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## Implications on the Constitutionality of Student Cell Phone Searches Following *Riley v. California*

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**IMPLICATIONS ON THE CONSTITUTIONALITY OF STUDENT  
CELL PHONE SEARCHES FOLLOWING *RILEY V. CALIFORNIA***

Ross Hoogstraten\*

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INTRODUCTION

In today's society, most teenagers have a cell phone, and, often, the teenager is glued to the screen of the phone.<sup>1</sup> Students bring these phones to school to communicate with their parents if an emergency occurs, but sometimes the students are improperly communicating throughout the day with other students.<sup>2</sup> Cell phones cause a distraction to not only the students using the cell phone, but also to other

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<sup>1</sup> See MARY MADDEN ET AL., PEW RESEARCH CTR., TEENS AND TECHNOLOGY 2013, at 2 (2013), [http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP\\_TeensandTechnology2013.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_TeensandTechnology2013.pdf) [<http://perma.cc/9ZP8-GKJ5>] (highlighting the fact that 78% of teens have a cell phone).

<sup>2</sup> See, e.g., *Price v. N.Y.C. Bd. of Educ.*, 855 N.Y.S.2d 530, 542–43 (N.Y. App. Div. 2008) (detailing reasons for bringing cell phones to school to determine whether a school system can ban student cell phones from the school premises).

students and the teacher in the classroom.<sup>3</sup> If a teacher observes a student with a cell phone, the teacher confiscates the phone and often delivers it to the administrative office for disciplinary purposes.<sup>4</sup> In some of these instances, the school officials search the phone to find evidence of criminal conduct or another violation of school policies on the phone.<sup>5</sup>

Courts have allowed an exception to the warrant requirement for warrantless searches conducted by school officials under the standard the Supreme Court constructed in *New Jersey v. T.L.O.*<sup>6</sup> Based on the special needs required by the school setting, school officials must have reasonable suspicion for the search, and the search cannot be “excessively intrusive.”<sup>7</sup> When reviewing searches of cell phones conducted by school officials, courts have relied on this standard even though the two-part test was handed down in 1985, before cell phones were prolific or even present in schools.<sup>8</sup>

In 2014, the Supreme Court reviewed a similar, well-established exception to the warrant requirement in the cell phone context.<sup>9</sup> The Court ruled that for a search of a cell phone incident to an arrest, police must obtain a warrant, because the cell phone is unique from other tangible items that can be searched.<sup>10</sup> The Court concluded that when the exception was first introduced in 1969, the Court could not have conceived the characteristics and capabilities of modern cell phones.<sup>11</sup>

This Note develops the argument that the characteristics of a cell phone compel a reconsideration of the *T.L.O.* standard for warrantless searches conducted by

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<sup>3</sup> *Id.* at 535.

<sup>4</sup> *See, e.g., Koch v. Adams*, 361 S.W.3d 817 (2010) (highlighting the fact that a student violated the student handbook by having a cell phone in the classroom, that officials confiscated the phone, and that they then sent the phone to the parents in the mail two weeks later).

<sup>5</sup> *See, e.g., Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 627 (E.D. Pa. 2006) (highlighting the fact that school officials called contacts in a confiscated phone to determine if other students were violating school policy).

<sup>6</sup> 469 U.S. 325 (1985).

<sup>7</sup> *Id.* at 342.

<sup>8</sup> *See, e.g., Klump*, 425 F. Supp. 2d at 641. In 1985, there were 340,213 U.S. cell phone subscribers. CTIA, CTIA’S WIRELESS INDUSTRY INDICES: 1985–2013 (2014), [http://www.ctia.org/docs/default-source/Facts-Stats/ctia\\_survey\\_ye\\_2013\\_graphics-final.pdf](http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf) [<http://perma.cc/2LFL-Z5QY>]. As of December 2014, however, there were 335,400,000 active cell phone devices in the United States, which is more than the population, but many users have more than one wireless device. *Your Wireless Life: Annual Wireless Industry Survey*, CTIA, <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey> [<http://perma.cc/ESD3-3YHS>] (last updated June 2015).

<sup>9</sup> *Riley v. California*, 134 S. Ct. 2473 (2014) (analyzing the search incident to arrest exception).

<sup>10</sup> *Id.* at 2493.

<sup>11</sup> *Id.* at 4584 (highlighting the fact that the original search incident to arrest exception was introduced by the Court in *Chimel v. California*, 395 U.S. 752 (1969)).

school officials.<sup>12</sup> *Riley*—and other Fourth Amendment cases dealing with new technologies—established the framework for reconsideration in other contexts of the Fourth Amendment in relation to cell phones and other new technologies through a balancing test.<sup>13</sup> Following *Riley*, this Note argues that a student’s heightened expectation of privacy in her cell phone outweighs the school’s interests in maintaining order and protecting the safety of students.<sup>14</sup>

This Note first examines the historical context of the Fourth Amendment, specifically in relation to school searches.<sup>15</sup> Second, this Note details the current problem with cell phones in schools and introduces the limited amount of cases that have dealt with a warrantless search of a cell phone in schools.<sup>16</sup> This Note then reviews *Riley v. California*<sup>17</sup> and argues that it brings clarity to the growing concern of warrantless searches of student cell phones.<sup>18</sup> Finally, this Note looks for guidance from other warrant exceptions,<sup>19</sup> and then concludes by offering possible policies relating to cell phones that school districts could implement.<sup>20</sup>

## I. THE FOURTH AMENDMENT AND *NEW JERSEY V. T.L.O.*

### A. Historical Overview of the Fourth Amendment

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>21</sup>

During colonial times, the English issued general warrants against the American colonists, which caused much uproar.<sup>22</sup> Resistance to these general warrants was the underlying reason for the Fourth Amendment, which sought to protect a person’s privacy from invasions “by any general authority to search and seize his goods and papers.”<sup>23</sup>

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<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part IV.A.

<sup>14</sup> See *infra* Part IV.D.

<sup>15</sup> See *infra* Part I.

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *infra* Part V.

<sup>20</sup> See *infra* Part VI.

<sup>21</sup> U.S. CONST. amend. IV.

<sup>22</sup> See *Weeks v. United States*, 232 U.S. 383, 390 (1914).

<sup>23</sup> *Id.*

Centuries later, a unanimous Court determined that the Fourth Amendment, incorporated by the Fourteenth Amendment, protects citizens from unreasonable searches and seizures conducted by state officers.<sup>24</sup> The Court concluded that protecting one's privacy from unreasonable searches by police "is implicit 'in the concept of ordered liberty,'" and therefore enforceable against state officers through the Due Process Clause of the Fourteenth Amendment.<sup>25</sup>

Early in the twentieth century, courts had yet to confer constitutional protections on public schoolchildren.<sup>26</sup> In 1943, however, the Court required public schools to impart certain constitutional protections to students.<sup>27</sup> That case dealt with the First Amendment, but language used by the Justices extended the entire Bill of Rights's protections to schoolchildren.<sup>28</sup> Even though the protections were extended to children in schools, students do not receive the full breadth of those protections.<sup>29</sup> Subsequent cases dealt with each fundamental right pertaining to children in schools.<sup>30</sup> In 1985, the Supreme Court dealt with the Fourth Amendment and schoolchildren.<sup>31</sup>

#### B. *New Jersey v. T.L.O.*

In *New Jersey v. T.L.O.*, a teacher caught a high school freshman with another student, smoking cigarettes in the restroom.<sup>32</sup> The teacher brought the student to the assistant principal's office, and the assistant principal asked the student whether she was smoking: a violation of the school's policy.<sup>33</sup> The student denied that she had been smoking, and the assistant principal asked to see her purse.<sup>34</sup>

The assistant principal opened the purse and saw a package of cigarettes. Upon removing the cigarettes, the assistant principal discovered a "package of cigarette rolling

<sup>24</sup> *Elkins v. United States*, 364 U.S. 206, 213 (1960).

<sup>25</sup> *Id.* (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

<sup>26</sup> The Court, in 1940, even rejected certain freedom of religion objections when a school system required children to salute to the flag. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>27</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

<sup>28</sup> *Id.* ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.")

<sup>29</sup> *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that speech can be curtailed if student behavior "materially disrupts" classwork).

<sup>30</sup> *See, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977) (applying the Eighth Amendment to schoolchildren); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (applying the First Amendment to schoolchildren).

<sup>31</sup> *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (finding a search of a student's purse reasonable after the student was found smoking on school grounds).

<sup>32</sup> *Id.* at 328.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* The other student, with whom T.L.O. was caught in the restroom, admitted she had violated the rule. *Id.*

papers,” which he, from his experience, knew were associated with the use of marijuana.<sup>35</sup> After this discovery, the assistant principal conducted a closer examination of the purse for additional evidence of drug use, and this thorough search of the purse

revealed a small amount of marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T. L. O. money, and two letters that implicated T. L. O. in marijuana dealing.<sup>36</sup>

The assistant principal concluded his search and called the girl’s mother and the police.<sup>37</sup> Once the police arrived, the assistant principal turned over all the evidence he found in the girl’s purse.<sup>38</sup> On the basis of this evidence, the State brought delinquency charges against the girl, and T.L.O. filed a motion to suppress the assistant principal’s search based on a violation of her Fourth Amendment rights.<sup>39</sup> The New Jersey juvenile court denied the motion, and then T.L.O. appealed to New Jersey state court and eventually to the New Jersey Supreme Court.<sup>40</sup> The New Jersey Supreme Court held that the assistant principal’s search was unreasonable under the Fourth Amendment because he did not have the necessary level of suspicion to believe the purse contained any evidence of wrongdoing.<sup>41</sup>

The U.S. Supreme Court reversed the ruling, deeming the assistant principal’s search reasonable under the Fourth Amendment.<sup>42</sup> This holding carved out an exception to the Fourth Amendment’s probable cause and warrant requirement that still holds today for searches conducted in schools based on the special needs requirement.

The Court first found that the Fourth Amendment applied to public school officials, but that is only the beginning of “the inquiry into the standards governing

<sup>35</sup> *Id.* The search was conducted in the assistant principal’s private office. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* T.L.O. confessed to the police that she had been dealing marijuana. *Id.* at 329.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The juvenile court concluded that school officials can search a student if there is “reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.” *Id.* (quoting *State ex rel T.L.O.*, 428 A.2d 1327, 1333 (1980)). The appellate division affirmed that there was no Fourth Amendment violation. *Id.* at 330.

<sup>41</sup> *Id.* at 330–31 (“According to the [New Jersey Supreme Court], the contents of T. L. O.’s purse had no bearing on the accusation against T. L. O. for possession of cigarettes (as opposed to smoking them in the lavatory) did not violate school rules, and a mere desire for evidence that would impeach T. L. O.’s claim that she did not smoke cigarettes could not justify the search. . . . Finally, leaving aside the question whether [the assistant principal] was justified in opening the purse, the court held that the evidence of drug use that he saw inside did not justify the extensive ‘rummaging’ through T. L. O.’s papers and effects that followed.”) (citing *State ex rel T.L.O.*, 428 A.2d at 1334).

<sup>42</sup> *Id.* at 346.

such searches.”<sup>43</sup> Justice White stated that reasonableness is the ultimate touchstone of the Fourth Amendment, and “[t]he determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’”<sup>44</sup> The balancing test weighs, on one side, the child’s “legitimate expectations of privacy and personal security,” versus the government’s—or in this case, the school’s—“need for effective methods to deal with breaches of public order.”<sup>45</sup> Expectation of privacy has to not only be legitimate in the eyes of the child, but society has to be prepared to recognize the privacy concern as legitimate as well.<sup>46</sup>

In reviewing a student’s legitimate expectations of privacy, the Court concluded that a student does have some privacy expectations, but those expectations are eased in the school setting.<sup>47</sup> The main factor “[a]gainst the child’s interest in privacy [is] the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms.”<sup>48</sup> The scale is tipped in the government’s favor because requiring school officials to obtain a warrant would frustrate the reasons for the search and the informal disciplinary procedures of the educational process.<sup>49</sup>

With the balance in favor of governmental interests, the Court eliminated the warrant requirement and also withdrew the probable cause requirement in the school setting.<sup>50</sup> Instead of the normal probable cause requirement, the Court stated that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”<sup>51</sup> To determine the reasonableness of any school search requires a court to conduct a two-step inquiry: (1) whether the search “was

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<sup>43</sup> *Id.* at 337. There was a lengthy discussion in the Court’s opinion dealing with this question, because, even though the Court had applied the Bill of Rights’s protections to schoolchildren, a few lower courts had found that Fourth Amendment protections did not apply. *Id.* at 336. The Court disregarded those decisions based on earlier cases dealing with schoolchildren’s rights and the First Amendment. *Id.* at 336–37.

<sup>44</sup> *Id.* at 337 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967)).

<sup>45</sup> *Id.* This is the test that the Court uses each time it faces the question of whether to allow an exception to the warrant requirement. *See, e.g., Camara*, 387 U.S. 523.

<sup>46</sup> *T.L.O.*, 469 U.S. at 338–39.

<sup>47</sup> *Id.* at 340. The student has reason to bring certain items to school—such as keys or money—and nothing suggests that bringing these items onto school grounds would waive all privacy concerns. *Id.* at 339.

<sup>48</sup> *Id.* The Court stated that, with this difficulty in maintaining security and order, school officials are allowed a certain degree of flexibility in school disciplinary procedures. *Id.* at 339–40.

<sup>49</sup> *Id.* at 340.

<sup>50</sup> *Id.* at 340–41.

<sup>51</sup> *Id.* at 341. This standard was construed on the basis that the privacy interests of a student “will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.” *Id.* at 343.

justified at its inception”); and (2) if the search, as conducted, “was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>52</sup> The scope of the search is permissible “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.”<sup>53</sup>

In applying the twofold test to the search at hand, Justice White upheld the assistant principal’s search as reasonable.<sup>54</sup> The assistant principal’s search was “justified at its inception,” because T.L.O. denied the accusation of smoking on school grounds, and the presence of cigarettes in T.L.O.’s purse would support the eyewitness’s testimony.<sup>55</sup> The assistant principal could reasonably believe that such a search would produce evidence of a violation of school policies.<sup>56</sup> Upon removing the cigarettes and viewing the rolling papers, the assistant principal was within a reasonable scope to continue to search for other drug paraphernalia.<sup>57</sup> The Court concluded that the search did not violate the student’s constitutional rights.<sup>58</sup> This test is still applied today.

### C. *Subsequent Developments in School Searches Following T.L.O.*

In 1995 and again in 2002, the Court recognized the diminished expectation of privacy in regards to the drug testing of public school students.<sup>59</sup> In *Vernonia School*

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<sup>52</sup> *Id.* at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). “[A] search of a student by a teacher or other school official will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* at 341–42 (footnote omitted).

<sup>53</sup> *Id.* at 342.

<sup>54</sup> *Id.* at 345–47.

<sup>55</sup> *Id.* at 345–46.

<sup>56</sup> *Id.* The Court rejected the New Jersey Supreme Court’s argument that the contents of T.L.O.’s purse had no bearing on the accusation against T.L.O. because the possession of cigarettes did not violate school rules because:

T. L. O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T. L. O.’s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T. L. O.’s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking.

*Id.* at 345.

<sup>57</sup> *Id.* at 347. The Court even held that it was reasonable to extend the search to a separate zippered compartment of the purse. *Id.*

<sup>58</sup> *Id.* at 347–48.

<sup>59</sup> *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

*District 47J v. Acton*, the Court upheld the random drug testing of student athletes.<sup>60</sup> In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the Court upheld the drug testing of all students that participated in after-school activities.<sup>61</sup> Although both cases dealt with suspicionless searches, instead of the individualized suspicion in *T.L.O.*, they are still helpful in evaluating the level of intrusion allowed into a student's expectation of privacy.<sup>62</sup> By choosing to "go out for the team" or participating in other school-sanctioned activities, the students open themselves up to an even lower expectation of privacy.<sup>63</sup> Based on this further diminution of privacy, the drug tests were "negligible"<sup>64</sup> or "minimal"<sup>65</sup> additional intrusions. The Court also explained that "[d]eterring drug use by our Nation's schoolchildren" heightened the governmental concern at issue in both cases.<sup>66</sup>

The most recent school search case to go to the Supreme Court was *Safford Unified School District No. 1 v. Redding*.<sup>67</sup> In that case, a middle school student made a report to the assistant principal that an eighth grader was distributing pills to her

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<sup>60</sup> 515 U.S. at 665.

<sup>61</sup> 536 U.S. at 838.

<sup>62</sup> These two cases deal with suspicionless drug testing, while *T.L.O.* was a search based on individualized suspicion. The test for reasonableness is different: a court reviews the person's (or in these two cases, a group of persons') legitimate expectation of privacy, the degree of intrusion into that privacy interest, and the nature and immediacy of the governmental concern at issue in the case. Compare *Vernonia*, 515 U.S. 646, and *Earls*, 536 U.S. 822, with *T.L.O.*, 469 U.S. 325. The cases are still useful in determining the reasonable expectation of privacy of a student in school because the Court would not go as far to say that suspicionless testing would work for all students; but, because these students participated in extracurricular activities, their expectation of privacy was further diminished. See generally A. James Spung, Comment, *From Backpacks to BlackBerry: (Re)Examining New Jersey v. T.L.O. in the Age of the Cell Phone*, 61 EMORY L.J. 111 (2011) (arguing that modern technology has eroded the foundations of *T.L.O.*).

<sup>63</sup> *Vernonia*, 515 U.S. at 657 ("Legitimate privacy expectations are even less with regard to student athletes. School sports . . . require 'suing up' before each practice or event, and showering and changing afterwards. . . . As the . . . Seventh Circuit has noted, there is 'an element of "communal undress" inherent in athletic participation . . .'" (citation omitted)); *Earls*, 536 U.S. at 831–32 ("[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole." (footnote omitted)).

<sup>64</sup> *Vernonia*, 515 U.S. at 658.

<sup>65</sup> *Earls*, 536 U.S. at 834.

<sup>66</sup> *Vernonia*, 515 U.S. at 661 ("That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted."); *Earls*, 536 U.S. at 834 ("[T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school.").

<sup>67</sup> 557 U.S. 364 (2009).

classmates.<sup>68</sup> Similar to *T.L.O.*, the girl, Savana, denied any involvement, and the assistant principal sought to search her belongings for evidence of a school policy violation.<sup>69</sup> After searching Savana's backpack and outer clothing to no avail, the assistant principal instructed the girl to go to the nurse's office.<sup>70</sup> While in the nurse's office, Savana was instructed to remove all clothing except for her underwear.<sup>71</sup> This search again produced no evidence of wrongdoing, and Savana was allowed to leave.<sup>72</sup>

Upon returning home from school, Savana told her mother about the search, and the mother sued the school district for a violation of her daughter's Fourth Amendment rights.<sup>73</sup> First, the Court stated that the search was "justified at its inception" because of the allegations against the student.<sup>74</sup> Ultimately, the Court decided the search was unreasonable because of the "excessively intrusive" nature of the strip search.<sup>75</sup> The Court stated that the student had a high level of expectation of privacy as to her undergarments and that the administrators had no reason to believe that she was hiding the pills in her underwear.<sup>76</sup> Moreover, the school's interest was lowered because the assistant principal knew that the pills he was searching for were an over-the-counter medication.<sup>77</sup>

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<sup>68</sup> *Id.* at 368. The report filed initially identified another student, not the party to the case, as the "drug dealer." *Id.* at 372. The assistant principal searched that student and found a day planner with pills and "several knives, lighters, a permanent marker, and a cigarette." *Id.* at 368. This student denied involvement and pointed the finger at Savana Redding. *Id.* at 372. Before searching Savana, the assistant principal conducted a similar "strip search" on this "drug dealing" student, which also produced no other pills. *Id.* at 373.

<sup>69</sup> *Id.* at 368. Savana informed the assistant principal that she lent her day planner to a friend a few days before and said the items belonged to her. *Id.* This was the student who accused Savana. *Id.*

<sup>70</sup> *Id.* at 369.

<sup>71</sup> *Id.* The search was conducted in front of the administrative assistant and the nurse, both females. *Id.*

<sup>72</sup> *Id.* ("Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.")

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 373. Even though the assistant principal had conflicting reports, and a previous search with no results, the Court concluded that he had reasonable suspicion to search "Savana's backpack and outer clothing." *Id.*

<sup>75</sup> *Id.* at 375–76. There is language in the Court's opinion stating that a strip search of a student could be allowed in other cases: "The indignity of the search does not, of course, outlaw it . . ." *Id.* at 375. Moreover, "no evidence in the record" suggests "any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear." *Id.* at 376.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The Court stated that evidence of a vast amount of over-the-counter medication or evidence of illegal narcotics would increase the governmental concern. *Id.* at 375–76. This sliding scale has been absent from previous case law, but it should not have an effect on this Note.

## II. CELL PHONES IN SCHOOL ZONES

*A. Statistics on Cell Phone Use and School Policies*

As of 2013, 78% of teenagers have a cell phone, and 47% of those teenagers have a cell phone which is considered a smartphone.<sup>78</sup> In a 2010 study on cell phone use in schools, 77% of teenage students reported that they brought their cell phones onto school grounds each day.<sup>79</sup> Of the teens that bring their cell phones to school, 64% said that they have texted during class.<sup>80</sup> Some students have reported using a cell phone to cheat on a school assignment.<sup>81</sup>

In a recent poll of teenagers about school policies on cell phones, the study found that “12% of all students say they can have their phone at school at any time,” “62% of all students say they can have their phone in school, just not in class,” and “24% of teens attend schools that ban all cell phones from school grounds.”<sup>82</sup> For school districts that allow a student to bring a cell phone onto school grounds, most school boards require the students to keep the cell phone turned off during class hours.<sup>83</sup> Schools implement these types of policies so that students can contact parents following after-school activities or if an emergency occurs.<sup>84</sup> Other schools allow cell

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<sup>78</sup> See MADDEN ET AL., *supra* note 1. A smartphone is defined as a cellular phone with internet capabilities (among other technological advances). *Definition of: Smartphone*, PC MAG., <http://www.pcmag.com/encyclopedia/term/51537/smartphone> [<http://perma.cc/27GN-LV7V>]; see also AMANDA LENHART ET AL., PEW RESEARCH CTR., TEENS AND MOBILE PHONES 76 (2010), <http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf> [<http://perma.cc/TKN9-RD8P>] (“Most American teenagers get their first cell phone in middle school, at age 12 or 13: 23% of teens got their first cell phone at age 12 and another 23% got their first phone at age 13. About 20% of teens have their first phone by the time they enter middle school (age 11 or under for first cell phone owned). Another 14% of teens get their first phone at age 14 and roughly 20% get their first phone when they’re between 15 and 17.”).

<sup>79</sup> See LENHART ET AL., *supra* note 78, at 82 (“[A]nother 7% take their phone to school at least several times a week. Less than 10% of teens take their phone to school less often and just 8% say they never take their phone to school.”).

<sup>80</sup> *Id.* at 4.

<sup>81</sup> See *id.* at 85 (“[C]heating is carried out through the cell phone by texting test answers to others, taking pictures of exams, taking pictures of textbook materials to bring into an exam, and getting answers online . . .”).

<sup>82</sup> *Id.* at 4.

<sup>83</sup> See, e.g., *Electronics/Cell Phone Use Policy*, BENICIA HIGH SCH. (last visited Mar. 3, 2016) [hereinafter BENICIA POLICY], <http://bhs.beniciaunified.org/our-school/attendance-procedures-1/electronics-cell-phone-use>; DARLINGTON CTY. SCH. DIST., HARTSVILLE HIGH SCHOOL CELL PHONE POLICY (2014), [http://hhs.dcsdschools.org/UserFiles/Servers/Server\\_3842348/Image/Cell%20Phone%20Policy%20-%20One%20Page.pdf](http://hhs.dcsdschools.org/UserFiles/Servers/Server_3842348/Image/Cell%20Phone%20Policy%20-%20One%20Page.pdf) [<http://perma.cc/HK9T-JWK6>].

<sup>84</sup> See, e.g., L.A. UNIFIED SCH. DIST., PARENT-STUDENT HANDBOOK 5 (2013–2014) [hereinafter L.A. POLICY], [http://home.lausd.net/pdf/Families\\_Forms/2013-2014\\_Parent\\_Student\\_Handbook.pdf](http://home.lausd.net/pdf/Families_Forms/2013-2014_Parent_Student_Handbook.pdf) [<http://perma.cc/DEC8-SU7S>].

phones on the premises and allow each teacher to implement his or her own policy regarding cell phone use.<sup>85</sup> Of the schools allowing cell phones subject to certain restrictions, the normal policy allows for the confiscation of the cell phone if a student improperly uses the phone.<sup>86</sup>

Cell phones are prevalent and cause major problems in schools today because they distract students, allow them to cheat on assignments, or even encourage cyberbullying. While school districts are trying to prevent students from bringing a phone to class, those policies often do not work. Of those polled, 24% reported that their school bans cell phones on school grounds, but 65% of those students reported that they still brought their cell phone with them to school.<sup>87</sup> Many more school systems just limit students from bringing cell phones into the classrooms, but these efforts produce the same results as outright bans.<sup>88</sup> Teachers have to do something to prevent the distraction. The use of cell phones in classrooms has led to confiscations, and, in certain instances, the school administrators have searched the confiscated phones.<sup>89</sup>

#### B. Klump, Desoto County, and Owensboro Cases<sup>90</sup>

The next three cases involve a school official's search of a student's confiscated cell phone. All three cases follow the two-prong test from *T.L.O.*, but they have inconsistent results.

In *Klump v. Nazareth Area School District*,<sup>91</sup> a student's cell phone accidentally fell out of his pocket while he was in class.<sup>92</sup> The teacher brought the phone to the

<sup>85</sup> See, e.g., *Bring Your Own Device Policy*, BORDENTOWN REGIONAL HIGH SCH., <http://www.bordentown.k12.nj.us/BRHS.cfm?subpage=314012> [<http://perma.cc/3WC5-JH76>] (“Students may use devices in class at the teacher’s discretion.” (emphasis omitted)).

<sup>86</sup> See BENICIA POLICY, *supra* note 83; L.A. POLICY, *supra* note 84.

<sup>87</sup> See LENHART ET AL., *supra* note 78, at 4.

<sup>88</sup> See *id.* at 83 (“Just one-quarter of teens (23%) who take their phones to school say they never have them turned on during the school day.”).

<sup>89</sup> See *infra* Part II.B.

<sup>90</sup> These are not the only instances of student cell phone searches. Many cases settle before trial, for example, *Stipulated Order of Dismissal, N.N. v. Tunkhannock Area Sch. Dist.*, No. 3:10-cv-1080 (M.D. Pa. Mar. 26, 2012), or do not answer the specific question presented in this Note. See, e.g., *Koch v. Adams*, 361 S.W.3d 817 (Ark. 2010) (arguing conversion and trespass for student cell phone confiscations); *Bohnert v. Roman Catholic Archbishop of S.F.*, No. 14-cv-02854-WHO, 2015 WL 5652647 (N.D. Cal. Sept. 25, 2015) (claiming hostile environment harassment and infliction of emotional distress). Other instances are presumably never reported to authorities. These cases, however, can be useful in demonstrating the problem of cell phones in schools and how school systems struggle to address the issue.

<sup>91</sup> 425 F. Supp. 2d 622 (E.D. Pa. 2006).

<sup>92</sup> *Id.* at 630. In this case, “[t]he high school ha[d] a policy which permit[ted] students to carry, but not use or display cell phones during school hours. . . . Christopher’s cell phone fell out of his pocket and came to rest on his leg. Upon seeing Christopher’s cell phone, . . . a teacher at the high school[ ] enforced the school policy prohibiting [the] use or display of cell phones by confiscating the phone.” *Id.*

main office, where school officials then searched the phone.<sup>93</sup> Without any knowledge of other wrongdoing, school officials attempted to contact nine other students to see who else was using their phone and thus violating school policy.<sup>94</sup> The court determined that the search was justified, but that it was not reasonable in its scope because it searched for *other* students' misconduct.<sup>95</sup> The school officials "hoped to utilize his phone as a tool to catch other students' violations," and it is "evident that there must be some basis for initiating a search."<sup>96</sup> Thus, the search failed on prong two of the *T.L.O.* test because the school officials had no evidence of misconduct on the part of the student except for the violation of school policy by having the phone visible.<sup>97</sup> The court did not rule out, however, that a cell phone search could never be justified. The court seemed to indicate that had the officials known of the drug-related text message before the search began, then the search could have been justified.<sup>98</sup>

In *J.W. v. Desoto County School District*,<sup>99</sup> the student's cell phone was seized and searched by school officials after witnessing the student reading a text message from his father on school grounds.<sup>100</sup> School officials found gang pictures on the phone, and the school ultimately expelled the student.<sup>101</sup> His mother filed a constitutional claim for violation of his Fourth Amendment rights and a claim for unlawful expulsion.<sup>102</sup> The court noted that "[u]pon witnessing a student improperly using a cell phone at school, it [was] reasonable for a school official to seek to determine to what end the student was improperly using that phone."<sup>103</sup> The court found a blanket search of cell phones to be reasonable when a student intentionally violates school policy.<sup>104</sup> The court reviewed *Klump*, but distinguished the present case from *Klump* because the plaintiff intentionally violated school policy in this case, thus further

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* The school officials later stated that they found drug-related text messages on the phone, which prompted the subsequent searches into the other students. *Id.* at 631.

<sup>95</sup> *Id.* at 640.

<sup>96</sup> *Id.* at 640–41.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059 (N.D. Miss. Nov. 1, 2010).

<sup>100</sup> *Id.* at \*1.

<sup>101</sup> *Id.* at \*2.

<sup>102</sup> *Id.* at \*1.

<sup>103</sup> *Id.* at \*4. The court reasoned:

For example, it may well be the case that the student was engaged in some form of cheating, such as by viewing information improperly stored in the cell phone. It is also true that a student using his cell phone at school may reasonably be suspected of communicating with another student who would also be subject to disciplinary action for improper cell phone usage.

*Id.*

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

diminishing his expectation of privacy.<sup>105</sup> *Desoto County* hinged on the degree of the violation of the school policy, but the degree of violation was wholly absent from the majority's opinion in *T.L.O.*<sup>106</sup>

In *G.C. v. Owensboro Public Schools*,<sup>107</sup> there were two searches of a student's cell phone.<sup>108</sup> In the first instance, the student went to the principal's office and told the principal that he was very depressed, and then the principal searched the student's cell phone to check for suicidal tendencies.<sup>109</sup> The principal knew that the student had a history of problems in school that led to mental treatment, but she did not find any specific evidence on the student's phone; the Sixth Circuit concluded this search was reasonable.<sup>110</sup> In the second instance, a teacher confiscated the student's cell phone after watching the student use it in school, which was subsequently searched.<sup>111</sup> The school system argued that it had reasonable suspicion to search the text messages because the student was a drug abuser with suicidal tendencies known to the school official conducting the search.<sup>112</sup>

The court rejected the finding in *Desoto County* of a blanket allowance for a search of a cell phone if seized pursuant to an intentional violation of a school policy

<sup>105</sup> *Id.* at \*5.

The school officials in *Klump* appeared to use that accident as a pretext to conduct a wholesale fishing expedition into the student's personal life, in such a manner as to clearly raise valid Fourth Amendment concerns. . . . [B]y contrast, plaintiff . . . admits that R.W. knowingly violated school rules by even bringing his phone on school grounds, and he compounded that violation by deciding to actually use the phone at school.

*Id.* The judge here seems to believe that the two cases—*Klump* and *Desoto County*—are consistent with each other. *But see* *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623 (6th Cir. 2013).

<sup>106</sup> *Cf.* *New Jersey v. T.L.O.*, 469 U.S. 325, 377 (1985) (Stevens, J., concurring in part and dissenting in part) (“This standard will permit teachers and school administrators to search students when they suspect that the search will reveal evidence of even the most trivial school regulation or precatory guideline for student behavior. The Court’s standard for deciding whether a search is justified ‘at its inception’ treats all violations of the rules of the school as though they were fungible. For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity.” (footnote omitted)). *But see* *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375–77 (2009) (holding that indignity does not outlaw a search). The Court seems to suggest that the level of intrusiveness is a sliding scale based on the nature of the infraction committed by the student. *Id.* at 376.

<sup>107</sup> 711 F.3d 623 (6th Cir. 2013).

<sup>108</sup> *Id.* at 627–28. The two instances took place six months apart and were conducted by two different school officials. *Id.*

<sup>109</sup> *Id.* at 627.

<sup>110</sup> *Id.* at 632.

<sup>111</sup> *Id.* at 634. The teacher caught the student texting, confiscated the phone, and then turned the phone over to an assistant principal. *Id.*

<sup>112</sup> *Id.* at 633.

and ruled that the school system did not have reasonable suspicion to search the cell phone.<sup>113</sup> The court stated that, based on the facts at the time of the search (sitting in class and texting), there was no evidence that the defendant was involved in drug activity or suicidal thoughts.<sup>114</sup> Even with the knowledge of previous drug abuse and suicidal tendencies, the court reasoned that there must be more for a search in this specific instance.<sup>115</sup> In rejecting the broad approach in *Desoto County*, the court “conclude[d] that the fact-based approach taken in *Klump* more accurately reflects [the] court’s standard than the blanket rule set forth in *Desoto*.”<sup>116</sup>

These three rulings demonstrate how the courts are struggling with the topic. Different outcomes could lead to confusion in school systems as to what they are legally entitled to do and which policies to implement. It is perfectly reasonable to think that the school officials in the previous three cases would not be alone in their actions. Many school officials would conduct the same types of searches. Based on the facts in each instance, it would be difficult to determine if the student gave a school official the necessary justifications for a search. Looking into the school violation involved, previous history of the student, and other evidence known at the time are not suitable elements for the school setting. The reason for the special needs exception in the school setting is to provide ease for schools to maintain order, but, with differing outcomes in this area of law, every school search of a cell phone could require a school official to make a fact-based inquiry. School officials are not equipped for this, which is precisely why the warrant and probable cause requirement were reduced. Keeping the current standard and allowing searches will ultimately lead to a flood of litigation.

### III. *RILEY V. CALIFORNIA*

In *Riley v. California*,<sup>117</sup> the Supreme Court gave a blanket rule for searches of a cell phone incident to arrest: “Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”<sup>118</sup> The Court did not, however, rule out the possibility of a warrantless search of a cell phone under the exigent circumstances exception.<sup>119</sup>

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<sup>113</sup> *Id.* at 633–34.

<sup>114</sup> *Id.* at 634.

<sup>115</sup> *Id.* at 633–34.

<sup>116</sup> *Id.* at 633.

<sup>117</sup> 134 S. Ct. 2473 (2014).

<sup>118</sup> *Id.* at 2495. This case combined two fact patterns, but the facts of the cases—involving the level of intrusion of the search—are wholly irrelevant because of the blanket rule announced. *Id.* at 2480–82.

<sup>119</sup> *Id.* at 2494 (“In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals. . .”). This exception basically allows police officers—in emergencies

The Court first reviewed the historical significance of the search incident to arrest exception, concluding that the underlying rationales for the exception were the governmental interests in protecting the arresting officer and preventing the destruction of evidence.<sup>120</sup> The nature of cell phones, however, forced the court to reconsider the rationales.<sup>121</sup> Cell phones were not present or even conceivable when the exception was conceptualized, so the Court relied on precedent when dealing with new categories of effects searched:

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” . . . Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here.

. . . [However] a search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

. . . .

[Therefore we must] consider each *Chimel* concern in turn . . . [and] ask . . . whether application of the search incident to arrest doctrine to this particular category of effects would “untether the rule from the justifications underlying the *Chimel* exception.”<sup>122</sup>

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only—to conduct a warrantless search because it is infeasible and even dangerous to obtain a warrant. *See, e.g., id.* (giving examples of exigent circumstances).

<sup>120</sup> *Id.* at 2483–84. The following quote from *Chimel v. California*, 359 U.S. 752 (1969), outlined the rationales:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. . . . There is ample justification, therefore, for a search of the arrestee’s person and the area “within his immediate control”—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

*Id.* at 762–63.

<sup>121</sup> *Riley*, 134 S. Ct. at 2484.

<sup>122</sup> *Riley*, 134 S. Ct. at 2484–85 (citations omitted).

The Court quickly dispensed with the first *Chimel* rationale because the arrestee cannot use a cell phone as a weapon in a direct way.<sup>123</sup> The second *Chimel* rationale produced more debate because of the possibility of remote wiping of the cell phone's data.<sup>124</sup> The Court, however, also found this argument unpersuasive because remote wiping is not prevalent, and police can implement procedures to protect a phone from remote wipe attempts, for example, Faraday Bags.<sup>125</sup> Both governmental interests were absent in the cell phone context, but the Court still had to review the person's privacy interests at stake.<sup>126</sup>

With "an arrestee's reduced privacy interests upon being taken into police custody," an inspection "constituted only minor additional intrusions compared to the substantial government authority exercised in taking [the arrestee] into custody."<sup>127</sup> Even though an arrestee has a diminished expectation of privacy in his person and effects, it does not follow that the "Fourth Amendment falls out of the picture entirely . . . when 'privacy-related concerns are weighty enough' [that] a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'"<sup>128</sup> The Government tried to assert that the content searches in *United States v. Robinson*<sup>129</sup>—a previous search incident to arrest case where the contents of a cigarette package found on an arrestee were searched—was "materially indistinguishable" from searches of a cell phone; it returned a quick refusal from the Court.<sup>130</sup>

Before cell phones, a search incident to arrest was limited to what the arrestee physically carried.<sup>131</sup> Cell phones differ from those objects, requiring a review of an

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<sup>123</sup> *Id.* at 2485–86.

<sup>124</sup> *Id.* at 2486.

<sup>125</sup> *Id.* at 2486–88 ("Remote wiping [also] can be fully prevented by disconnecting a phone from the network."). Faraday bags are a type of bag that is usually lined with aluminum foil to prevent outside signals from interfering with the device inside the bag. Brief of Criminal Law Professors as Amici Curiae Supporting Riley and Respondent Wurie at 3–4, *Riley*, 134 S. Ct. 2473 (No. 99-55532).

<sup>126</sup> *Riley*, 134 S. Ct. at 2488–89.

<sup>127</sup> *Id.* at 2488.

<sup>128</sup> *Id.* (citations omitted).

<sup>129</sup> 414 U.S. 218 (1973).

<sup>130</sup> *Riley*, 134 S. Ct. at 2488. The majority's response to that characterization: That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

*Id.* at 2488–89.

<sup>131</sup> *Id.* at 2488.

arrestee's reasonable expectation of privacy in his or her cell phone.<sup>132</sup> The Court stated that a person can carry a vast amount of personal information on a cell phone, and the search would not be physically limited as in previous cases:

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. . . .

. . . .

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns . . . .

. . . .

In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is “a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.” . . . If his pockets contain a cell phone, however, that is no longer true. . . . [A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phones is.<sup>133</sup>

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<sup>132</sup> *Id.* at 2489.

<sup>133</sup> *Id.* at 2489–91 (citation omitted). The government also asked for the officers to have the ability to search cell phone data “if they could have obtained the same information from

The Court concluded that absent the original justifications for a search incident to arrest, the governmental concerns for a warrantless search did not outweigh the heightened privacy interests in one's cell phone.<sup>134</sup>

#### IV. THE EFFECTS OF *RILEY* IN THE SCHOOL ZONE

*Riley* demonstrates that the nature of cell phones should bring caution to a court's decision about a search of a cell phone. The opinion has effect only in the search incident to arrest context, but it should offer guidance in other areas in which warrantless searches are allowed. The main focus is technological advances, and, when the courts first decided these issues, the "technology [was] nearly inconceivable."<sup>135</sup>

##### A. *Riley* Requires the Court to Re-weigh the Balancing Test

Even though there is a set standard for determining the reasonableness of a warrantless search in the school context, a court should re-weigh the balancing test. There was a set standard for determining the reasonableness of a warrantless search in the search incident to arrest context, but that did not stop the Court from re-examining the original justifications of the exception.<sup>136</sup> The technology at issue in *Riley*—a cell phone—was the driving factor in the determination to re-weigh the balance of interests.<sup>137</sup> The same technology—a cell phone—should produce the same result of re-weighing the interests in other exceptions to the warrant requirement of the Fourth Amendment.

In *Riley*, the Court could have followed the original search incident to arrest rule,<sup>138</sup> but decided to review the original rationales for the exception to see if they

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a pre-digital counterpart," but the Court differentiated cell phone searches from those of letters, mail, and address books that could be found on a person in the time of *Chimel*, because no one person would carry all that information on his or her person at one time. *Id.* at 2493.

<sup>134</sup> *Id.* It is a good time to point out that the *Riley* Court did not look to any other possible governmental interests in a warrantless search of an arrestee. The Court conducted the balancing test solely with the existing/original justifications in play. The balancing test weighs governmental interests; however, it does not distinguish between predetermined justifications and new justifications. It is hard, however, to imagine another governmental interest, but there could be some out there. In his concurrence, Justice Alito takes up this point: he looks to the common law on this issue before the *Chimel* rationale was determined. He stated that the government had an interest at common law for all evidence on an arrestee, and it did not matter if destruction was imminent. *Id.* at 2495 (Alito, J., concurring). Based on this rationale, this Note will only conduct the balancing test with regard to the original justifications from *T.L.O.*

<sup>135</sup> *Id.* at 2484.

<sup>136</sup> See *supra* Part III.

<sup>137</sup> See *Riley*, 134 S. Ct. at 2484.

<sup>138</sup> Police were allowed to search anything in the arrestee's reach to protect the arresting officer or to prevent the destruction of evidence. *United States v. Robinson*, 414 U.S. 218

were still present.<sup>139</sup> The Court determined it was compelled to conduct a new balancing test because the technology at issue was not present when the original cases were decided, and “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”<sup>140</sup>

The re-weighting should also be done in public schools for searches of a student’s cell phone. Currently, courts have allowed a warrantless search of a cell phone based on the original rule from *T.L.O.*<sup>141</sup> Following *Riley* (as well as other cases), this is not the correct process because the cell phone technology was not present when *T.L.O.* was decided.<sup>142</sup> The courts, because of the unique characteristics of cell phones, should review the underlying rationales for allowing warrantless searches in schools. A court facing this problem should weigh the governmental interests in protecting order and maintaining discipline in schools against a student’s reasonable expectation of privacy in her cell phone.<sup>143</sup> This is always the test conducted when a new problem faces the Court under the Fourth Amendment.<sup>144</sup>

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(1973) (“The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.”).

<sup>139</sup> *Riley*, 134 S. Ct. at 2484.

<sup>140</sup> *Id.* at 2482–84 (citation omitted) (“Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” (citation omitted)); *see also* *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (“In determining whether a particular governmental action violate[d] [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. . . . Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness . . . .” (citations omitted)).

<sup>141</sup> *See, e.g.*, *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 632 (6th Cir. 2013).

<sup>142</sup> Remember, the Court distinguished searches of other tangible items (which were present at the time the exception was made) from searches of cell phones (which were not present at the time the exception was made). *See Riley*, 134 S. Ct. at 2488–89.

<sup>143</sup> For an explanation of why the courts should only use these governmental interests, see Part II. Just as in the case of the search incident to arrest exception, it might not be that this is a part of the framework of analysis, but that there is no other governmental interests involved.

<sup>144</sup> *See, e.g.*, *Riley*, 134 S. Ct. at 2484; *Houghton*, 526 U.S. at 300; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (“[I]n a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard ‘is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’” (footnote omitted)). Because of *Riley*, a federal district court in Maryland, considering a warrantless search of electronics pursuant to the border exception, re-weighted the governmental interests against the person’s expectation of privacy in his electronics. *See United States v. Saboonchi*, 48 F. Supp. 3d 815 (D. Md. 2014). The case is discussed further in Part V, along with other cases that support the proposition.

In the most recent case involving a search of a student's cell phone, District Court Judge Gibney of the Eastern District of Virginia asked the parties to brief the court on the possible implications of *Riley*.<sup>145</sup> In that case, school officials received a tip that a student was smoking marijuana on school grounds.<sup>146</sup> The school officials called the student into the main office and subsequently searched his backpack, shoes, pockets, and cell phone.<sup>147</sup> Following *T.L.O.*, Judge Gibney found that the search of the backpack, shoes, and pockets was justified at its inception and reasonably related in scope to that justification because the school officials could have found drugs in these places.<sup>148</sup> When reviewing the search of the cell phone, the court found that it was not reasonably related in scope, because "the cell phone could not have contained drugs."<sup>149</sup>

Even though Judge Gibney asked the parties to write briefs to the court based on *Riley*, he did not refer to *Riley* in his opinion.<sup>150</sup> Judge Gibney even stated that the search could have been justified if there were more facts to support a cell phone search.<sup>151</sup> It is hard to determine why *Riley* did not factor into the judge's opinion, but the plaintiff's brief did not fully articulate an argument based on the impact of *Riley*—the brief argued that since the Fourth Amendment applies to both law enforcement officials and school officials, so should *Riley*.<sup>152</sup> In the brief for the school administrators, the lawyers argued that *Riley* does not apply because it is only applicable to law enforcement officers when a person is being searched incident to an arrest.<sup>153</sup> The defendant's brief conceded that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search," but they stated that the *T.L.O.* decision described what is reasonable in the school search

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<sup>145</sup> *Gallimore ex rel. W.S.G. v. Henrico Cty. Sch. Bd.*, 38 F. Supp. 3d 721 (E.D. Va. 2014); see also Mark Walsh, *Judge Rejects Administrators' Search of Student's Cellphone*, EDUC. WK.:SCH. L. (Sept. 12, 2014, 9:19 AM), [http://blogs.edweek.org/edweek/school\\_law/2014/09/judge\\_rejects\\_administrators\\_s.html](http://blogs.edweek.org/edweek/school_law/2014/09/judge_rejects_administrators_s.html).

<sup>146</sup> *Gallimore*, 38 F. Supp. 3d at 724.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 724–25.

<sup>149</sup> *Id.* at 725.

<sup>150</sup> See generally *id.*

<sup>151</sup> *Id.* at 725 n.4 ("The Court does not suggest that [the school official] did not have reasonable cause to check the cell phone's contents. For instance, she could have had reason to suspect that text messages or telephone calls stored in the phone would disclose a marijuana supplier or purchaser in the school. On the record before the Court, however, no such facts justify the search. She may, of course, assert additional facts in a motion for summary judgment, when the Court will view both sides of the case.").

<sup>152</sup> Plaintiff's Further Opposition to Defendant's Motion to Dismiss at 5–6, *Gallimore*, 38 F. Supp. 3d 721 (No. 3:14cv009). The plaintiff only argued about reasonableness, not how the balancing test factored into determining reasonableness. *Id.*

<sup>153</sup> Defendant's Further Support of Motion to Dismiss at 3, *Gallimore*, 38 F. Supp. 3d 721 (No. 3:14cv009).

context.<sup>154</sup> That statement is correct with respect to searches of tangible items in schools, but it fails to factor in the new technology. *Riley* and similar cases involving novel issues pertaining to technology in the context of the Fourth Amendment require a court to conduct a balancing test which is the “ultimate touchstone” of reasonableness under the Fourth Amendment.

*Riley* is not the first case dealing with a new technology and the Fourth Amendment.<sup>155</sup> In 2001, the Supreme Court recognized the need to evolve Fourth Amendment jurisprudence in the face of advancing technology.<sup>156</sup> In *Kyllo*, a police officer was outside the defendant’s home—the defendant was a suspected drug dealer—and conducted thermal imaging of the home.<sup>157</sup> The Court determined that this was a search, and therefore police needed a warrant.<sup>158</sup> Previous case law stated that police observing—from a public area—activity that is exposed to the public is not a search under the Fourth Amendment.<sup>159</sup> The heat emanating from the home was being exposed to the public, but the Court stated that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance[ment] of technology.”<sup>160</sup> The Court refused to apply former rules of the Fourth Amendment in the face of technology.<sup>161</sup>

In two additional cases, the Court reviewed established Fourth Amendment rules in the face of technology.<sup>162</sup> In *United States v. Jones*, the Court determined that when police place a GPS tracking device on a vehicle, it constitutes a search.<sup>163</sup> The Court previously held that the police could place a beeper on an effect (a barrel placed in the

<sup>154</sup> *Id.* at 3 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985)).

<sup>155</sup> The first two cases (*Kyllo* and *Jones*) deal with the definition of a “search” and its interplay with technology. The cases determine whether the police conduct amounts to a search under the Fourth Amendment. *Riley* and the school search cases are searches within the definition of the Fourth Amendment, but are based on exceptions to the warrant requirement. Compare *Kyllo v. United States*, 533 U.S. 27 (2001), and *United States v. Jones*, 132 S. Ct. 945 (2012), with *Riley v. California*, 134 S. Ct. 2473 (2014). The cases have no bearing on each other but are useful in looking to how the Court evolves Fourth Amendment jurisprudence in the face of technology. See also *infra* Part V (describing cases following *Riley*, which use the same framework).

<sup>156</sup> *Kyllo*, 533 U.S. at 33–34.

<sup>157</sup> *Id.* at 30. While sitting in his car, the detective scanned the house with the thermal imager. This process does not show what is happening inside the home; it only shows the heat emanating from the home. *Id.* at 29.

<sup>158</sup> *Id.* at 40.

<sup>159</sup> *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

<sup>160</sup> *Kyllo*, 533 U.S. at 33–34.

<sup>161</sup> *Id.* at 34.

<sup>162</sup> *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that the use of a GPS tracking device to monitor a vehicle is a search); *Maryland v. King*, 133 S. Ct. 1958 (2013) (holding that the use of a buccal swab to obtain a defendant’s DNA after an arrest for a serious offense is constitutional).

<sup>163</sup> 132 S. Ct. at 949.

back of defendant's car), but distinguished *Jones* on the fact of common law trespass.<sup>164</sup> In *Maryland v. King*, the Court determined that police could obtain an arrestee's DNA without a warrant.<sup>165</sup> In that case, the Court—once again—conducted a balancing test of the individual's privacy concerns versus the governmental interests in a warrantless search.<sup>166</sup> The outcome is different than in *Riley* because the governmental interest, trying to identify the arrestee, is still present.<sup>167</sup> Scholars suggest that the different outcomes are based on the level of information gleaned from the new technology compared to the original case<sup>168</sup>—just as *Riley* did when rejecting the argument that a search of a cell phone was similar to a search of any other tangible item present on an arrestee.<sup>169</sup>

These additional Fourth Amendment cases show the need to review original jurisprudence of the Fourth Amendment in the face of new technology. *Kyllo* and *Jones* demonstrated a new test for what constitutes a search because of the technology involved. *King* showed that *Riley* was not the first case when the Court conducted a re-weighing of the balancing test because of the technology involved.

#### *B. Governmental Interests for Warrantless Searches in Public Schools*

For public schools, the main reason for allowing a warrantless search is to protect the safety of schoolchildren and to maintain order and discipline in the schools.<sup>170</sup>

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<sup>164</sup> *Id.* at 952. In the previous case allowing this type of intrusion, the Court stated that placing a beeper in a barrel bought by the defendant was not a search because the beeper just revealed the places the defendant was traveling on public roads, thus exposing it to the public. *United States v. Knotts*, 460 U.S. 276, 284–85 (1983). The Court in *Jones* distinguished the two because *Jones* was already in possession of the car when police placed the beeper on it—thus a trespass violation—while *Knotts* did not own the item when the police placed the beeper in it. *Jones*, 132 S. Ct. at 952.

<sup>165</sup> 133 S. Ct. at 1980 (referring to the search incident to arrest exception).

<sup>166</sup> *Id.* at 1970. The Court held that the DNA profile was essential in determining who the arrestee is and offered no different information than fingerprints or photographs. *Id.* at 1980.

<sup>167</sup> *Id.*

<sup>168</sup> See Andrew Pincus, *Evolving Technology and the Fourth Amendment: The Implications of Riley v. California*, 2013–2014 CATO SUP. CT. REV. 307, 308, 320 (“The difference in outcome between [*King*] and *Kyllo* and *Jones* stems directly from the Court's analysis of the nature of the information gained through DNA analysis. Because the new technology was simply a more accurate means of ascertaining the arrestee's identity and prior criminal history—and did not reveal other types of personal information—the Court concluded that additional Fourth Amendment protection was not warranted.”). Alito—in his *Jones* opinion—possibly distinguished the beeper technology, which was unreliable, compared to the GPS tracker, which offered more reliable information as to the defendant's whereabouts, based on that reliability. *Id.* at 318.

<sup>169</sup> See *supra* Part III.

<sup>170</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985). Again, this Note is not suggesting that these are the only governmental interests for a warrantless search in a school, but it

The educational process would be severely disrupted if school administrators had to obtain search warrants to investigate every infraction of school policy or of criminal law.<sup>171</sup>

Cell phones cause massive disruptions in schools, not only to the students using them in the classroom, but also to surrounding students who may be distracted by the children using them. For instance, a child may be texting, surfing the web, playing a game, or cheating on an exam. It is not only distracting to that student, but also to another student who may witness the child on his or her phone. This may cause the other student to check his or her own phone or just become fixed on why the child is using his or her phone. If the teacher witnesses this activity, then the teacher has to pause instruction to deal with the distraction. The teacher could confiscate the phone or send the student to the main office—either way, class time has an unwanted disruption from the learning process that the students do not get back.

This disruption has caused many school districts to outlaw phones from being present in schools or some school districts to allow students to bring phones into the school and have the students store the phones in their lockers.<sup>172</sup> If the phone is seen by a teacher or administrator, the official will confiscate the phone because the teacher wants to rid the classroom of the unwanted distraction. Upon confiscation, however, the cell phone is no longer a disruption to the educational process. The cell phone *caused* a distraction but is no longer *causing* a distraction, and it can no longer disrupt order and delay the educational process. Teachers have the ability to maintain order without having to search the cell phone. There is no reason to search the cell phone but for the purpose of trying to determine what the student was doing on the cell phone. Determining if a student was playing a game on his cell phone versus surfing the web is irrelevant to the ability of a school to maintain order. The search simply does not fit under the *T.L.O.* justifications; all that is needed is the seizure of the cell phone.

In *Redding*, school officials received a report that a student had contraband (pills) on her body.<sup>173</sup> This report gives reasonable suspicion to search the student for the contraband. With cell phones, it is necessary to think of the cell phone as the contraband. There is nothing further to search when the contraband is found.

Consider the following illustration. Student X reports to the principal that two students are causing a disruption in class. Student X states that the first disruption is from Student A who is texting answers for the exam to other students. Student X

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seems that the balancing test does not look to new factors. Other governmental interests could be out there, but most would fall under the two original justifications. For example, in *Earls* and *Acton*, the Court stated that curbing the drug problem in schools is of utmost importance, but this can fall under the safety of schoolchildren justification. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>171</sup> See, e.g., *T.L.O.*, 469 U.S. at 340–41.

<sup>172</sup> See *supra* Part II.A.

<sup>173</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009).

states that the second disruption is from Student B who has paper copies of the answer key for the exam and is handing those copies out to students. Both disruptions prevent the teacher from maintaining order in the classroom, but both cannot be effectively prevented by one confiscation. The teacher can prevent Student A's disruption by confiscating the phone alone—Student A cannot text answers to the exam without her phone. If the teacher confiscates one answer key on Student B's desk, she must search the backpack or desk or person to see if there are other answer keys. Student B could have multiple answer keys and keep distributing after the initial confiscation; Student A cannot. The disruption in Student B's situation would not be stopped upon confiscation alone because of the possibility of additional copies of the exam answers elsewhere—there has to be an additional search to end the disruption.<sup>174</sup>

The other main justification for warrantless searches in schools is to protect the children.<sup>175</sup> This justification is similar to the justification in the search incident to arrest exception: conducting a warrantless search to protect the safety of the arresting officers.<sup>176</sup> Just as in *Riley*, digital data that is stored on a cell phone cannot be used to physically harm another student.<sup>177</sup>

There is an argument, however, that the pervasiveness of cyber-bullying is greatly affecting children today.<sup>178</sup> Cyber-bullying is a terrible thing, and school officials should do whatever is possible to stop it, but investigations of cyber-bullying should be left to law enforcement. School officials can be on the lookout to report cyber-bullying and to counsel affected students, but again there is no need for a school

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<sup>174</sup> It can be argued that both disruptions would cause an additional search. A person might argue that, in Student A's disruption, the teacher would want to search the phone to see the other students who received the answers from Student A. This would not follow because the teacher can only search for this particular student's misconduct. *See, e.g., Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622 (E.D. Pa. 2006) (holding that a teacher must have a reasonable suspicion based on misconduct to search a cellphone). It would be the same situation as that of Student B—the teacher could only search Student B—the teacher cannot search every other student in the classroom for the answer key absent individualized suspicion. Further, the *Riley* Court rejected a similar argument from the government; the government wanted the police to search phones if they knew there was evidence relevant to the crime the person was being arrested for on the phone. *See infra* Part IV.D.

<sup>175</sup> *See T.L.O.*, 469 U.S. at 339–40.

<sup>176</sup> *See Riley v. California*, 134 S. Ct. 2473, 2485 (2014).

<sup>177</sup> *Id.*

<sup>178</sup> *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641 (2011) (“Schoolyard bullying has been around for generations, but recently it has taken on a new, menacing face—cyberbullying. Now adolescents use technology to deliberately and repeatedly bully, harass, hassle, and threaten peers. . . . Adolescents use their cell phones to take photos anytime and anywhere (including bathrooms) and then instantaneously post them online for others to rate, tag, discuss, and pass along. Cyberbullying is one of the top challenges facing public schools.” (footnotes omitted)).

search. If there is a great deal of evidence that a student is a cyber-bully, police should obtain a warrant to search all of the student's electronic devices. Upon that report of cyber-bullying, school administrators can confiscate a student's electronic device, but there is not much else to be done.<sup>179</sup> The cyber-bully can no longer bully a student without his electronic devices, and, once the warrant is obtained, school officials can turn the devices over to police.

Both justifications for a warrantless search in a school are absent pertaining to cell phones. Just as in *Riley*, there could be circumstances that enhance the need for a warrantless search, but those instances are rare, and, in truly dire circumstances, the school administrators could search a phone under the exigent circumstances exception.<sup>180</sup>

### C. *The Student's Expectation of Privacy in a Cell Phone*

The next step in the inquiry is to view the student's expectation of privacy in his or her cell phone versus the diminished expectation of privacy a student has when bringing items onto school grounds. Similar to the diminished expectation of privacy of an arrestee, public school students have a lessened expectation of privacy because of their presence on school grounds.<sup>181</sup> The student, however, is not deprived of all protections against invasions of privacy.<sup>182</sup> The item that the student wants to protect against an invasion "must be one that society is 'prepared to recognize as legitimate.'"<sup>183</sup>

The Court just determined that society is prepared to recognize a legitimate privacy interest in one's cell phone based on the outcome in *Riley*.<sup>184</sup> Since that is the case, the arrestee and the student have the same *legitimate* privacy interest in their cell phones because in each case the phone can carry the same amount of personal data. A cell phone in the hands of an adult is no different from a cell phone in the hands of a teenager. Adults and schoolchildren could have different models of a

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<sup>179</sup> Upon a report of a cyber-bully, the report most likely would come from someone with knowledge. The person with knowledge could tell administrators everything that has happened and, if he or she is the person being bullied, could show the accounts of bullying on his or her own device. The problem could be resolved without the need of a search or a search warrant.

<sup>180</sup> See *Riley*, 134 S. Ct. at 2494.

<sup>181</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

<sup>182</sup> See *id.* at 337–38 ("We have recognized that even a limited search of the person is a substantial invasion of privacy. . . . A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." (footnote omitted) (citations omitted)).

<sup>183</sup> *Id.* at 338 (citation omitted).

<sup>184</sup> See *supra* Part III (emphasizing the fact that officers must get warrants to search cell phone data because this act constitutes a search under the Fourth Amendment).

phone (younger children could have a rudimentary functioning phone for emergency calls only), but the Court did not distinguish between phones in *Riley*.<sup>185</sup> There should be no difference between the personal information on an adult's phone compared to that of a child's.<sup>186</sup> Teenagers and adults use their phones in the same way, and both groups have access to the Internet and other "apps."<sup>187</sup>

Teenagers use their phones for a variety of reasons: to contact their parents, to speak with friends, to go online, or to post something to their social media accounts.<sup>188</sup> Phone conversations and text messages are obviously private, but society may not be prepared to accept that posts to Facebook are equally private. These problems are not unique to teenagers—many adults are online and can post the same materials as students to their social media accounts from their phones.<sup>189</sup> Further, in a study reviewing privacy settings on social media accounts, the researchers found a negligible difference between adult and teenager settings.<sup>190</sup>

In reviewing a person's expectation of privacy in his or her cell phone, the *Riley* Court focused on the "immense storage capacity" of cell phones.<sup>191</sup> The *Riley* Court stated that the internet browsing history and mobile applications on a person's phone

<sup>185</sup> *Riley*, 134 S. Ct. at 2484. In fact, in the two cases that were appealed to the Supreme Court for the search incident to arrest exception with respect to cell phones, the phones were not the same. Petitioner *Riley* was carrying a "smart phone." *Id.* at 2480. The companion case involved Respondent *Wurie*, who had an older-functioning "flip phone," which could not access the internet. *Id.* at 2481. The Court did not distinguish between the two types of phones and held that there must be a warrant for all phones. *Id.* at 2494–95.

<sup>186</sup> *See id.* at 2489 (emphasizing all that is stored on cell phones); *see also infra* note 187 and accompanying text. One can even argue that students have more private information on their phones than adults, but that should not be a factor in the analysis.

<sup>187</sup> Compare AMANDA LENHART, PEW RESEARCH CTR., TEENS, SMARTPHONES & TEXTING 10–18 (2012) [hereinafter LENHART, TEENS & SMARTPHONES], [http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP\\_Teens\\_Smartphones\\_and\\_Texting.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Teens_Smartphones_and_Texting.pdf) [<http://perma.cc/JL8B-Z3KL>] (detailing what teenagers do on cell phones), with AMANDA LENHART, PEW RESEARCH CTR., CELL PHONES AND AMERICAN ADULTS: THEY MAKE JUST AS MANY CALLS, BUT TEXT LESS OFTEN THAN TEENS 2–15 (2010), [http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP\\_Adults\\_Cellphones\\_Report\\_2010.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP_Adults_Cellphones_Report_2010.pdf) [<http://perma.cc/2CLB-4VG6>] (detailing what adults do on cell phones, which is similar to that of teenagers, but different amounts of usage).

<sup>188</sup> LENHART, TEENS & SMARTPHONES, *supra* note 187 (detailing teenagers' use of their phones on a daily basis, with the bulk of use in the form of text messages to friends).

<sup>189</sup> MAEVE DUGGAN & AARON SMITH, PEW RESEARCH CTR., SOCIAL MEDIA UPDATE 2013, at 1 (2013), [http://www.pewinternet.org/files/2013/12/PIP\\_Social-Networking-2013.pdf](http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf) [<http://perma.cc/4UAB-KMV6>] ("Some 73% of online adults now use a social networking site of some kind.").

<sup>190</sup> MARY MADDEN, PEW RES. CTR., PRIVACY MANAGEMENT ON SOCIAL MEDIA SITES 6 (2012), [http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP\\_Privacy\\_management\\_on\\_social\\_media\\_sites\\_022412.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_Privacy_management_on_social_media_sites_022412.pdf) [<http://perma.cc/88JX-BCHW>] ("[W]hen it comes to basic privacy settings, users of all ages are equally likely to choose a private, semi-private or public setting for their profile. There are no significant variations across age groups.").

<sup>191</sup> *Riley*, 134 S. Ct. at 2489.

heighten rather than diminish the expectation of privacy.<sup>192</sup> There is no mention of posts to social media sites or how they relate to privacy interests.<sup>193</sup> Teenagers may post more online from their phones than adults, but that should not matter when reviewing a person's expectation of privacy. Teenagers and adults alike should have the same expectation of privacy in social media posts from their cell phones. Moreover, *Riley* did not distinguish between juvenile and adult arrestees, so it is safe to assume that everyone has the same privacy interests in their phones.

When the exceptions to the warrant requirement of the Fourth Amendment were first expressed, the technology available in today's cell phone was "nearly inconceivable."<sup>194</sup> The information that is available on a cell phone accessible to governmental actors today versus the tangible items available a few decades ago "differ[s] in both a quantitative and a qualitative sense" and should heighten the privacy interests at stake.<sup>195</sup>

#### *D. The Outcome of the Balancing Test*

*Riley* calls for the weighing of privacy interests versus governmental interests for warrantless searches of cell phones, but the *Riley* Court explicitly stated that the ruling only applied to the search incident to arrest exception.<sup>196</sup> Just as in the search incident to arrest exception for a cell phone search, however, the governmental interests in a warrantless search of a student's cell phone are almost entirely absent.<sup>197</sup> Cell phones cannot injure other students, and the phone can cause no more disruptions once it has been taken from the student. After confiscation, there is no justification to search the cell phone. It is just a mere fishing expedition.

The government might argue that if school officials reasonably believe that evidence of a school violation or criminal activity is present on a student's phone, then the school officials should be able to search the phone. This is similar to the government's argument in *Riley*—that an officer should be allowed to search a cell phone for information relevant to the crime committed.<sup>198</sup> In *Riley*, the government proposed that a warrantless search of a cell phone should be allowed if it is reasonable to believe that evidence of the crime would be found on the phone.<sup>199</sup> The Court

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<sup>192</sup> *Id.* at 2490.

<sup>193</sup> *See generally id.* The Court acknowledges that a modern smartphone has these capabilities but does not factor that into their analysis. *Id.* at 2490.

<sup>194</sup> *Id.* at 2484. *Chimel* and *Robinson* were decided over a decade earlier than *T.L.O.*, but the *T.L.O.* case was decided on a review of similar tangible items that were present in *Robinson*. *New Jersey v. T.L.O.*, 469 U.S. 325, 338–39 (1985).

<sup>195</sup> *Riley*, 134 S. Ct. at 2489.

<sup>196</sup> *Id.* at 2489–90 n.1.

<sup>197</sup> *See supra* Part IV.B.

<sup>198</sup> *Riley*, 134 S. Ct. at 2492.

<sup>199</sup> *Id.*

rejected this argument because it would impose few meaningful restraints on an officer.<sup>200</sup> This standard should not change for school officials. It would be too hard for a school administrator to limit the search just for evidence of the particular violation that justified the search in the first place. If the courts do allow searches just for a particular crime, it will inevitably lead to some “rummaging.”<sup>201</sup> This would cause a great deal of litigation and undue burden on the justice system on where to draw a line.

Both exceptions to the warrant requirement allowed for warrantless searches because the particular person being searched has a diminished expectation of privacy in that particular setting.<sup>202</sup> There is no literature distinguishing between the search warrant exceptions—as to if one exception arises to a more diminished expectation of privacy compared to another.<sup>203</sup> Moreover, there has been no court opinion on the issue. It should follow that the person’s expectation of privacy is diminished by the same amount in each of the two particular settings (search incident to arrest and school search) pertaining to the exceptions to the warrant requirement. If that is true—and the fact that an arrestee and student have the same expectation of privacy in their cell phones—then the expectation of privacy of a student’s cell phone is greater than the diminished expectation of privacy of that student on school grounds combined with the fact that the original justifications are absent. The expectation of privacy of a cell phone should not change based on the settings.

The heightened privacy interest in the data on a cell phone compels a court to conclude that the privacy interests outweigh the governmental concerns, which are absent in this instance.<sup>204</sup> There may be some truly exceptional circumstances where a warrantless search is necessary, but just like police officers in *Riley*, school officials can rely on the exigent circumstances exception.

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<sup>200</sup> *Id.* (“The sources of potential pertinent information are virtually unlimited, so applying the *Gant* standard to cell phones would in effect give ‘police officers unbridled discretion to rummage at will among a person’s private effects.’” (citation omitted)).

<sup>201</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 331 (1985).

<sup>202</sup> *See supra* Part I.B; *see also supra* Part III.

<sup>203</sup> Both exceptions limited the governmental actors to some test of reasonableness when conducting a warrantless search, but for the border exception, there are few limits for searches. *See United States v. Saboonchi*, 48 F. Supp. 3d 815, 817–18 (D. Md. 2014) (highlighting the fact that routine border searches are permissible without even reasonable suspicion). Therefore, one can argue that the border involves a greater diminution of privacy than the search incident to arrest and school exception. There is no corresponding differentiation between the search incident to arrest exception and the school search exception. Further, courts in the border exception context have applied *Riley*. *See infra* Part V.

<sup>204</sup> In *King*, which re-weighed the search incident to arrest exception pursuant to a new technology (DNA), the Court found that the governmental interests outweighed the privacy concerns. *Maryland v. King*, 133 S. Ct. 1958, 1976 (2013). The *King* Court stated that the police needed to determine who the arrestee is (governmental interest), and that was not a greater intrusion than fingerprinting. *Id.* *Riley* and the school search cases of cell phones have a greater privacy interest and a reduced governmental interest compared to *King*.

V. RECENT RULINGS PERTAINING TO TECHNOLOGICAL ADVANCES IN  
OTHER CATEGORICAL EXCEPTIONS TO THE WARRANT REQUIREMENT  
ARE CONSISTENT WITH THIS NOTE

Following *Riley*, courts have been constantly reviewing technological advances with respect to other areas of the Fourth Amendment. There are multiple categorical exceptions to the warrant requirement, and many cases are coming to the surface that are similar to *Riley*. Two particular exceptions are noted in this Section: the border search exception and the warrantless search of a parolee.

Historically, the border exception to the warrant requirement has allowed border searches without any probable cause or reasonable suspicion.<sup>205</sup> A warrantless search at the border is justified because the country wants to patrol its territories and to protect national security.<sup>206</sup> A recent Ninth Circuit ruling held that searches of electronic devices at the border now have to be conducted with reasonable suspicion as compared to the suspicionless searches that the border patrol has historically conducted.<sup>207</sup> In contrast, a federal district court upheld a warrantless search of a cell phone at the border, despite *Riley*, in *United States v. Saboonchi*.<sup>208</sup>

The court in *Saboonchi* reviewed the case, a cell phone search at the border, again following *Riley* on insistence by the defendant.<sup>209</sup> Judge Grimm first distinguished the search incident to arrest doctrine from the border exception doctrine because the two were based on different justifications.<sup>210</sup> Judge Grimm held that the original purpose for the border exception—to protect national security—is still present in the face of today’s technology.<sup>211</sup> Judge Grimm found that the original purpose

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<sup>205</sup> See *United States v. Ramsey*, 431 U.S. 606, 617 (1977) (detailing the history of the common law and Fourth Amendment with respect to searches at the border).

<sup>206</sup> See *id.* at 619 (“Border searches . . . have been considered to be ‘reasonable’ by the single fact that the person or item in question had entered into our country from outside.”); see also Samuel A. Townsend, Note, *Laptop Searches at the Border and United States v. Cotterman*, 94 B.U. L. REV. 1745, 1753 (2014) (“[P]roponents of the border search exception argue that it plays a key role in protecting governmental interests in customs, immigration, and national security.”).

<sup>207</sup> *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (finding that officers had reasonable suspicion to search a man when he was stopped at the border because he had a seventeen-year-old conviction for child molestation and the border patrol agents conducted a thorough forensic examination of his laptop).

<sup>208</sup> *United States v. Saboonchi*, 48 F. Supp. 3d 815, 819 (D. Md. 2014).

<sup>209</sup> *Id.* at 816.

<sup>210</sup> *Id.* at 817–18. The search incident to arrest exception’s justifications are protecting evidence and the arresting officer; in contrast, the border exception’s justification is protecting national security. *Id.*

<sup>211</sup> *Id.* at 819 (“This [argument] might have merit if the search incident to arrest and border search exceptions had the same purpose . . . . But that is not the case.”). This Note assumes that Judge Grimm did not mean that the two exceptions had to have the same purpose; rather, he meant that the argument might have merit if the two exceptions both had similar justifications that were absent in the context of technology.

still outweighs the expectation of privacy that a person who is crossing the border has in a cell phone.<sup>212</sup>

In a similar case out of a federal court in the District of Columbia, the court reviewed a search of a laptop at the border.<sup>213</sup> The court stated, “following the approach utilized in *Riley*,” that it must conduct a balancing test.<sup>214</sup> “As part of that exercise, the Court should, as the Supreme Court did [in *Riley*], consider whether the application of the recognized warrant exception to this particular category of personal property would ‘untether the rule from the justifications’ underlying the exception.”<sup>215</sup> The court then conducted a similar balancing test as the one urged in this Note.<sup>216</sup>

In another area of the Fourth Amendment, a warrantless search of a parolee is allowed because the state has a compelling interest in reducing recidivism and promoting reintegration into society.<sup>217</sup> Federal courts have reviewed this exception following *Riley*, regarding warrantless searches of parolees’ electronic devices.<sup>218</sup> In *Johnson*, the court reviewed the original justifications for the parole exception, and one justification—preventing the disposal of evidence—was present that was also present in *Riley*.<sup>219</sup> One justification being similar, however, “was insufficient to overcome” the other primary justifications that are still present.<sup>220</sup> The parolee’s argument erred in “ignor[ing] the other bases for the parole search exception,” and, with the justifications still present, the test fails.<sup>221</sup>

These cases are relevant because they implicate other search warrant exceptions with respect to technology. Before *Riley*, the *Cotterman* court recognized a heightened expectation of privacy in electronic devices in the context of the border search exception to the warrant requirement.<sup>222</sup> Further, the *Saboonchi* case exemplifies the need for courts to reconsider the search warrant exceptions, pursuant to *Riley*, to see if the original justifications of the exception are still present.<sup>223</sup> After this re-examination, courts are required to weigh those governmental interests versus the individual’s

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<sup>212</sup> *Id.* Judge Grimm even stated that “[t]here is no question in my mind that the forensic search of Saboonchi’s Devices was *more* invasive than the conventional searches found to be violations in *Riley*,” but he still upheld the warrantless search. *Id.*

<sup>213</sup> *United States v. Kim*, No. 13-0100, 2015 WL 2148070 (D.D.C. May 8, 2015) (noting that the court eventually suppressed the evidence from the search because the court believed the search was not conducted at the border). The analysis is useful for this Note and advocates the same position. *Id.* at \*22.

<sup>214</sup> *Id.* at \*19.

<sup>215</sup> *Id.* (citation omitted).

<sup>216</sup> *Id.*

<sup>217</sup> *Samson v. California*, 547 U.S. 843, 844 (2006).

<sup>218</sup> *See, e.g., United States v. Johnson*, No. 14-cr-00412-TEH, 2015 WL 4776096, at \*3 (N.D. Cal. Aug. 13, 2015).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *United States v. Cotterman*, 709 F.3d 952, 965 (9th Cir. 2013).

<sup>223</sup> *United States v. Saboonchi*, 48 F. Supp. 3d 815, 817–18 (D. Md. 2014).

privacy interests. That is exactly what was done in the previous cases, and, even though the cases resulted in different outcomes, they are consistent. *Saboonchi* and *Kim* demonstrated that the original justification for the border search exception is still present in the face of technology. *Johnson* demonstrated that, even though one justification for the parole search exception was eliminated, that did not outweigh the other justifications that were still present. In contrast, the original justifications for the search warrant exception in public schools are not present in the face of technology.

#### VI. POLICIES SCHOOL DISTRICTS SHOULD IMPLEMENT

School administrators currently face the problem of determining when they are justified to conduct a warrantless search of a student. This problem has often led to civil cases by a student claiming a violation of her constitutional rights.<sup>224</sup> School districts do not want to be subject to these suits, but administrators want to effectively deal with problems when they arise. It is difficult to determine which policies to implement, especially with the emergence of new technologies. *Riley* demonstrates that technological advances are unique and often require different analysis under the law.<sup>225</sup> How then should school districts protect themselves from suits while maintaining order in their schools?

First, school districts should ban the use of cell phones in schools and request students to leave their phones in lockers, book bags, or somewhere out of sight. This will hopefully reduce the use of cell phones in schools, but inevitably some students will disregard the rules and distract other students. All school officials should have the power to confiscate a phone upon seeing the phone.

Second, school districts should increase the punishment for the use of a phone in school. If students face greater discipline, the students will shy away from using the phone during school hours. Again, this will not eliminate the problem, but hopefully curtail it.

Next, school districts should allow students to use phones during class breaks and lunchtime. It is much easier to hold off on the use of a phone for an hour than for the whole day. If students were allowed to access their phones intermittently, then students might be able to wait to use their phone until the break. Moreover, when a student is using his or her phone in-between classes or at lunchtime, there is no real disruption to the learning process or possibility of a student cheating on an exam. School districts, therefore, should confiscate phones only when a student is caught with the phone during class time.

After confiscation, however, the school districts should ban officials from searching the phone. Confiscation prevents further distraction to students and teachers, and often teachers have no reason to search or to believe illegal activity is evidenced on the phone. Similar to the search incident to arrest exception, if the phone is confiscated,

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<sup>224</sup> See, e.g., *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622 (E.D. Pa. 2006).

<sup>225</sup> See *supra* Part III.

any evidence on the phone will be present if and when a search warrant is obtained. If there are truly exceptional circumstances that require swift action to protect students or teachers, school officials can rely on the exigent circumstances exception.<sup>226</sup>

This policy will allow schools to maintain order and not violate a student's constitutional protections. One of the original *T.L.O.* justifications is adhered to, and the other justification—protecting the safety of students—is maintained under the exigent circumstances exception. School districts will also be immune from unwanted lawsuits if the schools follow the policy. Without this policy in place, school officials will continue to search cell phones with little to no suspicion of wrong-doing other than that the individual violated a policy by using the phone or having it out. The absence of a well-thought-out policy could lead to abuse by school officials and/or police. This Note advocates a policy that hopefully will reduce the improper use of cell phones in schools, but also set a bright-line rule for school officials.

#### CONCLUSION

Almost all of the people in the United States have a cell phone. Parents acquire cell phones for their children at younger and younger ages each year.<sup>227</sup> One of the main reasons for children to possess a cell phone is for the child to communicate with his or her parents when he or she is away from home.<sup>228</sup> Children are most often away from home when they are in school, and parents often desire for their children to take their phones with them in case of emergencies.<sup>229</sup> A phone is not a necessity in schools, but it allows children to communicate with their parents after school if, for example, a student just finished an extracurricular activity and needs for a parent to come pick him or her up. This, however, is not the reason why most students bring their cell phones to school. Teenagers often communicate with each other during the school day or play games when they get bored.<sup>230</sup>

This causes a great distraction in school systems today, and school districts have been working on various policies to try to restrict the use of phones in schools.<sup>231</sup> Many students disregard the rules, and teachers have to confiscate the phones. School officials may believe that a student has evidence on the phone of violations of school policies or of illegal criminal conduct. Teachers currently search phones based on *T.L.O.*'s relaxation of the warrant requirement on school grounds.<sup>232</sup>

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<sup>226</sup> If an exigent circumstance presents itself in the classroom, the teacher should first contact the school principal and police before trying to determine the extent of the exigency by searching the phone.

<sup>227</sup> See *supra* Part II.A.

<sup>228</sup> See *supra* Part II.A.

<sup>229</sup> See *supra* Part II.A.

<sup>230</sup> See *supra* Part II.A.

<sup>231</sup> See *supra* Part II.A.

<sup>232</sup> See *supra* Part II.B.

Cell phones, however, are different from other tangible items that were at stake in *T.L.O.* The Court may not have envisioned this problem when deciding *T.L.O.* and may not have wished the exception to extend to technological advances. The Supreme Court recently recognized that some technology is separate from other personal items that a person might carry in *Riley*.<sup>233</sup> *Riley* held that the search incident to arrest exception does not apply to cell phones and that police must obtain a warrant to search an arrestee's cell phone.<sup>234</sup> The Court made this determination because the original justifications for the search incident to arrest exception were not present in the context of cell phones.<sup>235</sup> The Court reviewed the original justifications because the Court stated that is what is required when the Court faces a new challenge that was not present when the original cases were determined.<sup>236</sup> The "ultimate touchstone" of the Fourth Amendment is reasonableness, and courts do not have to blindly follow precedent that was contrived in a time when cell phones were not present. The Court then conducted a balancing test in which the expectation of privacy of an arrestee's cell phone outweighed the governmental concern for a warrantless search.<sup>237</sup>

Just as in *Riley*, the courts should review the original justifications of a warrantless search in a school and see if they apply to cell phones. *T.L.O.* justified warrantless searches of a student's belongings in the school context in order for schools to maintain order and to protect students.<sup>238</sup> Similar to *Riley*, *T.L.O.*'s justifications disappear with respect to cell phones.<sup>239</sup> Cell phones cannot hurt other students, and schools can maintain order by confiscating the cell phone.<sup>240</sup> A cell phone in the teacher's hands can no longer distract students, and the teachers often do not have a reason to search the phone.<sup>241</sup> Warrantless searches of a cell phone are unreasonable almost in every context because of the reasonable expectation of privacy a student has in the data on her phone.<sup>242</sup> This expectation of privacy outweighs the governmental concerns that are absent in the context of cell phones in schools.<sup>243</sup>

School districts should implement policies banning cell phones from classrooms and should confiscate phones that are in violation of this policy.<sup>244</sup> Upon confiscation, however, school districts should prevent officials from searching a student's cell phone without a warrant. This is reasonable.

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<sup>233</sup> See *supra* Part III.

<sup>234</sup> See *supra* Part III.

<sup>235</sup> See *supra* Part III.

<sup>236</sup> See *supra* Part III.

<sup>237</sup> See *supra* Part III.

<sup>238</sup> See *supra* Part I.B.

<sup>239</sup> See *supra* Part IV.B.

<sup>240</sup> See *supra* Part IV.B.

<sup>241</sup> See *supra* Part IV.B.

<sup>242</sup> See *supra* Part IV.C.

<sup>243</sup> See *supra* Part IV.D.

<sup>244</sup> See *supra* Part VI.

