sup>193</sup>

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<sup>191</sup> *T.L.O.* dealt with the tangible equivalent of these types of evidence. 469 U.S. at 328.

<sup>192</sup> *See id.* at 339–43.

<sup>193</sup> There may be instances in which schools, with reasonable suspicion, need to search cell phones for evidence of an extreme threat to school safety (for example, a stored photo of a pipe bomb hidden in the school). The proposition that this kind of circumstance tosses aside any careful balancing analysis and justifies a search based on sheer urgency is generally accepted. *See, e.g., ACLU Applauds Boulder Valley School District's Decision to Limit Searches of Students' Cell Phone Text Messages*, ACLU (Apr. 21, 2008), <http://www.aclu.org/technology-and-liberty/aclu-applauds-boulder-valley-school-districts-decision-limit-searches-student> [hereinafter *ACLU Applauds School District*]. These imminent-threat situations may call for an exception to the argument that cell phones demand higher safeguards than currently provided under *T.L.O.*

#### IV. PROTECTING STUDENTS' RIGHTS: THE SEARCH FOR FEASIBLE SOLUTIONS

To this point, this Comment has established that the *T.L.O.* calculus justifying the elimination of the warrant requirement and the abrogation of the probable cause requirement in school searches is insufficient to protect the privacy students reasonably expect in their cell phones against school officials' intrusions. Thus, higher safeguards under the Fourth Amendment are needed to fully respect these rights.<sup>194</sup> This Part explores possible solutions for raising safeguards and protecting students' privacy expectations, beginning with the first that may come to mind: the reinstatement of the warrant requirement for school officials' searches of cell phones.

##### A. *Reinstating the Warrant Requirement: An Infeasible Solution*

As a starting point, it may be posited that the way to repair the Fourth Amendment standard in schools is to reinstate the warrant requirement for cell phone searches. School officials would, under this suggestion, be required to request a warrant from a magistrate judge declaring the facts giving rise to sufficient individualized suspicion and stating, with particularity, the specific files that the cell phone search intends to turn up. While conceivable in theory, however, the imposition of a warrant requirement is highly impractical and would likely fail to protect students' Fourth Amendment rights to any greater degree.

First, *T.L.O.* makes clear that, regardless of the balancing inquiry, the warrant requirement is simply ill fit for school officials' searches of students' belongings. As Justice White conclusively stated, “[t]he warrant requirement . . . is unsuited to the school environment” because “requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”<sup>195</sup> In the years since *T.L.O.*, this categorical recognition of the infeasibility of the warrant requirement in schools has become entrenched.<sup>196</sup> It

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<sup>194</sup> Notably, there may be some contention that any solution to the problem outlined in this Comment would essentially function as an “exception to the exception” and lead to a confusing array of standards depending on the type of object searched, as the door would be opened to further litigation offering various theories similar to the one advanced herein. This scenario is a possibility. The Supreme Court, however, has not hesitated to carve such an exception within the *T.L.O.* doctrine when the balancing act favors the student's rights over the school's interests. *See Redding*, 129 S. Ct. 2633.

<sup>195</sup> *T.L.O.*, 469 U.S. at 340.

<sup>196</sup> *See LAFAVE*, *supra* note 5, § 10.11(e), at 539.

is highly unlikely, even with the need for higher Fourth Amendment protections in cell phones, that any court, state legislature, or school board would even consider such an audacious measure.

Furthermore, it is unclear exactly how a reinstatement of the warrant requirement would actually protect students' privacy expectations in their cell phones. The purpose of the warrant has traditionally been recognized as twofold.<sup>197</sup> First, a warrant "provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case."<sup>198</sup> Given the deference with which courts are typically required to treat school officials' judgments,<sup>199</sup> however, courts are quite likely to grant a warrant request in almost any situation—particularly if probable cause is not required to justify the search. Second, "[a] warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope."<sup>200</sup> The logistical problems of navigating through the information contained in cell phones,<sup>201</sup> however, conceivably erase the intended perception of legitimacy in the cell phone owner's mind. If a school official cannot selectively pick through a cell phone's contents without coming across any number of protected files or data, it is unclear how a warrant would assure any greater degree of particularity.

### *B. Requiring Probable Cause in Cell Phone Searches*

As an alternative to the ill-fitting warrant requirement, courts could require administrators to articulate probable cause before engaging in any cell phone search—the official would have to know of "facts and circumstances," based on "reasonably trustworthy information," that are "sufficient in themselves to warrant a man of reasonable caution in the belief that" the cell phone contains evidence of a violation of school rules or criminal law.<sup>202</sup>

The virtue of requiring probable cause is that it forces the school official to justify the cell phone search on more than the amorphous reasonable suspicion test set out in *T.L.O.*, thus ostensibly requiring a stronger, more articulated

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<sup>197</sup> See *Camara v. Mun. Court*, 387 U.S. 523, 532 (1967).

<sup>198</sup> *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 622 (1989) (citing *United States v. Chadwick*, 433 U.S. 1, 9 (1977)).

<sup>199</sup> See *supra* note 126.

<sup>200</sup> *Skinner*, 489 U.S. at 622.

<sup>201</sup> See discussion *supra* Part III.B.

<sup>202</sup> See *Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949)) (internal quotation mark omitted).

government interest to match the degree to which the search may intrude upon students' privacy expectations. This higher safeguard, therefore, would better reflect the shift that cell phones have caused in the *T.L.O.* balancing equation. Moreover, courts are likely to find probable cause a more feasible safeguard than a warrant; unlike the warrant requirement, probable cause is not necessarily unsuited for the school environment. While *T.L.O.* rejected such a requirement for school administrators, it did so after determining that the school's interest needed to meet only a heavily reduced expectation of privacy<sup>203</sup> and did not—and perhaps could not—explain why the probable cause standard was inappropriate to the school environment in general.<sup>204</sup> With a new evaluation of students' privacy expectations, however, comes a new evaluation of the standard the government must meet to match them, and it is reasonable to believe that school officials (perhaps with training) could understand and apply the standard in justifying a cell phone search.<sup>205</sup>

Arguably, however, probable cause still provides an unclear standard that may fail to protect students' rights to any greater degree based, perhaps, on the willingness of school administrators to make the circumstances fit the standard. Indeed, LaFave has observed that, even in *T.L.O.*, Choplick would likely have been able to justify the search under a probable cause standard.<sup>206</sup> Consider again the model case.<sup>207</sup> Principal had information from an ostensibly reliable source (a student in good standing at the school) that Pupil was sending harassing material to another student through the communication modes available on his iPhone. When asked, Pupil denied the accusations. Principal undoubtedly had reasonable suspicion to justify the search under *T.L.O.*<sup>208</sup>—but if her legal judgment were ever questioned, it would be difficult to conclude that she did *not* have probable cause, as well. Principal had knowledge based on the reliable third-party report that was arguably sufficient

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<sup>203</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985).

<sup>204</sup> See LAFAVE, *supra* note 5, § 10.11(b), at 498 (observing that *T.L.O.* “simply assume[d] that the ‘school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search,’” but “[t]he basis of this assumption is never explained” (quoting *T.L.O.*, 469 U.S. at 340)).

<sup>205</sup> Indeed, some state courts have required probable cause under certain circumstances in the school environment. See, e.g., *State v. Heirtzler*, 789 A.2d 634, 640 (N.H. 2001) (holding that when “school officials agree to take on the mantle of criminal investigation and enforcement . . . they should be charged with abiding by the constitutional protections required in criminal investigations,” including probable cause); see also LAFAVE, *supra* note 5, § 10.11(b), at 511 (noting that the probable cause requirement remains in school searches if law enforcement officials are involved “in a significant way”).

<sup>206</sup> LAFAVE, *supra* note 5, § 10.11(b), at 498.

<sup>207</sup> See *supra* Part I.C.

<sup>208</sup> See *supra* notes 122–23 and accompanying text.

to justify a belief that Pupil had violated City High School's antibullying policy. It is a close call, and as courts allow substantial deference to school officials' decisions,<sup>209</sup> Principal could argue that she was justified even under a higher standard.

As the scenario demonstrates, it is unclear in which situations the probable cause standard would actually provide greater protection for students' privacy expectations in their cell phones. While probable cause could repair the disparity between schools' interests and students' privacy expectations, the fact-intensive inquiry it requires and the deference inherent in courts' evaluation of school officials' decisions could often render probable cause an illusory safeguard.

### C. *State Legislatures and School Boards*

Another potential solution calls upon state legislatures and school boards, rather than courts, to develop the necessary safeguards for respecting students' privacy expectations, either under the Fourth Amendment or state constitutional or statutory equivalents.<sup>210</sup> Arguably, because state legislatures and school boards are stitched into the fabric of local democratic processes, they are more familiar with school issues, and are therefore better able to recognize students' heightened privacy expectations and provide higher standards for searches in response. As a result, the outcome of these local bodies' deliberations in protecting students' rights will be perceived as somewhat more legitimate than courts' holdings on the matter, an aspect of school disciplinary programs that at least one Supreme Court Justice has identified as important to the analysis.<sup>211</sup> Thus, state legislatures can mandate, and school boards can implement, the safeguards necessary to recognize the adjusted balance between students' privacy expectations and schools' interests.

Some may question whether these governing bodies would incorporate the proper safeguards in schools. As Professor Adam Gershowitz has observed, state legislatures are typically loath to impede upon authorities' discretion,

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<sup>209</sup> See *supra* note 126.

<sup>210</sup> See Gershowitz, *supra* note 132, at 51 (suggesting that state legislatures play a role in limiting law enforcement officers' discretion under the search-incident-to-arrest exception).

<sup>211</sup> See *Bd. of Educ. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (noting the importance of the democratic process engaged in by the school board in cases of "close question[s] involving the interpretation of constitutional values").

particularly in the area of law enforcement.<sup>212</sup> Students' privacy expectations—the protection of which is guaranteed as a matter of constitutional law—would potentially be compromised by school boards or state legislatures siding with school officials' demands to maintain disciplinary flexibility.

It may be equally true, however, that state legislators or school board members are better equipped than judges to understand the privacy concerns associated with cell phones.<sup>213</sup> Often belonging to the cell-phone-owning demographic, these individuals may personally relate to the privacy interests inherent in cell phones,<sup>214</sup> particularly for students. Moreover, school board members and state legislators are likely more responsive to worried parents,<sup>215</sup> who may be concerned about protecting the information on their students' cell phones from prying school authorities.<sup>216</sup> In fact, some state legislatures and school boards have thus far shown a willingness to accommodate the privacy concerns associated with cell phone searches by adapting their policies to reflect these issues. A Colorado school district, for example, recently imposed greater safeguards than reasonable suspicion in these searches in response to a groundswell of opposition to the searches based on the reduced *T.L.O.* standard alone.<sup>217</sup> It may be that these bodies are more responsive than courts to the privacy expectations of their constituents and more capable of developing agreeable solutions to respect these rights in schools.

#### *D. The Requirement of Parental Consent*

A final solution that courts—or state legislatures and school boards, as discussed in the previous section—could consider to protect students' privacy expectations involves requiring parental notification and consent before a school official can search a student's cell phone. This safeguard would require

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<sup>212</sup> See Gershowitz, *supra* note 132, at 51 (“Legislatures are not typically in the business of limiting police officers’ ability to conduct criminal investigations.” (citing Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993))).

<sup>213</sup> See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 858–59 (2004) (noting that courts “cannot readily understand how the technologies may develop, cannot easily appreciate context, and often cannot even recognize whether the facts of the case before them raise privacy implications that happen to be typical or atypical,” and thus state legislatures should play a greater role in developing privacy safeguards for new technologies).

<sup>214</sup> See Gershowitz, *supra* note 132, at 51–52.

<sup>215</sup> See *id.* at 53 (noting the need to please constituents).

<sup>216</sup> See Unmuth, *supra* note 2; Whittenberg, *supra* note 2.

<sup>217</sup> See *ACLU Applauds School District*, *supra* note 193.

an administrator, when considering the search of a student's cell phone, to first call the student's parent or guardian (using school directory information and a school-provided phone) and describe the suspicion giving rise to the need to conduct a search. The administrator could then allow the parent to give consent for the search, object to the search generally, or specify the steps the administrator could take to limit the search to the intended areas. Indeed, the parent could even walk the administrator through the search either in person or over the phone, effectively limiting the intrusion into private areas of the phone not related to the object of the search.

There are several benefits to this type of safeguard. As an initial matter, the policy recognizes that parents, in most situations, are the true owners of the cell phone and therefore are, as a matter of propriety, the individuals in the best position to sign off on a search through its contents. The policy also recognizes that a cell phone search is not just an intrusion upon the students' privacy rights, but an intrusion upon the privacy expectations of the family to which the student belongs.

In substance, moreover, justifying a search through parental consent relies not on the balancing process of pitting the students' privacy against the school's interest, but on the doctrine of *in loco parentis*; if the school has the permission of the parent to act as the parent, then it may ignore the student's privacy expectations to the extent that the parent has specified, increasing the fluidity and effectiveness of the search.<sup>218</sup> As mentioned above, involving the parent in the process may limit the degree of intrusion by providing greater particularity as to the places searched. Finally, involving the parent may serve to build trust between the school and its constituents, a necessary element of the inculcation function of the public education system.

A major shortcoming here is what a school official may do if a parent wholly objects to the search. At this point, the official would need to justify the search using traditional Fourth Amendment principles, destroying the effectiveness of a parental consent requirement and still leaving a student in need of heightened Fourth Amendment protection against an administrator's

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<sup>218</sup> The doctrine of *in loco parentis* posits that a parent may "delegate part of his parental authority . . . to the tutor or schoolmaster of his child; who . . . then . . . has such a portion of the power of the parent committed to his charge." LAFAVE, *supra* note 5, § 10.11(a), at 486 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*453). Cases following *T.L.O.*, however, dismissed the doctrine's full application to public schools. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) ("In *T.L.O.*, we rejected the notion that public schools . . . exercise only parental power over their students, which of course is not subject to constitutional constraints." (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985))).

cell phone search. Thus, while a parental consent requirement could provide a partial solution, full respect for students' increased expectations of privacy in their cell phones likely demands a more holistic program of safeguards.

Another possible limitation on this safeguard is that a small percentage of students (typically those who are in their final year of secondary education) have reached the age of majority, thus calling into question whether parents can provide the necessary consent. It is likely, however, that parents can still serve this function if they retain the same degree of control over their adult student.<sup>219</sup> That parents can still give consent is particularly evident if they own the cell phone and pay for the plan, as is often the case even after their student becomes a legal adult.

### CONCLUSION

The troubling question of how cell phones fit into broad Fourth Amendment doctrine has been debated in the last few years. Some aspects of the argument advanced herein have been suggested, in somewhat scattershot fashion, in a relatively young body of case law and commentary addressing other exceptions to the typical Fourth Amendment requirement of a warrant and probable cause. While acknowledging some of these propositions, this Comment's argument applies only to the untested particularities of the public school exception established in *T.L.O.*

Thus, this Comment sets forth the argument that, in light of the characteristics and capabilities of students' cell phones, the *T.L.O.* standard for guiding school officials' searches under the Fourth Amendment fails to recognize students' heightened expectations of privacy in the devices, the greater degree to which school officials can intrude upon these expectations, and the insufficiency of schools' interests in justifying these intrusions. Therefore, higher safeguards, such as the articulation of probable cause, the requirement of parental notification and consent, or the development of more customized safeguards by local democratic processes, must be considered and

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<sup>219</sup> See, e.g., *United States v. Andrus*, 483 F.3d 711, 720–21 (10th Cir. 2007) (holding that a parent had apparent authority to consent to the search of his 51-year-old son's room when he did not pay rent, when the parent had unrestricted access to the bedroom, and where the parent paid for Internet access that his son used).

applied to better protect the privacy students expect in their cell phones as these devices pervade every aspect of students' lives—including the hallways of public schools.

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