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Perfectly Reasonable: The Overextension of Fourth Amendment Privacy Protections to Students and Their Cell Phones

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*Perfectly Reasonable: The Overextension of Fourth Amendment Privacy Protections to Students
and Their Cell Phones*

by
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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Kristi L. Bowman
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**PERFECTLY REASONABLE: THE OVEREXTENSION OF FOURTH AMENDMENT PRIVACY
PROTECTIONS TO STUDENTS AND THEIR CELL PHONES**

Daniel L. Eyer

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INTRODUCTION

A high school student with a long history of drug use, emotional outbursts, fighting, and suicidal tendencies is caught violating school policy by using his cell phone during class.¹ The assistant principal, now in possession of the phone and well aware of the student's checkered past, is concerned about the student's well-being and emotional reaction to the confiscation of his phone.² The assistant principal decides, in the best interests of the child and for the safety of the school environment, to read four text messages on the phone to ensure that the student was not on the verge of some emotional tragedy.³ What would the reaction be to such an action by a school official? Would there be praise for his swift action to ensure the safety and well-being of the student? Would there be an acknowledgement that students can have no cause for complaint when they have their cell phone confiscated since they were well aware that possession and use of the phone during school is a clear violation of school policy?

No. In a stunning twist, the assistant principal and the school district were forced to fight a four year lawsuit defending themselves against accusations of violating the student's privacy rights by looking through the four text messages on the cell phone.⁴ But the real shocker was still to come. Not only was the school forced to defend their actions in federal court, but the Sixth Circuit declared that the assistant principal's actions *were unreasonable* and violated the student's Fourth Amendment rights.⁵ The Sixth Circuit's decision marked the first time a United States Court of Appeals had faced the issue of student cell phone searching, so its impact is sure to resonate through the hallways of schools throughout the country.

¹ This scenario is based on *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623 (6th Cir. 2013), a recent case of first impression that was the primary inspiration for this article.

² *Id.* at 632.

³ *Id.* at 633.

⁴ *Id.*

⁵ *Id.* at 634.

Unfortunately for the school personnel, who are tasked with the monumental challenge of maintaining a safe and orderly educational environment, this result is just the latest in a series of pro-students' privacy decisions by the nation's judiciaries and legislatures that are tying the hands of school officials to deal with the ever-growing list of problems that cell phones in schools present. Bullying, cheating, sexting, disrupting class: cell phones are creating and intensifying all of these problems in the school environment.⁶ But as the problems and prevalence of cell phones continue to escalate, the school's ability to deal with these problems is being further and further restricted. What is a school to do? How can the school respond?

Part I of this article explains the background and precedent dealing with students' Fourth Amendment rights and their protection from "unreasonable" searches of their persons and their belongings. Part I also analyzes a very recent and very significant Sixth Circuit court decision that marked the first time a United States Court of Appeals faced the issue of cell phone searching. Part I concludes by examining the recently enacted internet privacy protection laws, which seem to work in tandem with the court decisions to severely restrict a school's ability to deal with all of the problems presented by students' cell phones. Specifically, Michigan's Internet Privacy Protection Act will be discussed, since it represents the broadest of all state laws impacting student privacy and offers lessons that all schools throughout the country can take to heart. Part II argues that the balance of students' constitutional rights and schools' interests must be, and always has been, heavily tipped in favor of the schools' interest in protecting its ability to educate and maintaining discipline in the school environment, and that limitations in other areas of constitutional law offer guidance and justification for limiting students' Fourth Amendment rights in the privacy of their cell phones. Part II also addresses the incongruity between holding

⁶ For a rundown of various issues presented by student cell phone possession, see Joseph O. Oluwole & William Visotsky, *The Faces of Student Cell Phone Regulations and the Implications of Three Clauses of the Federal Constitution*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 51, 53-60 (2010).

schools liable for failures to prevent evils like bullying and school violence while also restricting their ability to combat these problems through cell phone searches. Part III addresses students' subjective expectations of privacy in their cell phones, and suggests that although students may place a high expectation of privacy in their phones, these expectations are unfounded and unreasonable. Part III also presents the school's case and suggests that the reasoning in the recent Sixth Circuit case is inconsistent with the constitutional reasoning applied in other student privacy rights cases. Part IV recognizes that although the balance should be tipped in favor of the schools, it presently is not. Therefore, policies regarding cell phone bans and searches that comply with the wishes of the courts and the legislatures are suggested and explained. These policies attempt to protect the schools' interests as best as they can in spite of the harsh and difficult climate of student privacy that schools are currently forced to operate within.

This article attempts to aid school personnel by educating them on the past and present state of Fourth Amendment law as applied to the new and murky area of student cell phones. It suggests policies and practices that will best protect schools' interests while still complying with the overly restricting law currently in force. However, it also offers schools an argument that will hopefully aid them in swaying the judiciary and the legislature back towards the path of allowing schools to protect their ultimate purposes and interests in preserving an orderly and positive educational environment.

I. BACKGROUND

Although there is no clear authority on the constitutional limits of suspicion-based⁷ cell phone searches in schools, there are clues scattered throughout other Fourth Amendment school

⁷ The distinction between suspicion-based searching of students and suspicion-less searching of students is critical. The Court has upheld various suspicion-less searches of students, but although these cases will be passingly referenced throughout this article, they operate under a completely different set of rules than the suspicion-based

cases, various state statutes, and decisions by various lower federal courts that have dealt with the scenario. This part begins by reviewing the lessons learned from the Supreme Court's seminal school Fourth Amendment cases. Next, the various lower federal court decisions that have tackled the cell phone search issue will be compared and contrasted with the goal of articulating some consistent policies and rules. Finally, the Sixth Circuit's recent decision and an example of recent legislation on cell phone privacy will be highlighted, setting the stage for some preliminary guidance and model rules for public schools throughout the country to abide by.

A. The Touchstone Case: *New Jersey v. T.L.O.*

The story of school and student Fourth Amendment jurisprudence finds its origins in *New Jersey v. T.L.O.*⁸ In *T.L.O.*, a fourteen year old high school freshman was caught smoking in the bathroom, which was a clear violation of school policy.⁹ When questioned by the principal, T.L.O. denied any wrongdoing.¹⁰ Now suspicious, the principal searched T.L.O.'s purse and uncovered a pack of cigarettes.¹¹ Unfortunately for T.L.O, that was not all the principal found. He also noticed some rolling papers, which he knew were used for smoking marijuana.¹² The principal suspected that continuing the search would reveal additional evidence of drug use.¹³ Sure enough, a thorough search of the purse revealed some marijuana.¹⁴

But the principal still wasn't done. He next opened a zippered compartment of the purse where he found an index card containing various names and letters, which is apparently classic

searches that are the focus of this article. For examples of suspicion-less searches, *see* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), *Bd. of Education v. Earls*, 536 U.S. 822 (2002).

⁸ 469 U.S. 325 (1985).

⁹ *Id.* at 328.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

evidence of drug dealing.¹⁵ T.L.O. was charged as a juvenile based on the evidence found by the principal and her subsequent confession.¹⁶ She attempted to defend herself by claiming that she had been unlawfully searched, which, if true, would have rendered the evidence from the search and her subsequent confession tainted and inadmissible at trial.¹⁷

While acknowledging that the students do enjoy protection under the Fourth Amendment, the *T.L.O.* Court nevertheless ruled that schools required “some modification of the level of suspicion of illicit activity needed to justify a search.”¹⁸ In light of this proclamation, instead of requiring probable cause or a search warrant (the normal requirements for a search under the Fourth Amendment), the Court established an inquiry of “reasonableness, under all the circumstances, of the search.”¹⁹ This reasonableness test requires a two-part inquiry. First, “one . . . [must] consider ‘whether the . . . action was justified at its inception.’”²⁰ Second, one must “determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”²¹ For a search to be justified at its inception, a school official must have “reasonable grounds for suspecting that the search will turn up evidence” that the student has been breaking either school rules or the law.²² To be permissible in scope, the search tactics employed must be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”²³ The Court trusted that this test would neither “unduly burden” school

¹⁵ *Id.*

¹⁶ *Id.* at 329.

¹⁷ *Id.*

¹⁸ *Id.* at 340.

¹⁹ *Id.*

²⁰ *Id.* at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

²¹ *T.L.O.*, 489 U.S. at 341 (citing *Terry*, 392 U.S. at 20).

²² *T.L.O.*, 469 U.S. at 342.

²³ *Id.*

officials “nor authorize unrestrained intrusions upon the privacy of schoolchildren.”²⁴ Rather, the Court felt that the reasonableness test would allow school officials to search students “according to the dictates of reason and common sense.”²⁵

Applying this test, the Court ultimately concluded that the search did not violate *T.L.O.*’s Fourth Amendment rights.²⁶ The principal’s search of the purse was reasonable because he had received a tip that she was smoking in the bathroom, and her denials provided a sufficient basis to search the purse for evidence of smoking.²⁷ The papers he uncovered then gave rise to further suspicion that she was a drug dealer and justified his opening and reading of the letters.²⁸ Therefore, the scope was reasonable, since the extent of the search was reasonably related to the principal’s suspicion of finding drug related evidence. *T.L.O.* continues to be the touchstone case for student search law, and courts throughout the country have relied on its rules and reasoning when deciding the initial wave of student cell phone search cases. The impact of *T.L.O.* cannot be understated, and any forecast of future student search decisions must take it into account as the starting point of the analysis.

B. Suspicion Based Searching Revisited – *Safford Unified School District Number 1 v. Redding*

In establishing its reasonableness test, *T.L.O.* rejected the argument that students have no legitimate expectation of privacy in any personal property brought to school.²⁹ However, the Court balanced any expectation of privacy in personal items like “photographs, letters, and diaries” with the school’s significant interest in preventing disruption and maintaining safety.³⁰ For over twenty years after *T.L.O.*, the Supreme Court stayed clear of the issue of suspicion-

²⁴ *Id.* at 342-43.

²⁵ *Id.* at 343.

²⁶ *Id.* at 332-33.

²⁷ *Id.* at 345.

²⁸ *Id.* at 347.

²⁹ *Id.* at 339.

³⁰ *Id.* at 326, 339.

based searches of students, but in 2009 they finally revisited the topic in *Safford Unified School District Number 1 v. Redding*.³¹ In *Redding*, the Court applied the *T.L.O.* reasonableness test to “strip searches.” In the case, school officials “strip searched” a thirteen year old female student by removing the elastic from her undergarments and pulling out her bra, where they suspected the student was concealing prescription drugs that she was distributing to her fellow students.³²

The Supreme Court both incorporated and expanded the *T.L.O.* standard in its resolution of *Redding*. According to Justice Souter, there is a three step inquiry that must be applied in order to determine the “reasonableness” of student search cases. The first step in the evaluation of an “invasive” search is to determine the student’s subjective expectation of privacy.³³ The student’s expectation of privacy must be viewed in light of the humiliation, fear, and embarrassment that Redding experienced during the strip search.³⁴ Redding herself drove this point home and met this first requirement when she testified about her own embarrassment and humiliation caused by the search.³⁵

The second step in the analysis is asking whether society would recognize her expectation of privacy as legitimate. The Court went to great lengths to confirm the legitimacy of Redding’s expectation of privacy by pointing to the similarity of attitudes among her peer group and the findings of social science research.³⁶ Finding that Redding’s embarrassment, fear, and humiliation were “consistent” with the reactions of other students who experienced invasive strip searches, the Court determined that their “adolescent vulnerability intensifies the patent intrusiveness of the exposure” of the search.³⁷ The Court relied upon the “common reaction” of

³¹ *Safford Unified Sch. Dist. No.1 v. Redding*, 129 S. Ct. 2633, 2641 (2009).

³² *Id.* at 2637-38.

³³ *Id.* at 2638.

³⁴ *Id.* at 2641.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 2641-42.

children to a strip search, as identified by social science studies, to confirm the legitimacy of the expectation and allow Redding to prevail on the second part of the inquiry.³⁸

The third step is necessary only when the first two steps establish both that the student possessed a subjective expectation of privacy and that the expectation of privacy is objectively reasonable.³⁹ Here, *Redding* relied heavily upon *T.L.O.*, quoting the language that the search “as actually conducted [must be] reasonably related in scope to the circumstances which justified the interference in the first place.”⁴⁰ The search’s scope is reasonable “when it is ‘not excessively intrusive in light of the age and sex of the student and the nature of the infraction.’”⁴¹ With regards to *Redding’s* strip search, the Court found that the “content of the suspicion failed to match the degree of intrusion.”⁴² The school officials in *Redding* knew that the contraband pills were merely common over the counter pain relievers, and therefore they represented only “limited threat” of danger.⁴³ Due to the limited nature of the threat, the school officials could not justify the “extreme intrusiveness of a search” of Redding’s underwear.⁴⁴ The Court found the argument that students typically hide contraband in their underclothing unpersuasive, and called the search overly extensive.⁴⁵ They justified their finding by declaring that, “nondangerous school contraband does not raise the specter of stashes in intimate places,” and, mere “general background possibilities” are insufficient to justify a strip search of a student, due to “the degradation its subject may reasonably feel.”⁴⁶

³⁸ *Id.* at 2642.

³⁹ *Id.*

⁴⁰ *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

⁴¹ *Redding*, 129 S. Ct. at 2642 (quoting *T.L.O.*, 469 U.S. at 342).

⁴² *Redding*, 129 S. Ct. at 2642.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2643.

Redding is the most up to date Supreme Court jurisprudence on suspicion based student searching. It refined *T.L.O.*'s reasonableness test by taking into account the student's subjective expectation of privacy as well as society's willingness to recognize that expectation as legitimate when analyzing the invasiveness and reasonableness of the search. Since *Redding* is the latest student suspicion based searching decision, any new search cases will take its reasoning into account when applying the *T.L.O.* test. Therefore, it is highly probable that whenever the new and uncharted question of student cell phone searching comes before the Supreme Court, *Redding* will play a decisive role in the outcome.

C. Current Cell Phone Searching Law

Generally speaking, courts recognize that people have a legitimate expectation of privacy in the contents of their cell phones.⁴⁷ Cell phones contain vast amounts of potentially private information, including recent-call list, emails, texts, and photos.⁴⁸ Generally, the private nature of the contents of a cell phone "gives users a reasonable and justifiable expectation of a higher level of privacy in the information they contain."⁴⁹ Due to this legitimate expectation of privacy, in the general (non-school) setting, a search warrant is usually required for a search of a cell phone, unless an exception exists.⁵⁰ However, as *T.L.O.* made clear, different rules apply in the school environment. These differences are a topic of much debate, since the prevalence and reliance on cell phones is growing at a rapid rate amongst our nation's youth.

⁴⁷ For examples of cases that recognize a legitimate expectation of privacy in cell phones in non-school settings, see *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008); *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (D. Fla. 2009); *Connecticut v. Boyd*, 992 A.2d 1071, 1083 (Conn. 2010); *Ohio v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009).

⁴⁸ *Quintana*, 594 F. Supp. 2d at 1299 (citing *Zavala*, 541 F.3d at 577).

⁴⁹ *Smith*, 920 N.E.2d at 955.

⁵⁰ *Quintana*, 594 F. Supp. 2d at 1299. Police officers that make a lawful arrest do not need a warrant to conduct a search incident to that arrest. See *Chimel v. California*, 395 U.S. 752 (1969); *New York v. Belton*, 453 U.S. 454 (1981); *Arizona v. Gant*, 556 U.S. 332 (2009).

1. New Issues Presented by Students and Their Cell Phones

The ever increasing number of students bringing phones to school has sparked a variety of new problems and headaches for school staff. Cell phones offer students the opportunity to engage in all kinds of mischief, including texting during class, setting up illegal drug sales, cheating on tests, sexting, and bullying their peers.⁵¹ A growing number of schools have instituted policies banning cell phones outright, but these policies are futile, since about two-thirds of students at these schools bring them anyway.⁵² These policies are further undermined by parents who refuse to support the schools' efforts. For example, in 2007, parents of New York City public school students actually sued the school after it instituted a cell phone ban.⁵³

Since outright bans are completely ineffective, schools often attack the problem with strict confiscation policies.⁵⁴ Further, some schools authorize searches of cell phones after they are confiscated. Courts have tolerated these searches of confiscated phones where there is reasonable suspicion of a violation of school rule or of law,⁵⁵ following, to the best of their ability, the *T.L.O.* standard. However, these searches are being challenged with more and more frequency in court.⁵⁶

⁵¹ Amanda Lenhart et al., *Teens and Mobile Phones: Text Messaging Explodes as Teens Embrace It as the Centerpiece of Their Communication Strategies with Friends*, PEW INTERNET (Apr. 20, 2010), at 1,5,9, available at <http://pewinternet.org/~media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf>; Zach Miners, *One Third of Teens Use Cellphones to Cheat in School*, U.S. NEWS ON EDUCATION BLOG (June 23, 2009), <http://www.usnews.com/education/blogs/on-education/2009/06/23/one-third-of-teens-use-cellphones-to-cheat-in-school>.

⁵² Lenhart, *supra* note 51, at 83.

⁵³ Price v. New York City Bd. of Educ., 837 N.Y.S.2d 507 (Sup. Ct. 2007), *aff'd* 855 N.Y.S.2d 530 (App. Div. 2008).

⁵⁴ For an example of a Michigan cell phone confiscation policy, see DETROIT PUBLIC SCHOOLS, RIGHTS AND RESPONSIBILITIES OF STUDENTS IN THE DETROIT PUBLIC SCHOOLS 15-16 (2011), available at http://detroitk12.org/resources/students/codeOfConduct/Student_C

⁵⁵ Mendoza v. Klein Indep. Sch. Dist., No. H-09-3895, slip op. at 22 (S.D. Tex. Mar. 15, 2011). See also ACLU OF CALIFORNIA, HELLO! STUDENTS HAVE A RIGHT TO PRIVACY IN THEIR CELL PHONES: INDISCRIMINATE CELL PHONE SEARCHES VIOLATE STUDENTS' PRIVACY RIGHTS (Sept. 2011), available at <http://www.aclusandiego.org/site/wp-content/uploads/2012/05/H-E-L-L-O-student-cell-phone-rights.pdf>

⁵⁶ See, e.g., Mendoza v. Klein Indep. Sch. Dist., No. H-09-3895, slip op. at 22 (S.D. Tex. Mar. 15, 2011); J.W. v. DeSoto County Sch. Dist., 2:09-CV-00155-MPM, 2010 WL 4394059 (N.D. Miss. Nov. 1, 2010); N.N. v. Tunkahannock Area Sch. Dist., 801 F. Supp. 2d 312 (M.D. Penn. 2011).

2. The First Wave of Lawsuits

The courts have handled these challenges to student cell phones searches by applying the *T.L.O.* two-part “reasonableness” test: first, they must examine the reasonableness of the initial justification for the search, and second, they must decide whether the scope of the search was reasonable.⁵⁷ Courts are not apt to declare the scope of a search of the entire contents of a phone as reasonable.⁵⁸ For example, in *Klump v. Nazareth Area School District*, a teacher, following school policy banning the use and display (but not the possession) of cell phones, confiscated a student’s cell phone after it fell out of his pocket.⁵⁹ School officials then listened to the student’s voice mail, read the student’s texts, and called several numbers in the phone’s contact list in an attempt to catch other students breaking the school rules by answering their cell phones during school.⁶⁰ Eventually, evidence of drug activity was found.⁶¹ The student sued the school claiming, among many other things, Fourth Amendment violations.⁶²

Applying *T.L.O.*’s two-part reasonableness inquiry, the court found that seizing the phone was justified because the student had violated a school policy by displaying the phone.⁶³ However, the court decided that the search was not reasonable in scope, since the school had no justification to search the contents of the phone or to use the phone as a tool to entrap other students.⁶⁴ School officials had no reasonable suspicion to suspect that the student was violating

⁵⁷ Bernard James, *Safe Schools, Cell Phones, and the Fourth Amendment*, NASRO J. OF SCH. SAFETY, Winter 2009, available at <http://law.pepperdine.edu/academics/faculty/publications/James-NASROCellPhoneLaw.pdf>.

⁵⁸ Amy Vorenberg, *Indecent Exposure: Do Warrantless Searches of a Student's Cell Phone Violate the Fourth Amendment?*, 17 BERKELEY J. CRIM. L. 62, 83 (2012).

⁵⁹ *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 627 (E.D. Penn. 2006).

⁶⁰ *Id.*

⁶¹ *Id.* at 631.

⁶² *Id.*

⁶³ *Id.* at 640.

⁶⁴ *Id.*

any other school policy at the time of the confiscation.⁶⁵ Therefore, because the text about drug activity was not apparent to officials until after they unreasonably began searching the contents of the phone, the search was disallowed.⁶⁶

Similarly, in *Mendoza v. Klein Independent School District*, a teacher confiscated an eighth grader's phone after observing her looking at it with some friends.⁶⁷ Because the students appeared "guilty" when they were confronted, the teacher deduced that they were doing something inappropriate.⁶⁸ The teacher searched through the text messages and found nude photos of the student.⁶⁹ The student confessed that she had sent the photos to her boyfriend,⁷⁰ and she was soon suspended.⁷¹ She subsequently sued the school, among other reasons, for violating her Fourth Amendment rights.⁷² The court decided that the search was justified at its inception because the student claimed she was not using the phone, but the teacher's observations created reasonable suspicion that she was.⁷³ Therefore, it was reasonable for the teacher to check if the student had violated school policy by sending a text at school.⁷⁴ However, the school's motion for summary judgment was denied, since the court believed that a jury could find that reading the texts on the phone was not reasonably related to the initial justification for searching the phone.⁷⁵

However, the students have not had it all their way. In *J.W. v. DeSoto County School District*, a twelve-year-old boy was expelled from school for gang activity after his cell phone,

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Mendoza v. Klein Indep. Sch. Dist.*, No. H-09-3895, slip op. at 2 (S.D. Tex. Mar. 15, 2011).

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 3-4.

⁷⁰ *Id.* at 4.

⁷¹ *Id.* at 5-6.

⁷² *Id.* at 7-8.

⁷³ *Id.* at 22.

⁷⁴ *Id.* at 22-23.

⁷⁵ *Id.* at 27.

confiscated for in-class use, was found to contain a picture of a friend engaged in gang behavior.⁷⁶ The court found that the search of the student's cell phone was reasonable both at its inception and in scope because the student brought it to school and used it against clear school policy.⁷⁷ This behavior diminished the student's expectation of privacy,⁷⁸ thereby making a search of the phone reasonable. The *DeSoto* court distinguished the case from *Klump*, calling *Klump* a "fishing expedition" into the student's personal life.⁷⁹ Here, the school's actions were "limited" to only looking at the student's photos.⁸⁰ The case was later settled.⁸¹

The ACLU has also become heavily involved in student cell phone searches. For example, in 2007, the ACLU challenged a Colorado school district's cell phone searching policy.⁸² School administrators had been routinely confiscating cell phones after minor infractions and then reading the phone's texts.⁸³ The ACLU challenged the policy, arguing that it violated state law and the Fourth Amendment.⁸⁴ The school district agreed to implement new rules that require school officials to obtain either student or parental permission before searching a cell phone unless there is an imminent danger to school safety.⁸⁵

In California, the ACLU made a similar complaint. There, a school administrator confiscated a student's phone and allegedly proceeded to read several weeks of prior text

⁷⁶ 2:09-CV-00155-MPM, 2010 WL 4394059, at *2 (N.D. Miss. Nov. 1, 2010).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at *5.

⁸⁰ *Id.*

⁸¹ Press Release, ACLU, Mississippi School District to Clarify Gang Policy as Part of Settlement of ACLU Lawsuit (Feb. 9, 2011), available at <http://www.aclu.org/racial-justice/mississippi-school-district-clarify-gang-policy-part-settlement-aclu-lawsuit>.

⁸² See Letter from American Civil Liberties Union to Bd. of Educ., Boulder Valley Sch. Dist. (Oct. 10, 2007), available at http://aclu-co.org/sites/default/files/BVSD_ACLU_10-10-07.pdf.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Press Release, ACLU, ACLU Applauds Boulder Valley School District's Decision to Limit Searches of Students' Cell Phone Text Messages (Apr. 21, 2008), available at <http://aclu-co.org/news/aclu-applauds-boulder-valley-school-district%E2%80%99s-decision-to-limit-searches-of-students%E2%80%99-cell-pho>.

messages that included “personal” communications.⁸⁶ In response, the school agreed that school officials would not search the text messages of confiscated cell phones unless they had reasonable suspicion that they would find evidence of a violation of law or school rules.⁸⁷ The school also agreed to limit the scope of any searches to information pertaining directly to the alleged infraction that led to the initial confiscation.⁸⁸ Finally, the ACLU of Pennsylvania sued a school district after the principal searched a student’s phone and uncovered “explicit” photos, which the principal then submitted to law enforcement.⁸⁹ The case was settled, but the school paid a steep price by paying the plaintiff \$33,000 and agreeing to formulate clearer guidelines for cell phone searches.⁹⁰

So, as these scattered and inconsistent decisions indicate, both schools and courts continue to struggle with understanding and implementing the *T.L.O.* “reasonableness” test to the new world of student cell phones. The need for clarity is critical, because as cell phone ownership and use continues to increase, these occurrences will only become more common. Teachers and principals are going to be faced with this issue on a daily basis, and they are going to need to be able to act quickly and confidently to properly address any disciplinary issues raised by the cell phones. Blanket bans have proven ineffective, so there does not seem to be any easy way out of the problem. Confiscation policies are dominant, but the guidelines and circumstances for when a school official can search the confiscated phone remain unclear. As *T.L.O.* indicated, students do not enjoy the same level of constitutional protection as adults, so

⁸⁶ *Id.*

⁸⁷ Press Release, ACLU, School District Changes Its Unconstitutional Cell Phone Search Policy (Apr. 16, 2008), *available at* http://www.aclunc.org/cases/other_legal_advocacy/school_district_changes_its_unconstitutional_cell_phone_search_policy.shtml?ht=.

⁸⁸ *Id.*

⁸⁹ Complaint, *N.N. v. Tunkhannock Area Sch. Dist.*, 801 F. Supp. 2d 312 (M.D. Pa. May 20, 2010) (No. 10-CV-01080).

⁹⁰ Press Release, ACLU, ACLU Settles Student-Cell-Phone-Search Lawsuit with Northeast Pennsylvania School District (Sep. 15, 2010), *available at* <http://www.aclupa.org/pressroom/aclusettlesstudentcellphon.htm>.

student cell phone searching by school officials falls into a hazy and confusing no-man's land. However, with all of the recent litigation and the constant stream of ACLU challenges, a resolution of this controversy cannot be far off.

D. The Sixth Circuit Blazes the Trail

Meanwhile, the Sixth Circuit finally faced the issue of student cell phone searches for the first time last year in *G.C. v. Owensboro Public Schools*.⁹¹ This was the highest court to ever take on this issue, so the case is sure to draw attention, criticism, and analysis from across the country, and its effect will be felt by students and schools no matter where they reside. Our student, G.C., had a long history of disciplinary violations, including incidents where G.C. admitted to drug usage and having suicidal thoughts.⁹² The incident in question was not the first time that a school administrator had searched G.C.'s cell phone, but the search in question occurred in September 2009 when G.C. was caught texting on his cell phone during class in clear violation of school rules.⁹³ The teacher confiscated the phone and turned it over to an assistant principal, who in turn read four of G.C.'s text messages.⁹⁴ The assistant principal testified that she was aware of G.C.'s previous issues with suicide, and wanted "to see if there was an issue with which I could help him so that he would not do something harmful to himself or someone else."⁹⁵ She was also worried because she "was aware of previous angry outbursts from [G.C.] and that [he] had admitted to drug use in the past. I was concerned how [he] would further react to his phone being taken away and that he might hurt himself or someone else."⁹⁶

⁹¹ 711 F.3d 623 (6th Cir. 2013).

⁹² *Id.* at 627.

⁹³ *Id.* at 628.

⁹⁴ *Id.* at 628.

⁹⁵ *Id.*

⁹⁶ *Id.*

In its two-to-one decision, the court admitted that the situation was a novel and unprecedented one, noting that the no circuit had yet attempted to “address how the *T.L.O.* [reasonableness] inquiry applies to the search of a student’s cell phone.”⁹⁷ For guidance, the court looked in depth at some of the previously discussed cases from Mississippi and Pennsylvania. It first analyzed the *DeSoto* case, citing the Mississippi court’s statement that, “[u]pon witnessing a student improperly using a cell phone at school, it strikes this court as being reasonable for a school official to seek to determine to what end the student was improperly using that phone.”⁹⁸ The *Owensboro* court ultimately rejected the school-district friendly *DeSoto* approach as too broad, reasoning that, “Under our two-part test, using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction.”⁹⁹

Instead, the *Owensboro* court endorsed the students’ rights friendly *Klump* approach.¹⁰⁰ The *Owensboro* court relied on *Klump* for the proposition that in determining the legality of the search, the court must consider only the information that the officials possessed when the search commenced.¹⁰¹ The court was persuaded by the *Klump* reasoning that the school personnel “did not see the allegedly drug-related text message until after they initiated the search of [the] cell phone. Accordingly . . . there was no justification for the school officials to search [the] phone

⁹⁷ *Id.* at 632.

⁹⁸ *Owensboro*, 711 F.3d at 633 (quoting *J.W. v. DeSoto County School District*, No. 2:09-cv-00155-MPM-DAS, 2010 U.S. Dist. LEXIS 116328, 2010 WL 4394059, at *4 (N.D. Miss. Nov. 1, 2010)).

⁹⁹ *Owensboro*, 711 F.3d at 633.

¹⁰⁰ *Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622 (E.D. Pa. 2006).

¹⁰¹ *Owensboro*, 711 F.3d at 633.

for evidence of drug activity.”¹⁰² The *Owensboro* court concluded that the fact-based analysis in *Klump* more accurately reflects their standard than the “blanket rule” utilized in *DeSoto*.¹⁰³

The *Owensboro* court also ruled that mere general background knowledge of drug abuse or depressive tendencies is not enough to qualify a school official’s search of a student’s cell phone as reasonable.¹⁰⁴ The Court reasoned that school officials had no specific reason at the inception of the search to believe that G.C. was engaging in any unlawful activity or that there was a threat of injury to himself or another student.¹⁰⁵ G.C. was simply sitting in class when his teacher caught him sending texts with his phone.¹⁰⁶ The school officials failed to present any evidence that indicated that a search of the phone would reveal criminal activity or potential danger to anyone else in the school.¹⁰⁷ Therefore, in the court’s view, the school did not have a reasonable suspicion to justify the search at its inception.¹⁰⁸

However, the ruling was not so clear cut and unanimous. Judge Alan Norris strongly dissented, stating that, “School officials are acting *in loco parentis* and, as such, they have a keen interest in student welfare and safety. For that reason, they must be allowed more leeway under the Fourth Amendment than is appropriate outside the school setting.”¹⁰⁹ Based on the assistant principal’s knowledge of G.C’s previous fights, drug usage, and suicidal thoughts, Judge Norris believed that the assistant principal’s search, which was limited to reading four text messages, was reasonable under *T.L.O.*¹¹⁰

¹⁰² *Id.* (citing *Klump*, 425 F. Supp. 2d at 640-41).

¹⁰³ *Owensboro*, 711 F.3d at 633.

¹⁰⁴ *Id.* at 633-34.

¹⁰⁵ *Id.* at 634.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 636.

¹¹⁰ *Id.*

The decision stirred up plenty of response and controversy. The New York Times lauded the decision as wise.¹¹¹ However, another commentator was shocked by the pro-students' rights decision, especially in light of the unusually sympathetic facts weighing in favor of the school.¹¹² First, the student had a long record of disciplinary issues, and this incident was in fact the last straw leading to his expulsion.¹¹³ Second, the student's suicidal tendencies were well documented, and the assistant principal justified the search by expressing her concern for his mental health, a seemingly noble and sympathetic cause.¹¹⁴ Finally, the search was quite narrow (merely four messages), rather than a "wholesale fishing expedition" into the student's social media, photos, and emails contained on the phone.¹¹⁵ But, despite all of these facts weighing in the school's favor, the Sixth Circuit was not persuaded. *Owensboro* sent a powerful message to the schools throughout both the Sixth Circuit and the rest of the country: the Fourth Amendment applies with force to students and their cell phones, even when the phones are seized in violation of school rules.

E. Internet Privacy Protection Laws

The courts are not alone in their movement towards affording greater privacy protection to students in their cell phones. State and federal legislators around the country "sought to ride the wave of public sentiment by introducing [and passing] legislation to slam the door on the perceived abuse" by schools.¹¹⁶ In 2012 alone, fourteen states¹¹⁷ and Congress¹¹⁸ introduced

¹¹¹ Editorial, *An Illegal Cellphone Search*, NEW YORK TIMES, April 7, 2013, http://www.nytimes.com/2013/04/08/opinion/an-illegal-cellphone-search.html?_r=3&

¹¹² Frank LoMonte, *Federal Appeal Court Dials Up an Important Win for Students' Cellphone Privacy*, STUDENT PRESS LAW CENTER, May 26, 2013, <http://www.splc.org/wordpress/?p=5144>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Most of these proposed and passed laws focus on both employers and schools, though this article will focus solely on the school aspect. Sarah O'Donohue 'Like' it or Not, *Password Protection Laws Could Protect Much More than Passwords*, 20 J.L. BUS. & ETH. 4-5 (Forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344801.

legislation to restrict both schools and employers from requesting that students or employees surrender passwords for their personal accounts and personal electronic devices (e.g., cell phones). Today, these password privacy statutes have been passed in at least fourteen states.¹¹⁹ The trend towards password protection of cell phones and social media sites is made readily apparent by the fact that in 2013, thirty six more states considered similar statutes.¹²⁰ With this powerful movement towards password privacy protection, schools simply must take the potential consequences of such laws into account when conducting cell phone searches.

Michigan's Internet Privacy Protection Act (IPPA) provides the perfect example for assessing the potential impact of these password protection laws on the school environment, since Michigan's law extends broader protection to students than any other state statute, applying to students at all levels and to both cell phone and social media passwords.¹²¹ It therefore represents the strictest limitations that have been placed upon schools, so the lessons learned from adhering to its provisions will be applicable when adhering to any state's limitations. Michigan's IPPA is a law intended to prohibit "educational institutions from requiring certain individuals to grant access to, allow observation of, or disclose information that allows access to or observation of personal internet accounts" and to prohibit "educational institutions from

¹¹⁷ *Employer Access to Social Media Usernames and Passwords*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx> (last updated Jan. 17, 2013). At least 36 states considered bills in 2013. *Employer Access to Social Media Usernames and Passwords 2013*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx> (last updated Sept. 12, 2013).

¹¹⁸ Password Protection Act of 2012, H.R. 5684 & S. 3074, 112th Cong. (2012); Social Networking Online Protection Act, H.R. 5050, 112th Cong. (2012).

¹¹⁹ See ARK. CODE ANN. § 11-2-124 (West 2013); CAL. EDUC. CODE § 99120-22 (West 2013); COL. REV. STAT. ANN. § 8-2-127 (West 2013); DEL. CODE ANN. tit. 14 §§ 8101-05 (West 2013); 820 ILL. COMP. STAT. 55/10 (West 2013); MD. COMP. ANN. Lab. & Empl. §§ 3-712 (West 2013); N.J. STAT. ANN. §§ 18A:3-29-32; UTAH CODE ANN. § 34-48-101-301 (West 2013); UTAH CODE ANN. §§ 53B-25-101-301 (West 2013); VT. STAT. ANN. tit. 21, § 495j (West 2013); WASH. REV. CODE ANN. §§ 49.44.0003-0004 (West 2013). Nevada, New Mexico, and Oregon have also recently passed similar legislation.

¹²⁰ *Employer Access to Social Media Usernames and Passwords 2013*, *supra* note 117.

¹²¹ Buckley, Timothy J., *Password Protection Now: An Elaboration on the Need for Federal Password Protection Legislation and Suggestions on How to Draft It*, CARDOZO ARTS & ENT. L.J. 875, 884-85 (2013).

taking certain actions for failure to allow access to, observation of, or disclosure of information that allows access to personal internet accounts.”¹²² According to the statute, schools may not:

- (a) Request a student or prospective student to grant access to, allow observation of, or disclose information that allows access to or observation of the student’s or prospective student’s personal internet account.
- (b) Expel, discipline, fail to admit, or otherwise penalize a student or prospective student for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the student’s or prospective student’s personal internet account.¹²³

According to the IPPA, “personal internet account” means “an account created via a bounded system established by an internet-based service that requires a user to input or store access information via *an electronic device* to view, create, utilize, or edit the user’s account information, profile, display, communications, or stored data.”¹²⁴ Cell phones surely fit squarely within this definition.

The IPPA forbids schools from requesting students to disclose passwords that would allow access to students’ phones and internet accounts, since Section 2(a) defines “access information” as “user name, password, login information, or other security information that protects access to a personal internet account.”¹²⁵ However, as this is a very recently enacted statute, there are no cases or scholarly articles dealing with or interpreting the meaning of the law. Unfortunately, as is often the case for schools, no one tells them what the law means, but they are still very much bound by it. School districts need guidance on dealing with the statute and in crafting policies that effectively balance their interests in protecting the safety of the school with the legislature’s desire for greater student privacy.

¹²² 2012 Mich. Pub. Acts 478.

¹²³ MICH. COMP. LAWS § 37.274 (2009).

¹²⁴ MICH. COMP. LAWS § 37.272 (2009) (*emphasis added*).

¹²⁵ MICH. COMP. LAWS § 37.272(a) (2009).

A leading Michigan law firm notes that the IPPA is designed to prevent schools from requesting access to student's social media accounts, such as Gmail, Facebook and Twitter.¹²⁶ The firm also highlights the complexity of the issue and the significance of the IPPA by warning school districts to "tread carefully" when searching a student's cell phone.¹²⁷ Failing to do so could lead to liability under the Fourth Amendment as well as under the IPPA.¹²⁸ However, since there is no additional guidance offered by the courts or the legislature on how to comply with the IPPA or the various other password protection laws enacted in other states, the firm offers no additional advice beyond the ominous warning of "tread carefully".

The IPPA and other laws like it alert us to the legislatures' concerns with the privacy of students in their cell phones. When paired with the Sixth Circuit's recent decision in *G.C. v. Owensboro*, there exists an undeniable trend towards affording greater protection to students in their phones. However, historically students have not been afforded heightened constitutional protections, and schools have always been allowed greater leeway in protecting their interests. With the recent storm of student cell phone lawsuits discussed above, the time for authoritative and final rulings on the issue must come soon.

II. THE BALANCE WEIGHS HEAVILY IN FAVOR OF THE SCHOOLS

The Supreme Court has always recognized that students do not enjoy the same level of constitutional protection as adults due to the special circumstances and interests of the educational environment. This is why schools may restrict student speech in many situations where adults would be allowed to speak freely, and why schools can search students with

¹²⁶ Miller Canfield, *Michigan's Internet Privacy Protection Act and Its Effect on Educational Institutions*, January 2, 2013, <http://www.millercanfield.com/publications-alerts-814.html>

¹²⁷ David G. King & Christopher M. Trebilcock, *Be Careful When Searching Student Cell Phones, Sixth Circuit Warns* (April 2, 2013), <http://www.jdsupra.com/legalnews/be-careful-when-searching-student-cell-p-89825/>

¹²⁸ *Id.*

something less than a warrant or probable cause. Courts dealing with these constitutional rights issues are constantly balancing the students' interests against the very real and compelling needs of the schools to maintain a safe and orderly educational environment. In some situations, schools can in fact be held liable for a failure to maintain that environment, such as when a student is victimized by bullying. The schools' strong interest in preserving discipline and stopping harmful practices such as bullying, sexting, and drug dealing should be enough to justify searches on students' cell phones once they are confiscated. The legislature and the courts need to make a decision on where their priorities lie: do we demand safety and order in the schools and hold them liable for not protecting their students and their environment but sacrifice students' privacy in their cell phones, or do we tie the hands of the school to act and uphold the students' privacy expectations, no matter what the cost?

A. The Balancing Act

The *T.L.O.* Court sought to ensure that its test neither “unduly burden[ed]” school officials “nor authorize[ed] unrestrained intrusions upon the privacy of schoolchildren.”¹²⁹ The Court felt that their reasonableness test would allow school officials to search students “according to the dictates of reason and common sense.”¹³⁰ The test requires the balancing of the school's interest in protecting the educational environment with the students' expectations of privacy. The students' expectations will be dealt with later. For now, the focus is on the first part of the balancing equation: the school's interest in protecting the school environment.

First and foremost, cell phones are often linked with loss of instructional time, thereby undermining the entire educational purpose of the schools.¹³¹ Teachers are distracted from their

¹²⁹ *T.L.O.* at 342-43.

¹³⁰ *Id.* at 343.

¹³¹ Oluwole & Visotsky, *supra* note 6, at 55.

work when they are forced to investigate cell phone usage,¹³² and students are constantly distracted by the activity on their phones.¹³³ However, although this loss of instructional time is devastating, it is far from the most severe interruption that cell phone possession and usage causes in schools.

School officials are often overwhelmed by a sweeping variety of accusations, suspicions, and disputes, and, in response to these problems, they feel the need to search the contents of a cell phone.¹³⁴ One of the primary student issues that raises a compelling need to search a cell phone's content is the ever present evil of school bullying.¹³⁵ Bullying is often perpetrated through the use of the internet, cell phones, and other digital technologies, in which cases it is commonly referred to as "cyberbullying."¹³⁶ Bullying through the use of cell phones may take a variety of forms, including, but not limited to, heated text-message exchanges, insults through social media posts, calls, e-mails, or text messages, impersonation (where one student steals another's cell phone and sends harmful messages or images while posing as the cell phone's owner), and even "cyberstalking."¹³⁷ This list is far from exhaustive, for it never ceases to amaze us what levels of creativity children can demonstrate when devising new ways to cause trouble.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Marc Freeman, *New Warnings on Technology Set in Schools*, SUN-SENTINEL (Fort Lauderdale, Fla.), Aug. 31, 2011, at 1B. See, e.g., Katherine Leal Unmuth, *Phone Search by High School Angers Parent*, DALLAS MORNING NEWS, Aug. 2, 2010, at B11. 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?*, NY 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-cellphone-search-01313244.html>.

¹³⁵ See, e.g., Sharon Salyer Muikilte, *Schools May Check Students' Cell Phones*, HERALDNET (Jan. 24, 2011), <http://www.heraldnet.com/article/20110124/NEWSO1/701249945>; See also Whittenberg, *supra* note 106.

¹³⁶ Nancy E. Willard, *Cyber Safe Kids*, CYBER-SAVVY TEENS 10 (2007).

¹³⁷ *Id.* at 7-10.

Another potentially devastating use of cell phones is “sexting”. Sexting is defined as the “transmission of sexually charged materials” through text messages or photos.¹³⁸ Sexting often coincides with “cyberbullying”, for many students who receive “sexts” forward these photos to other students out of either intrigue or spite, which inevitably leads to wide dissemination and the shameful embarrassment of the original sender.¹³⁹

These evils are not rare occurrences. For example, over 40% percent of students have reported witnessing or engaging in sexting.¹⁴⁰ These school crimes are most often perpetrated (and often *exclusively* perpetrated) through the use of phone calls, text messages, e-mails, and social networking websites, and the evidence of cyberbullying and sexting can typically and sometimes exclusively be accessed by searching a cell phone’s content.¹⁴¹ But the need to investigate cyberbullying and sexting does not exhaust the list of reasons school officials have for searching students’ cell phones. Cell phones can be used to perpetrate any number of less serious violations of school rules or policies, including cell phone theft, use of the cell phone to call or text other students during class, and cheating on school work.¹⁴² At the other end of the spectrum, cell phones are often used as the “tools of the trade” in furtherance of serious crimes, like drug possession, use, or dealing.¹⁴³ The list of evils made possible by cell phones is seemingly endless.

¹³⁸ 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).

¹³⁹ See Willard, *supra* note 136, at 9-10.

¹⁴⁰ Dan Herbeck, ‘Sexting’ Youth Exposing Themselves to Greater Dangers than They Realize, BUFF. NEWS, Jan. 25, 2009, at A1.

¹⁴¹ See Amanda Lenhart, *Cyberbullying 2010: What the Research Tells Us*, PEW INTERNET & AM LIFE PROJECT (May 6, 2010), <http://w-ww.pewinternet.org/Presentations/2010/May/Cyberbullying-2010.aspx>.

¹⁴² 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>

¹⁴³ See, e.g., United States v. Garcia-Aleman, No. 1:10 -CR-29, 2010 WL 263507 1, at *12 (E.D. Tex. June 9, 2010) (labeling cell phones as “tools of the drug trade”).

In light of all of these evils that cell phones make possible, the balancing equation tips heavily in favor of the schools. Bullying, sexting, and cheating are potentially ruinous problems that damage students and destroy the school environment. Any court that analyzes student cell phone searches must take these heavy school interests into account when assessing the reasonableness of a search. The students' privacy interests must be compelling indeed to outweigh these powerful and compelling school interests.

B. Relevant Developments in Student First Amendment Law

Although there has not been a major Fourth Amendment school case extending the authority for schools to search cell phones, there have been recent school cases that deal with the justifications for limiting students' First Amendment rights. These recent First Amendment cases remind us that the original justifications for limiting students' rights are still relevant, and that those justifications must be used when determining constitutional limitations in new and uncharted territories like student cell phone searching. These First Amendment cases also reiterate that when students defy school policy and the school's mission, they subject themselves to greater restrictions to their constitutional rights.

The Supreme Court has long recognized that in the school setting, students' First Amendment free speech rights are subject to special limitations.¹⁴⁴ *Tinker v. Des Moines Independent School Community District*¹⁴⁵ was the first case to recognize that students had protected First Amendment rights when it famously pronounced that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁴⁶ However, although *Tinker* marked the first recognition of students' constitutional rights, it also served as

¹⁴⁴ Sean Cooke, *Reasonable Suspicion, Unreasonable Search: Defining Fourth Amendment Protections Against Searches of Students' Personal Electronic Devices by Public School Officials*, 40 CAP. U.L. REV. 293, 308 (2012).

¹⁴⁵ 393 U.S. 503, 506 (1969).

¹⁴⁶ *Id.*

the starting point for a series of ever increasing restrictions on student speech. Seventeen years later, in *Bethel School District No. 403 v. Fraser*,¹⁴⁷ the Court distinguished *Tinker* and upheld differential treatment for students in the school environment and adults in “other settings” when it came to First Amendment free speech principals.¹⁴⁸ Two years after that, the Court relied on *Fraser* and *Tinker* when asserting that students’ free speech rights must be analyzed through the lens of “the special characteristics of the school environment.”¹⁴⁹ The Court’s latest student speech decision in *Morse v. Frederick* emphasizes and expands these limits on student free speech in ways that have significant implications for students’ Fourth Amendment rights.¹⁵⁰ The actual holdings of *Morse* are difficult to identify due to the mess of necessary and partial occurrences. However, piecing together the various opinions, it is clear that *Morse* did confirm that punishment and restrictions for speech that presents a threat to the safety of the school and its students is constitutional, even when the same speech by an adult in other settings would be absolutely protected.¹⁵¹

Morse was a First Amendment free speech case, but it identified a link between the Court’s First and Fourth Amendment decisions, first by reaffirming the decisions¹⁵² in *Vernonia School District 47J v. Acton*¹⁵³ and *Board of Education of Independent School District Number 92 of Pottawatomie City v. Earls*,¹⁵⁴ two previous Supreme Court student Fourth Amendment

¹⁴⁷ 478 U.S. 675 (1986).

¹⁴⁸ *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)).

¹⁴⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

¹⁵⁰ *Morse v. Frederick*, 551 U.S. 393, (2007).

¹⁵¹ *Id.* at 396-97. Justices Scalia, Kennedy, Thomas, and Alito joined in the majority opinion. *Id.* Justice Thomas’s concurring opinion agreed with the majority’s reasoning, but would have gone further and held that students enjoy no constitutional protections at all. *Id.* at 411-422. “Justice Alito and Justice Kennedy filed a necessary concurrence that stated, “As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students.” *Id.* at 425. Piecing these opinions together, at least five members of the Court agree that, at a minimum, there are dangers that justify limitations on students’ constitutional rights.

¹⁵² *Id.* at 406.”

¹⁵³ 515 U.S. 646, 656 (1995).

¹⁵⁴ 536 U.S. 822, 829-30 (2002).

cases that upheld *suspicion-less* searches. The Court further connected the First and Fourth Amendment cases when it drew upon the seminal search case, *T.L.O.*,¹⁵⁵ and made it crystal clear that these three student search cases together correctly utilized the “principles applied in [the Court’s] student speech cases.”¹⁵⁶ Regardless of whether the issue is a First or Fourth Amendment one, the *Morse* Court recognized that “‘special needs’ inhere in the public school context,”¹⁵⁷ and the limitation on students’ constitutional rights is often thereby justified. This is important, because *T.L.O.*’s application to cell phone searching is vague at best, since cell phones did not even exist at the time the case was decided. The *Morse* Court also reiterated the *Vernonia* holding that the *T.L.O.* reasonableness standard must be conducted from the perspective of the school’s “custodial and tutelary responsibility for children.”¹⁵⁸ So, although the extent to which special needs of the school permit special limitations of students’ Fourth Amendment rights against unreasonable searches has not been defined by the Court when it comes to student cell phone searches, the direct confirmation of the connection between student speech cases and student search cases recognizes and legitimizes the ability of schools to rely upon the special mission and interest of the schools in protecting the safety of its students to justify otherwise unconstitutional searches, just as the Court has always relied upon those same interests in order to restrict student free speech rights.¹⁵⁹

Morse relied heavily upon the reasoning in *Vernonia*, where school officials instituted a random suspicion-less drug testing program for all athletes.¹⁶⁰ The *Morse* Court held that “detering drug use by schoolchildren is an ‘important-indeed perhaps compelling’ interest.”¹⁶¹

¹⁵⁵ 469 U.S. 325, 340 (1985).

¹⁵⁶ *Morse*, 551 U.S. at 406.

¹⁵⁷ *Id.* at 406 (quoting *Vernonia*, 515 U.S. at 656).

¹⁵⁸ *Id.* at 406 (quoting *Vernonia*, 515 U.S. at 656).

¹⁵⁹ Cooke, *supra* note 144, at 312.

¹⁶⁰ *Vernonia*, 515 U.S. at 664.

¹⁶¹ *Morse*, 551 U.S. at 407 (quoting *Vernonia*, 515 U.S. at 661).

The Court then pronounced that “part of a school’s job is educating students about the dangers of illegal drug use.”¹⁶² Next, *Morse* linked *Tinker*’s recognition of “the special characteristics of the school environment” with the “governmental interest in stopping student drug abuse” to describe the threatening nature of the drug-related speech in *Morse* as “serious and palpable.”¹⁶³ So, as a starting point, when there is a threat to the school environment, a school should be justified in limiting a student’s Fourth Amendment rights, just as the school was permitted to limit the student’s First Amendment rights in *Morse*. Further, by linking the decision to *Vernonia*, the Court endorsed not only “reasonable” searches of students, but *suspicion-less* searches of students when the student has subjected themselves to lesser expectations of privacy by participating in extracurricular activities.¹⁶⁴

Morse’s reasoning makes it clear that schools may specially limit student Fourth Amendment rights when the student runs afoul of public school policies that are in place to assure the safety of the students. Students obviously run afoul of these policies when they possess and use cell phones against school rules, since their possession and use may lead to all of the problems discussed above.¹⁶⁵ Schools must be able to respond nimbly and confidently to counter threats to the educational environment. The ruling in *Morse* appears to permit broad authority for school officials in the field of student cell phone searches whenever the school environment is threatened. As *T.L.O.* put it, schools officials cannot be bogged down in lengthy investigations and individualized suspicion requirements when such considerations “would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed

¹⁶² *Id.* at 408.

¹⁶³ *Id.*

¹⁶⁴ *Vernonia*, 515 U.S. at 664.

¹⁶⁵ *See supra* Part II.A.

in the schools.”¹⁶⁶ These same principles should apply in these new student cell phone search cases.

C. Don’t Tie the School’s Hands, or Don’t Hold Them Liable

Amidst all of the recent cases and trends reinforcing students’ rights to privacy in their cell phones, greater expectations and demands are being placed upon the schools to prevent the very evils that cell phone searching could help to eliminate. For example, forty-nine states have legislation in place to prevent bullying.¹⁶⁷ Every single one of these states have made schools liable for failures to prevent bullying.¹⁶⁸

Even worse for the schools is that when these cases are litigated, they often become a public spectacle in which the school receives almost no sympathy. For example, a recent Georgia bullying case that resulted in a teen’s suicide¹⁶⁹ generated plenty of negative publicity, despite the fact that school was ultimately found not liable.¹⁷⁰ As awareness of bullying increases, so too does parents’ expectations of schools to prevent it. The recent onslaught of devastating lawsuits is indicative of this trend. Just within the last three years, we have seen jury verdicts awarded against the schools for failure to prevent bullying in the staggering amounts of 4 million, 1.7

¹⁶⁶ New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

¹⁶⁷ SAMEER HINDUJA, PH.D. AND JUSTIN W. PATCHIN, PH.D., STATE CYBERBULLYING LAWS, A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES (2014), available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf

¹⁶⁸ Adele Kimmel & Adrian Alvarez, *Litigating Bullying Cases: Holding School Districts and Officials Accountable*, PUBLIC JUSTICE RIGHTING WRONGS, available at http://publicjustice.net/sites/default/files/downloads/Bullying-Litigation-Primer-April-2013_1.pdf; The U.S. Department of Health and Human Services has a website, www.stopbullying.gov, that provides a wealth of information on bullying, including every state’s anti-bullying laws and policies. See also [Bullypolice.org](http://bullypolice.org/), <http://bullypolice.org/>, which reports on and grades each state’s anti-bullying laws.

¹⁶⁹ Long v. Murray County School District, No. 12-13248. United States Court of Appeals, Eleventh Circuit. June 18, 2013.

¹⁷⁰ See, e.g., Brian Ach, , *Parents of ‘Bully’ Teen Appeal Dismissal of Lawsuit Over Son’s Suicide*, NBC NEWS (Jun 29, 2012), http://usnews.nbcnews.com/_news/2012/06/29/12483803-parents-of-bully-teen-appeal-dismissal-of-lawsuit-over-sons-suicide

million, and over 16 million dollars.¹⁷¹ This does not even include several other multi-million dollar settlements.¹⁷² These awards and settlements clearly indicate that society (as represented by the juries) shares the parents' expectation that schools should protect the children and prevent these incidents. Bullying is an example of the exact kind of threat to the school environment that *Morse* recognized.¹⁷³ It is the kind of threat that justifies severe limitations on students' constitutional rights.

As society's expectations that schools prevent issues such as bullying increase, does it make sense to tie the hands of the schools from using some of the best tools at their disposal to combat it? As discussed in Part II.A, cell phones are commonly the "tools of the trade" for bullying, sexting, drug dealing, and countless other school evils. Cell phones clearly offer new possibilities for bullying, since harmful information can now be more quickly disseminated to a wider audience while the person disseminating the information may do so while cloaked in something like anonymity.¹⁷⁴ In the past, bullies would need to confront their victims face to face.¹⁷⁵ Now, the modern bully can cause serious damage through quick and mass dissemination of electronic messages without even exposing him or herself. This relative anonymity allows for even harsher acts of bullying since the perpetrator never sees the pain or fear of the victim and faces little risk of being caught.¹⁷⁶

Furthermore, the evidence of bullying is often exclusively found in the contents of a cell phone. When the only evidence of the bullying is found in the cell phone, school personnel need

¹⁷¹ For a list of cases and their settlement amounts, see *Failure To Prevent Bullying Can Prove Costly To School Districts*, LEXISNEXIS LITIGATION RESOURCE COMMUNITY STAFF (May 8, 2013), <http://www.lexisnexis.com/legalnewsroom/litigation/b/jverdicts/archive/2013/05/08/failure-to-prevent-bullying-can-prove-costly-to-school-districts.aspx>.

¹⁷² *Id.*

¹⁷³ See *supra* Part II.B.

¹⁷⁴ Deborah Ahrenns, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1694 (2012).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

to have the leeway to search the cell phone without the higher levels of particularized suspicion that courts have previously required. Otherwise, how would they ever become aware of the bullying that they are tasked with stopping?

Cell phones offer greater opportunities for more severe acts of bullying and help to perpetrate the exact types of bullying incidents that the state liability statutes are designed to prevent. Schools cannot be subjected to legislation and lawsuits for failing to deal with issues like bullying when they are forced to refrain from utilizing some of the best methods at their disposal for stopping it, since a simple and limited search could turn up the very evidence that they need to stop the problem. It places teachers and staff, who know their students well from constant and daily interaction and observation, in an extremely difficult situation where their instincts, prior knowledge of students, and current observations, while not rising to the level of reasonable and particularized suspicion, warn them that there might be a situation that needs investigating and addressing. They can see and sense that something is wrong, but they cannot take one of the most powerful options they have to rectify the situation.

This is no suggestion that students have no Fourth Amendment rights in school settings. However, as we have seen in both the First and Fourth Amendment cases above, the constitutional rights of one student are consistently held to be limited when weighed against the greater safety and discipline of the school environment. This is exactly the type of threat to the school environment that *Morse* recognized as worthy of limiting students constitutional rights in order to combat.¹⁷⁷ A school free from bullying, sexting, drugs, and distraction is undoubtedly something that all educators and legislators would aspire to, but this cannot be achieved without some cost to student privacy rights. The laws and court decisions that place a heavy duty on schools to prevent issues like bullying are simply incongruent with the recent trends in student

¹⁷⁷ See *supra* Part II.B.

cell phone privacy protection. Schools cannot be held liable for issues like bullying in situations where a checkup on the contents of a cell phone might have prevented the incident. In an ideal world, schools would be able to protect both the safety and the privacy of students, but this is simply unrealistic. We cannot have it both ways. If schools are responsible for the safety of our students, then they must be able to take the necessary actions in order to ensure that threats are eliminated. The legislature and the courts need to make a call: do we allow violation of the students' privacy and hold the schools liable, or do we tie the hands of the school in order to maintain privacy for the students? The goal of protecting the safety of the students and the school environment is a worthy one, and the laws that hold schools liable for failing to protect their students are perfectly aligned with the schools' missions. While protecting students' privacy rights is a noble goal, protecting students from bullying and other threats is a far more significant and worthy objective. The balance between protecting the school and protecting the students' privacy simply must tilt in favor of stopping the threat and protecting the safety and well-being of the students. If this causes students to lose some privacy in their cell phones, then so be it.

III. EXPECTATIONS OF STUDENT PRIVACY

Courts nationwide have not gone out of their way to identify some heightened expectation of privacy in cell phones when the target of the search has already been caught in violation of law, and they have almost unanimously upheld police searches of cell phones incident to arrest.¹⁷⁸ It seems, then, that students who are caught violating school policy by using

¹⁷⁸ See, e.g., *United States v. Pineda-Areola*, 372 F. App'x 661, 663 (7th Cir. 2010); *United States v. Fuentes*, 368 F. App'x 95, 99 (11th Cir. 2010) (per curiam), *Silvan W. v. Briggs*, 309 F. App'x 216, 225 (10th Cir. 2009), *United States v. Murphy*, 552 F.3d 405, 410–12 (4th Cir. 2009), *United States v. Young*, 278 F. App'x 242, 246 (4th Cir. 2008) (per curiam), *United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007); *United States v. Faller*, 681 F. Supp. 2d 1028, 1046 (E.D. Mo. 2010), *Newhard v. Borders*, 649 F. Supp. 2d 440, 448–49 (W.D. Va. 2009); *United States v. Wurie*, 612 F. Supp. 2d 104, 110 (D. Mass. 2009), *United States v. Quintana*, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009); *United States v. Santillan*, 571 F. Supp. 2d 1093, 1104 (D. Ariz. 2008) (upholding

their cell phones might be subject to a similar search incident to their “arrest.” After all, why would school students receive higher protection than adults, especially when students are generally afforded lesser protections?

T.L.O. established that searches must be reasonably related in scope and not “excessively intrusive in light of age and sex of the student.”¹⁷⁹ This standard inevitably leads to several questions: what is “intrusive” when it comes to searching a student’s cell phone? What exactly is a reasonable expectation of privacy for a high school student in their cell phone?¹⁸⁰ This is a tricky and contentious issue because it is very well established that an expectation of privacy analysis measures both an individual’s subjective view and society’s objective view of what is reasonable.¹⁸¹ However, what is clear is that if a student’s expectation of privacy in a cell phone is unreasonable, then a search of that phone cannot possibly be “unreasonable” either at its inception or in its scope. In this light, it becomes clear that although a student’s subjective expectation of privacy in their cell phone is important, more attention must be paid to society’s view of the reasonableness of this expectation when determining the reasonableness of any cell phone search.

A. Students’ Subjective Expectation of Privacy in Their Cell Phones

The students’ expectation of privacy is initially critical, since it is the first factor that ultimately determines what level of suspicion is required to make the search reasonable. Looking back at various cases, it seems that a student’s expectation of privacy in their person and their belongings falls along a continuum. The more intrusive the search, the more suspicion is needed

search of cell phone’s call history); *United States v. Deans*, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008), *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1279 (D. Kan. 2007) .

¹⁷⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

¹⁸⁰ Bill O. Heder, *The Development of Search and Seizure Law in Public School*, 1999 B.Y.U. EDUC. & L. J. 71, 81 (1999) (“The test for subjective and socially acceptable privacy expectations places immense discretionary and interpretive burdens upon the courts.”).

¹⁸¹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan’s concurrence in *Katz* has since been adopted as the test applicable to Fourth Amendment claims.

in order for the search to be “reasonable.”¹⁸² Locker searches fall close to one end of the spectrum, due to the low level of intrusion.¹⁸³ Strip searches fall on the opposite end of the spectrum, because searching a student’s body embarrasses and exposes the student.¹⁸⁴ Officials must have a higher level of individualized and specific suspicion of the student’s wrongdoing or of a potential threat posed by the object of the search in order to legitimize a strip search of a student.¹⁸⁵

The law does tell us that pockets, backpacks, and purses are subject to stiffer guidelines than lockers, but they do not require quite the same the level of suspicion necessary for a strip search.¹⁸⁶ Searches of these items are likely permissible only when school officials have specific information that a student possesses drugs, weapons, or some similar threat.¹⁸⁷ Anonymous tips and rumors, on the other hand, do not justify a search of these personal items.¹⁸⁸ However, even if the tip is anonymous, if it includes information about drugs, weapons, or some other item that poses a risk to student and faculty safety, courts usually allow the search.¹⁸⁹ Despite the high level of intrusion, courts will defer to the school’s interest in a protecting a safe environment for the children.

So students have little expectation of privacy in their lockers, and conversely they have a higher expectation in their backpacks, purses, and bodies. But how can we apply these lessons to

¹⁸² Redding, 129 S. Ct. at 2643.

¹⁸³ See T.L.O., 469 U.S. at 342 (“[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”).

¹⁸⁴ See Redding, 129 S. Ct. at 2643.

¹⁸⁵ *Id.*

¹⁸⁶ In re J.N.Y., 931 A.2d 685 (Pa. Super. Ct. 2007).

¹⁸⁷ See, e.g., State v. Drake, 139 N.H. 662, 667 (1995) (pockets and backpacks); Matter of Gregory M., 627 N.E.2d 500, 582 (N.Y. 1993) (backpacks).

¹⁸⁸ In re J.N.Y., 931 A.2d at 688-89; see also Texas v. K.C.B., 141 S.W.3d 303, 309 (2004) (finding that the possible presence of drugs on a student does not warrant searching a student's undergarments when the suspicion is based on an anonymous tip).

¹⁸⁹ Thomson v. Carthage Sch. Dist., 87 F.3d 979, 983 (8th Cir. 2004) (weapon possession); In re Cody S., 16 Cal. Rptr. 3d 653, 655-56 (Ct. App. 2004) (weapon possession); In re Boykin, 237 N.E.2d 460 (Ill. 1968) (weapon possession).

new contexts and situations, such as the expectation of privacy in a cell phone? In *Redding*, Justice Souter took on the issue of privacy expectations in new situations by considering the student's own subjective feelings of embarrassment, humiliation, and fear when a school official ordered her to pull out her bra and the elastic on her pants.¹⁹⁰ Souter utilized a "semi-objective" measure, concluding that the "reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experience of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."¹⁹¹ Souter's standard asks us to look at the level of intrusiveness from the perspective of a typical adolescent, rather than a "reasonable person."¹⁹² Therefore, to answer our question of what a student's reasonable expectation of privacy is in their cell phone, we must decide how intrusive a cell phone search is to a student.¹⁹³

Much of the recent legal commentary on this issue advocates heavily for the position that students possess extremely high expectations of privacy in their cell phones, with some even suggesting that the expectation is so high that increased standards, such as warrants or probable cause, are required for a search.¹⁹⁴ The general reasoning goes like this: modern cell phones contain a wealth of information and are routinely used by teenagers as a source of communication.¹⁹⁵ Cell phones allow access to documents, websites, and countless "apps", all of which are reflections or extensions of the student's life.¹⁹⁶ Teenagers consider cell phones so essential that they might be called "virtual appendages".¹⁹⁷ This essential nature can be

¹⁹⁰ 129 S. Ct. 2633, 2641 (2009).

¹⁹¹ *Id.* (emphasis added).

¹⁹² Vorenberg, *supra* note 58, at 76.

¹⁹³ *Id.* at 76-77.

¹⁹⁴ *Id.* at 76. James A. Spung, *From Backpacks to Blackberries: (Re)Examining New Jersey v. T.L.O. in the Age of the Cell Phone*, 61 EMORY L.J. 111 (2012).

¹⁹⁵ GERALD GOGGIN, CELL PHONE CULTURE 20 (2006).

¹⁹⁶ Vorenberg, *supra* note 58, at 77.

¹⁹⁷ *Id.*

quantified: teenagers send approximately fifty text messages per day, and upwards of fifteen hundred texts per month.¹⁹⁸ Those numbers make it clear that cell phones have become the primary mode of communication for teenagers.¹⁹⁹ Many teens reported that they use text messages every day to share private information, and about three quarters of teens use texts to share “personal matters.”²⁰⁰ Teens called their cell phones their “bonding resource.”²⁰¹

The personal nature of cell phones extends far beyond just texting and calling. Many teens use their phones to take and share pictures.²⁰² They also use their phones to exchange videos, instant message, use the internet, access social network sites, and email.²⁰³ All of this data suggests that students place a great deal of personal and private expectation in the contents of their cell phones. Critically, this would place a cell phone closer to the “strip search” end of the spectrum, opposite the un-intrusive locker searches. If a student had their cell phone searched, they would potentially be subject to similar subjective feelings of embarrassment, humiliation, and fright that the strip searched girl in *Redding* experienced.²⁰⁴ After all, it must be remembered that a student’s special “adolescent vulnerability intensifies the patent intrusiveness of the exposure.”²⁰⁵ From the perspective of an adolescent, the level of intrusiveness of a cell phone search is high, thereby requiring a similar level of suspicion as a strip search to qualify as “reasonable”.

As a starting point, it is foolish to attempt to place oneself in the head of a teenager and to try to understand the teen’s subjective feelings and expectations. Giving so much credence to the outlook and perspective of a teenager opens this argument up to all sorts of criticism. But it can

¹⁹⁸ Lenhart, *supra* note 51.

¹⁹⁹ *Id.* at 9.

²⁰⁰ *Id.* at 55.

²⁰¹ *Id.*

²⁰² *Id.* at 5.

²⁰³ *Id.*

²⁰⁴ *Safford Unified Sch. Dist. No.1 v. Redding*, 129 S. Ct. 2633, 2641 (2009).

²⁰⁵ *Id.* (emphasis added).

be conceded that teenagers might very well place massive expectations of privacy in their cell phones. For the purposes of this article, this argument will be granted, because, even if it is conceded, it only answers half of the questions that need to be asked. The second critical question in the expectation of privacy test is whether society would be willing to recognize the expectation of privacy as legitimate. Now, let us turn to the question of whether society would really be willing to recognize a teenager's expectation of privacy in a cell phone, which has been brought to school and used against clear school policy, as reasonable.

B. Would Society Recognize the Student's Expectation of Privacy as Reasonable?

Notably absent from the courts' opinions in both *Klump* and *Owensboro* is any discussion of the second part of the classic *Katz* test that Souter incorporated into the *Redding* analysis: whether society is willing to recognize the student's expectation of privacy as reasonable.²⁰⁶ *Katz* and *Redding* both analyzed a Fourth Amendment search and found that a search could only be unreasonable if the target of the search had a subjective expectation of privacy in the object or place of the search and that society was willing to recognize that expectation of privacy as reasonable.²⁰⁷ The holdings in *Klump* and *Owensboro* focus entirely on a student who chooses to put various sorts of personal information in their cell phone. As recognized above, an adult's expectation of privacy in their cell phone is generally recognized as reasonable by society.²⁰⁸ However, just as we recognize a different search standard for students, society should hold students to a different standard when analyzing the reasonableness of their privacy expectations.²⁰⁹ So, is society willing to go so far as to recognize that students have a legitimate

²⁰⁶ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan's concurrence in *Katz* has since been adopted as the test applicable to Fourth Amendment claims.

²⁰⁷ *Id.*

²⁰⁸ *See supra* part II.B.

²⁰⁹ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

expectation of privacy in an object that they have chosen to bring to school against school rules? This is where the justification for heightened protection of student cell phones falls apart.

1. *DeSoto* Recognized the Illegitimacy of the Expectation

The *DeSoto* court questioned the reasonableness of placing an expectation of privacy in a cell phone that was brought to school against clear school policy, even if it did not frame the analysis using that exact vocabulary. The student in *DeSoto* knowingly violated clear school policy that prohibited even the mere *possession* of cell phones.²¹⁰ The phone then constituted “contraband”, and the student greatly increased his chances of being caught with that “contraband” (and of being suspected of further misconduct) when he made the decision to *use* it in school.²¹¹ The *Desoto* court felt that, after witnessing this violation, there was nothing unreasonable about following up by seeking to determine to what end the student was improperly using the phone.²¹² It may very well have been the case that the student was cheating or was communicating with another student who would also be subject to disciplinary action for improperly possessing and using a cell phone.²¹³ Therefore, the student, with full knowledge that merely possessing the phone was a violation of school policy, willingly abandoned any legitimate privacy expectation that he had in the cell phone when he chose to both bring it and use it at school.

The notion that students often knowingly and completely abandon their privacy rights is not a novel one. This very theory has been utilized previously by the Supreme Court in both

²¹⁰ J.W. v. DeSoto County School District, No. 2:09-cv-00155-MPM-DAS, 2010 U.S. Dist. LEXIS 116328, 2010 WL 4394059, at *12 (N.D. Miss. Nov. 1, 2010). “Contraband” might be too strong of a term, since there is nothing criminal about possessing the phone. However, this is the term that the *DeSoto* court chose to characterize a phone brought to school against school rules. It is accurate in the sense that it was a violation of school policy to merely possess the phone.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 12-13.

*Earls*²¹⁴ and *Acton*²¹⁵ when the Court reasoned that students sacrificed their expectations of privacy by participating in extracurricular activities. Their expectations were diminished so greatly that they were subject to *suspicion-less* searches.

DeSoto recognized that the student knowingly and willingly brought the cell phone into school, which was a violation of school policy in and of itself, and he knowingly further increased his chances of being caught with it when he chose to use it. Does a student legitimately believe that when he is caught using his phone against the rules that the teachers or administrators simply will not care what he was using it for? Does he legitimately expect that there will be no follow up investigation to determine to what ends the phone was, against school rules, being used? Simply put, he might, but that expectation would hardly qualify as reasonable.

This key fact that the cell phone was brought and used against school rules that banned even mere possession actually makes the *DeSoto* case reconcilable and consistent with *Klump*, despite the fact that the two cases came to completely opposite results. In *Klump*, the high school's policy permitted students to carry, but not to use or display, their cell phones.²¹⁶ In that case, the student's cell phone inadvertently fell out of his pocket.²¹⁷ Upon seeing it, a teacher enforced school policy by confiscating the phone. Subsequently, the principal began using the phone to make calls to other students listed in the phone number directory to determine whether they too were violating the school's cell phone policy.²¹⁸ The principal also accessed the text messages and voice mail, and held an instant message conversation with Klump's younger brother, all while pretending to be Klump himself.²¹⁹

²¹⁴ 536 U.S. 822, 829-30 (2002).

²¹⁵ 515 U.S. 646, 656 (1995).

²¹⁶ *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 630 (E.D. Penn. 2006).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

So, in *Klump*, the student *unintentionally* violated school policy by having a cell phone, which the student was permitted to possess, fall from his pocket, a stark contrast to the *DeSoto* student who *chose* to use the phone when it was not even permissible to *possess* it at school.²²⁰ The school officials in *Klump* then used that accident as an excuse to conduct a widespread “fishing expedition” into the student's personal life.²²¹ This pre-textual fishing expedition is the kind of situation that raises Fourth Amendment concerns, not the limited and justified search of a the phone that was brought to school against school rules in *DeSoto*.

When the student made the decision to violate school rules by bringing a cell phone onto campus and by using it within view of teachers, the result was a diminished privacy expectation in the cell phone.²²² Further, the school officials “search” of the phone, which was limited to merely looking at the photos on the cell phone, was far more justifiable than the widespread fishing expedition in *Klump*.²²³ When a student is caught texting in clear violation of school rules, society might still be willing to recognize the student’s expectation of privacy from a pre-textual “fishing expedition” as reasonable. However, it is unreasonable for the student to expect that no limited inquiry into the illegal usage of the phone will be made, because they have no reasonable expectation of privacy in their cell phone that they have brought to school in a knowing violation of school policy.

2. Owensboro’s Misapplication of the Privacy Expectations

In light of this reconciliation between *Klump* and *DeSoto*, and of the recognition that society would not recognize an expectation of privacy in a cell phone that was knowingly brought to school against school rules as reasonable, it becomes clear that the *Owensboro* court

²²⁰ J.W. v. DeSoto County School District, No. 2:09-cv-00155-MPM-DAS, 2010 U.S. Dist. LEXIS 116328, 2010 WL 4394059, at *15 (N.D. Miss. Nov. 1, 2010).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 16.

mischaracterized *DeSoto's* reasoning and conclusion. *Owensboro* dismissed *DeSoto*, claiming that, “Under our two-part test, using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction.”²²⁴ But *DeSoto* was not creating an unlimited right or a blanket rule that enabled the school officials to search any and all of the contents of the phone. Nor did *DeSoto* endorse the widespread pre-textual “fishing expedition” of *Klump*. *DeSoto* simply recognized that students who bring cell phones to school against the rules and choose to increase the risk of being caught by using it at school no longer possess a legitimate expectation of privacy in the cell phone.

In *Owensboro*, G.C. was caught texting on his cellphone in class in a knowing and willful violation of school rules.²²⁵ Upon confiscation, the principal read a mere four of G.C.’s text messages because he was concerned about G.C.’s previous issues with drugs and suicide.²²⁶ There was no “fishing expedition”. There was no pre-text. In fact, most of society might agree that it was completely reasonable to conduct a limited search of the phone to try and protect the student. Therefore, the search was reasonably justified at its inception and in its limited scope. The only unreasonable aspect of the case is recognizing the student’s expectation of privacy in the phone as legitimate. He gave that expectation up when he chose to bring it and use it against school policy. He made this choice despite the fact that he knew that the school administration was well aware of his past problems and would be suspicious of any unusual behavior.

²²⁴ G.C. v. Owensboro Pub. Sch., 711 F.3d 623, 633 (6th Cir. 2013).

²²⁵ *Id.* at 628. In fact, the incident in question was not the first time a school administrator searched G.C.’s cell phone. *Id.*

²²⁶ *Id.* at 628.

In his dissent, Judge Norris recognized that schools “must be allowed more leeway under the Fourth Amendment than is appropriate outside the school setting.”²²⁷ Based on the illegal usage and possession of the phone and the school’s knowledge of G.C’s previous fights, drug usage, and suicidal thoughts, there was no legitimate expectation of privacy. Therefore, the assistant principal’s search, which was limited to reading just four text messages, was reasonable under *T.L.O.*²²⁸ It was not “overly intrusive”, for how can a search be intrusive when the student has no legitimate expectation of privacy in the object of the search? There is no intruding, because there is no privacy to intrude upon. The search cannot be unreasonable when there was no reasonable expectation of privacy. *Owensboro* went too far in in protecting students’ rights, and made light of the school’s rules and interests.²²⁹ Such a ruling completely ignores the balance of student’s privacy interests and school’s interest in a safe and disciplined environment, and extends constitutional protection far beyond the limited rights recognized way back in *T.L.O.*. *T.L.O.*’s reasonableness test was supposed to balance these interests “according to the dictates of reason and common sense.”²³⁰ It is not common sense to recognize these expectations of privacy as reasonable, nor is it common sense to afford students the same heightened constitutional protections as adults while simultaneously ignoring the compelling safety and educational concerns of the school. This is the “special” school environment, and we thus need to focus less on the students’ subjective expectations of privacy, and more on what society would recognize as reasonable in light of the school’s mission of safety, education, and student well-being.

²²⁷ *Id.* at 636.

²²⁸ *Id.*

²²⁹ See *supra* Part II.A for a rundown of the schools’ interests and the history of balancing in favor of the school.

²³⁰ *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985).

IV. THE HARSH REALITY AND SAFE HARBOR POLICIES

Unfortunately for school officials, the recent trends in these student cell phone search cases all seem to significantly favor the students' expectations of privacy. As discussed, *Owensboro* endorsed an extremely student friendly approach despite overwhelmingly favorable facts for the school district.²³¹ Although the case was decided incorrectly, it is, for now at least, the law. What are schools do to in this era of non-recognition of their interests? What steps can school officials take in their attempts to protect their interests and their students?

A. Step 1: Ban and Confiscate

According to the Supreme Court, “[S]chool officials needed the relatively unencumbered ability to maintain ‘discipline in the classroom and on school grounds.’”²³² Cell phones can obviously disrupt this discipline, so the schools cannot just give up the fight and allow wanton use and possession of cell phones. The best way for schools to protect themselves from the potential distractions and disruptions caused by student use of cell phones is to exercise an outright ban on the possession of the devices.²³³ Schools absolutely possess the option of exercising a blanket ban on personal electronic devices.²³⁴ Further, once the policy banning the phones is in place, the school then also possesses the authority to seize the phones.²³⁵ However, often times schools try to be sensitive to parent and student expectations that students will have access to their cell phones, and sometimes even attempt to capitalize on the technology to engage students and facilitate learning in the classroom.²³⁶ These well-intentioned policies are errors with potentially devastating side effects. Many experts feel that students do not have the maturity

²³¹ See *supra* Part II.C.

²³² *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

²³³ *Cooke*, *supra* note 144, at 317.

²³⁴ *Id.* See also *Price v. New York City Bd. of Educ.*, 837 N.Y.S.2d 507 (Sup. Ct. 2007), *aff'd* 855 N.Y.S.2d 530 (App. Div. 2008).

²³⁵ See *Koch v. Adams*, 2010 Ark. 131, 2010 WL 986775 (2010),

²³⁶ *Id.*

or self-control to resist use and abuse, thereby making enforcement of a limited use policy too difficult.²³⁷ Limited possession and use policies also present a huge pitfall: once schools sanction possession or use of cell phones on school property during the school day, they will then be forced to deal with the reasonable search issue. By tolerating the possession or use of the phones, the illegitimate expectation of privacy articulated in this article will suddenly transform into a perfectly legitimate expectation of privacy. If the initial seizure of the phone is justified by the student simply possessing or using the cell phone against school policy, the school may be able to adopt the policy outlined by this article or the court's reasoning in the *DeSoto* case in order to attempt to determine the ends to which the phone was being illegally used. However, without a ban, schools will find it even more difficult to seize a phone, and will not be able to make any arguments about a student's lessened expectation of privacy due to the student knowingly violating school policy by merely bringing the phone into the school. They may also run into an "accidental" display case (like in *Klump*), and we know how that case turns out.

Therefore, as appealing as trusting students to bring and use their cell phones responsibly sounds, it would ultimately lead to too many headaches for the schools. Phone usage and possession lends itself to bullying, cheating, sexting, and disruptions.²³⁸ Without an outright ban and seizure policy, schools would have to articulate an additional initial reason to seize a phone beyond simply possessing and using, thereby further handicapping themselves in their fight against the evils that cell phones can create and escalate. Without a confiscation policy and ban, schools will find it difficult to get past the first hurdle: whether the search is justified at its inception. They also face a legitimately higher expectation of privacy, since simple possession is

²³⁷ Vorenberg, *supra* note 58, at 82.

²³⁸ See Oluwole & Visotsky, *supra* note 6, at 53-60.

not by itself a violation of school rules. For schools, the benefits of use and possession are simply not worth the downfalls of a limited usage and possession rule.

B. Step 2: Articulate a Danger

T.L.O. rejected the argument that students have no legitimate expectation of privacy in any personal property brought to school.²³⁹ However, the Court balanced any expectation of privacy in personal items like “photographs, letters, and diaries” with the school’s significant interest of preventing disruption and maintaining safety.²⁴⁰ *Redding* applied this test to strip searches, and that case now demonstrates the likely path that the Supreme Court will take when ruling on student cell phone searches.²⁴¹ In *Redding*, school officials, acting on the assistant principal’s direction, “strip searched” a thirteen year old female student.²⁴² The assistant principal suspected the girl of distributing prescription drugs to other students in violation of school policy.²⁴³ This case is informative, since it sets out the worst case scenario for the schools by indicating the strictest standard that the Court could possibly adopt. However, it also represents the safe harbor standard for a school to follow.

According to *Redding*, there is a three step inquiry that must be applied to student search cases. The first step in the analysis of an “invasive” search is to evaluate the student’s subjective expectation of privacy.²⁴⁴ The student’s expectation of privacy must be viewed in light of the embarrassment, fear, and humiliation that the student experienced during the search.²⁴⁵ As outlined above, cell phones contain pictures, messages, and other personal data. What student, the argument goes, would carry their entire private life in their phone if they expected that

²³⁹ *New Jersey v. T.L.O.*, 469 U.S. 326, 339 (1985).

²⁴⁰ *Id.* at 326, 339.

²⁴¹ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2638 (2008).

²⁴² *Id.* at 2637-38.

²⁴³ *Id.*

²⁴⁴ *Id.* at 2638.

²⁴⁵ *Id.* at 2641.

someone would examine it without their permission? Redding herself emphasized this aspect of the argument when she testified about her own embarrassment and humiliation caused by the search.²⁴⁶

The second step in the analysis is asking whether society would recognize the student's expectation of privacy as legitimate. The Court went to great length to confirm the legitimacy of Redding's expectation of privacy by pointing to the similarity of attitudes among her peer group and the findings of social science research,²⁴⁷ similar to the research described above in Part III.A. Finding that Redding's embarrassment, fear, and humiliation were "consistent" with the reactions of other students who experienced invasive strip searches, the Court determined that their "adolescent vulnerability intensifies the patent intrusiveness of the exposure" of the search.²⁴⁸ The Court relied upon the "common reaction" of children to a strip search, as identified by social science studies, to confirm the legitimacy of the expectation.²⁴⁹ Although this author entirely disagrees with the Court's determination on the second part of this test,²⁵⁰ it is likely that the Court would agree that society would recognize a student's expectation of privacy in their cell phone as reasonable.

The third step is necessary only when the first two steps establish both that the student possessed a subjective expectation of privacy and that the expectation of privacy is reasonable.²⁵¹ Here, *Redding* drew directly from *T.L.O.*, quoting the language that "[T]he search as actually conducted [must be] reasonably related in scope to the circumstances which justified the interference in the first place."²⁵² The search's scope is reasonable "when it is 'not excessively

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 2641-42.

²⁴⁹ *Id.* at 2642.

²⁵⁰ *See supra* Part III.B.

²⁵¹ Redding, 129 S. Ct. at 2642.

²⁵² *Id.* at 2642 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

intrusive in light of the age and sex of the student and the nature of the infraction.”²⁵³ With regards to *Redding*’s strip search, the Court found that “the content of the suspicion failed to match the degree of intrusion.”²⁵⁴ The school officials in *Redding* knew that the contraband pills that she was suspected of possessing were merely common over the counter pain medications, and therefore they represented only “limited threat” of danger.²⁵⁵ Because of the limited nature of the threat, the school officials could not justify the “extreme intrusiveness of a search” of *Redding*’s undergarments.²⁵⁶ The Court found the argument that students typically hide contraband in their undergarments unpersuasive, and labeled the search as overly extensive.²⁵⁷ The justified their finding by declaring that, “nondangerous school contraband does not raise the specter of stashes in intimate places,” and, mere “general background possibilities” are insufficient to justify a strip search of a student, due to “the degradation its subject may reasonably feel.”²⁵⁸

This analysis greatly favors the students in any cell phone search controversy. Despite the position taken by this article, the Court gives great weight to a student’s subjective expectation of privacy, and nowhere discusses the issue of whether a student can have a legitimate expectation of privacy in phone that is brought to school against school policy (which should prove fatal to the argument).²⁵⁹ However, the Court looks past this and embraces social science research that says students will be embarrassed and frightened, so therefore we should recognize their expectation of privacy as legitimate.²⁶⁰ Due to the extreme expectation of privacy that students place in their cell phones, a court is likely to side with the student on the first two issues in the

²⁵³ *Redding*, 129 S. Ct. at 2642 (quoting *T.L.O.*, 469 U.S. at 342).

²⁵⁴ *Redding*, 129 S. Ct. at 2642.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2643.

²⁵⁹ *See supra* Part IV.

²⁶⁰ *Redding*, 129 S. Ct. at 2641-42.

reasonableness test. As long as courts recognize a significant privacy interest in student cell phones, the situation will continue to be dire for the schools, and the schools will have an extremely difficult (perhaps impossible) obstacle to overcome in the quest to justify their cell phone searches.

So where is the safe harbor? Where can schools draw the line and be sure that when they search, they will not be violating the students' constitutional rights? The Court saw the contraband pills as presenting a limited threat of danger in declaring the scope of the search to be too invasive and unreasonable.²⁶¹ This indicates that a court will likely only accept a search of a student's cell phone if there is specific and individualized suspicion of some real and "non-limited" danger. What qualifies as dangerous enough to impress the Court remains to be seen, and is sure to be the cause of much future debate. What school officials are left with is a vague notion that there must be some specific and individualized suspicion of danger present before a search of a cell phone can be conducted.

Conducting a limited search of four text messages when the principal was concerned about a student who had a long history of violence, drugs, and suicide was not enough to qualify as a real threat or danger in *Owensboro*. So what is a school to do? When a phone is seized, the school official must be able to articulate some real threat or danger of which there is likely to be evidence of in the contents of the cell phone before conducting any kind of search. Otherwise, a court will likely declare the search of the contents of the phone as too invasive and humiliating for a student. A model guideline for school personnel will specify that this real threat or danger must be present before any search can be initiated. School personnel must be trained to understand that whenever a search of a cell phone is conducted, a real threat of danger must accompany the search. It seems overly harsh and places strange and heightened demands on

²⁶¹ *Id.* at 2642.

school officials, but in the current “students’ rights” friendly era (at least students’ rights friendly in the realm of cell phone privacy expectations), this is the harsh reality that school officials face. This approach represents the worst case scenario for the schools, and is likely the strictest standard that could possibly be adopted. But the good news is that if the schools abide by this real danger policy, they will find the safe harbor as far as respecting students’ constitutional rights.

C. The Minimal Impact of Password Protection Statutes

Much has been made of the recent student password protection statutes,²⁶² particularly the Michigan IPPA, with lawyers warning that schools must “tread carefully” in response to this new and highly restricting law.²⁶³ However, in light of the heightened standards for cell phone searching (and searching in general) articulated by *Owensboro* and *Redding*, the impact of IPPA and other statutes like it, although intended to heighten student privacy protection, will likely be minimal. The minimal impact of the IPPA is informative for schools throughout the country, since the IPPA offers the broadest protection to students of any of these password protection laws in terms of the types of passwords protected and the types of students included under its protections.²⁶⁴ Therefore, if the IPPA’s impact is minimal, so too will be the impact of any other password protection statute.²⁶⁵

According to the IPPA, schools may not “request a student or prospective student to grant access to, allow observation of, or disclose information that allows access to or observation of the student’s or prospective student’s personal internet account.”²⁶⁶ The IPPA defines “access

²⁶² Most of the statutes apply to both students and employees, but the focus here is solely on the student aspect.

²⁶³ See *supra* Part I.D.

²⁶⁴ Buckley, Timothy J., *Password Protection Now: An Elaboration on the Need for Federal Password Protection Legislation and Suggestions on How to Draft It*, CARDOZO ARTS & ENT. L.J. 875, 884-85 (2013).

²⁶⁵ This assumes that there are no ultra-protective statutes in the works.

²⁶⁶ MICH. COMP. LAWS § 37.274 (2009).

information” as “user name, password, login information, or other security information that protects access to a personal internet account.”²⁶⁷ So, for our purposes, the act appears to simply forbid the school from forcing a student to disclose their cell phone’s password. The act says nothing about phone searches generally.

The IPPA actually includes an exception to the general rule, making it clear that the act “does not prohibit or restrict an educational institution from viewing, accessing, or utilizing information about a student or applicant that can be obtained without any required access information or that is available in the public domain.”²⁶⁸ This seems to indicate that if the school administrator can meet the reasonableness requirement to search a phone, then, as long as they can guess the password or infer it from general knowledge, no additional obstacles are placed before them.

This is consistent with general case law. Courts throughout the country have long held that police may search cell phones incident to arrest in the non-school setting.²⁶⁹ Scholarly literature on the topic agrees that police, in the non-school setting, face no additional troubles when searching a password protected phone incident to arrest.²⁷⁰ After all, police have long been able to search locked containers incident to arrest.²⁷¹ Courts have never distinguished between locked and unlocked containers, which suggests that there is no greater expectation of privacy

²⁶⁷ MICH. COMP. LAWS § 37.272(a) (2009).

²⁶⁸ MICH. COMP. LAWS § 37.276 (2009).

²⁶⁹ See, e.g., *United States v. Pineda-Areola*, 372 F. App’x 661, 663 (7th Cir. 2010); *United States v. Fuentes*, 368 F. App’x 95, 99 (11th Cir. 2010) (per curiam), *Silvan W. v. Briggs*, 309 F. App’x 216, 225 (10th Cir. 2009), *United States v. Murphy*, 552 F.3d 405, 410–12 (4th Cir. 2009), *United States v. Young*, 278 F. App’x 242, 246 (4th Cir. 2008) (per curiam), *United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007); *United States v. Faller*, 681 F. Supp. 2d 1028, 1046 (E.D. Mo. 2010), *Newhard v. Borders*, 649 F. Supp. 2d 440, 448–49 (W.D. Va. 2009), *United States v. Wurie*, 612 F. Supp. 2d 104, 110 (D. Mass. 2009), *United States v. Quintana*, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009); *United States v. Santillan*, 571 F. Supp. 2d 1093, 1104 (D. Ariz. 2008) (upholding search of cell phone’s call history); *United States v. Deans*, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008), *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1279 (D. Kan. 2007) .

²⁷⁰ See Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1136-1143 (2011).

²⁷¹ *Id.* at 1151 (citing a long list of cases).

when the arrestee has taken steps to protect the “private” contents of the container. Consistent with this locked container rationale, it seems likely that police will be permitted to search password protected cell phones incident to arrest, just as they may search an unprotected phone incident to arrest.²⁷² Ultimately, passwords will do little to curb police searches of cell phones.²⁷³

This logic would apply to the school setting as well, especially when the standards of searching and privacy are supposed to be lower than those applied in the “adult world.” As long as the password can be guessed or inferred from public knowledge, the presence of password protection presents no additional trouble. The only real impact of the IPPA (and other statutes like it across the nation) is that it prevents the school from forcing students to reveal their own passwords. The IPPA has the broadest impact and offers the greatest protection of any password protection statute, so if schools can abide by the IPPA, then their conduct will be acceptable under any state law.

All in all, the real issue for schools is presented by *Owensboro* and *Redding*. Beating the “reasonable” suspicion test will be the true challenge, since the courts seem willing to extend a rather powerful expectation of privacy to students in their cell phones. If that (very high) hurdle can be overcome, then cracking the password presents no additional legal complication. Further, if the school can identify a threat of danger high enough to meet the test, then it is likely that they would have enough suspicion to justify a warrant or probable cause, in which case law enforcement could search the phone regardless of any password protection. Ultimately, although the various legislatures have attempted to protect the students’ privacy rights in their cell phones, their efforts are essentially meaningless, since the courts have already gone so far in protecting that privacy.

²⁷² *Id.* at 1154.

²⁷³ See Susan W. Brenner, *The Fifth Amendment, Cell Phones and Search Incident: A Response to Password Protected?*, 96 IOWA L. REV. BULL. 78 (2011).

CONCLUSION

In recent years, the balance of student and school interests in the realm of cell phone searching has tilted heavily in favor of the students. The schools' strong interest in preserving the safest and most orderly educational environment has taken a back seat to the students' privacy interests in the contents of their cell phones, despite the fact that possession of the phone is often a violation of school policy in and of itself. While this is the wrong solution to the student cell phone problem, *Owensboro* and the various password protection statutes make it clear that this is the treacherous situation that schools must now cope with, and the situation shows no signs of changing anytime soon. As it is, schools must tread carefully when searching students' cell phones, and they must be certain to have a real suspicion of a legitimate threat before embarking upon any search. Noble purpose and limited scope of the search cannot save the schools, and schools can be held liable for failing to stop evils like bullying, even where some limited cell phone searching might have prevented the whole incident.

Schools absolutely must keep bans on student possession and use of phones in place and continue to confiscate them whenever they are found. However, teachers and administrators must work to articulate a clear policy that the phones are only to be searched in the presence of some articulable suspicion of a "real" danger or a threat. This will ensure that the schools will at least operate in a safe harbor where they will not face constitutional challenges to their actions. Training must be implemented to ensure that all staff comply, since violating these policies can result in lengthy, expensive, and very public litigation. In the ideal world of education, the courts would recognize the schools' interests in protecting their educational environment. However, in 2014, the harsh reality is quite different.