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# Preventing Parkland: A Workable Fourth Amendment Standard for Searching Juveniles' Smartphones Amid School Threats in a Post-Parkland World

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# PREVENTING PARKLAND: A WORKABLE FOURTH AMENDMENT STANDARD FOR SEARCHING JUVENILES' SMARTPHONES AMID SCHOOL THREATS IN A POST-PARKLAND WORLD

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ABSTRACT

On February 14, 2018, Nikolas Cruz, age nineteen, went to the Marjory Stoneman Douglas High School campus in Parkland, Florida, armed with an AR-15 rifle.[1] He opened fire, killing seventeen students.[2] His unspeakable actions culminated in an attack, which eclipsed the 1999 Columbine High School Massacre to become the deadliest school shooting at a high school in American history.[3] In the immediate months following this still-recent tragedy, schools across the United States were flooded with "copycat" threats of violence.[4] Terroristic threat charges levied against juveniles have likewise skyrocketed.[5]

These recent events have resulted in new and burdensome pressures for schools and juveniles alike. In an age in which smart phones and social media are ubiquitous hallmarks of American youth culture, saturating nearly every grade level and socioeconomic stratum, schools must respond to the contemporary and evolving challenge

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[1] *America's Deadliest Mass Shootings Over Last 2 Years*, POLITICO (Aug. 4, 2019, 11:42 AM), https://www.politico.com/story/2019/08/04/deadly-shootings-1445953 [https://perma.cc/KYT9-L9A4]; Elizabeth Chuck et al., *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC NEWS (Feb. 15, 2018, 10:20 AM), https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101 [https://perma.cc/JYE5-ZP82].

[2] *America's Deadliest Shootings Over Last 2 Years*, *supra* note 1.

[3] *Id.*

[4] Tawnell D. Hobbs, *Schools Take Zero-Tolerance Approach to Threats After Parkland Shooting*, WALL STREET J. (Apr. 22, 2018, 7:00 AM), https://www.wsj.com/articles/schools-take-zero-tolerance-approach-to-threats-after-parkland-shooting-1524394800 [https://perma.cc/XP4K-ZABX].

[5] *See id.* (indicating there were 350 charges nationwide during the first two months after the Parkland shootings).

of maintaining school safety amid threats prepared and delivered on smartphone-accessible apps like Twitter, Instagram, and Snapchat. Law enforcement officials, at the behest of school officials whose chief concern is to prevent the next "Parkland," appear to be addressing this issue aggressively and charging juveniles with more crimes than before.[6] Whereas a search of a student's locker, backpack, or notebook used to suffice, she now carries a smartphone capable of storing, transmitting, and accessing private information and ideas, which exist far beyond the physical form of the device itself. Even when students' Fourth Amendment rights have been curtailed by a warrantless search of her belongings, rightly or wrongly, courts have been unwilling to tip the scales against school administrators[7]—but smartphones complicate the matter.

This Comment promotes a compromise aimed at addressing two timely and related concerns: protecting students' safety and defending students' privacy. First, the Supreme Court should enunciate a new standard for searching students' smartphones on school grounds. A new standard will provide clarity for school officials and students alike and will illuminate acceptable circumstances that warrant abridging students' Fourth Amendment rights in the name of keeping schools safe. It will also make clear when searches of students' smartphones become unreasonable and violative of the Constitution. Second, this Comment suggests one policy schools should adopt to best maintain school safety, curb threats, and protect students' Fourth Amendment rights with respect to their smartphones. These proposals taken together will assist schools in addressing and curtailing smartphone-generated threats directed at students, faculty, and administrators, while simultaneously reducing the number of charges levied against juveniles in a post-Parkland America.



[6] *See, e.g.*, Julie Bosman, *After Parkland, a Flood of New Threats, Tips and False Alarms*, N.Y. TIMES (Feb. 25, 2018), https://www.nytimes.com/2018/02/05/us/threats-schools-shootings.html [https://nytimes/2s0kBPm] (detailing an increase in police actions and arrests shortly after the Parkland shootings).

[7] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1984) (allowing for special exceptions to Fourth Amendment searches of juveniles in school settings).

## INTRODUCTION

Nestled between Stonehill College, a private Catholic institution,[7] and suburban downtown Brockton, Massachusetts, population 100,000, Brockton High School (BHS) rests in one of the Best Communities for Young People (2010, 2008, and 2005) and belongs to an award-winning public school system that has twice been named one of America's Best High Schools by *U.S. News & World Report*.[8] Brockton High School serves approximately 4,300 students in a purportedly "safe, supportive environment that provides . . . the knowledge, skills, values and behaviors necessary to become responsible and productive members of a diverse society."[9]

Nearly 1,500 miles away, Marjory Stoneman Douglas High School sits somewhere between the Everglades and downtown Parkland, Florida, a woodsy satellite of Boca Raton with approximately 25,000 residents.[10] Marjory Stoneman Douglas High School serves approximately 3,000 students[11] with the aim of maintaining a "safe,

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[7] *About Stonehill & Our Catholic Mission*, STONEHILL, https://web.archive.org/web/20080405001716/http://www.stonehill.edu/about-stonehill-our-mission/ [https://perma.cc/E6ZY-MZ3F] (last visited Apr. 14, 2020).

[8] *About Brockton*, CITY BROCKTON, MASS., https://web.archive.org/web/20181009130904/www.brockton.ma.us/Community/AboutBrockton.aspx [https://perma.cc/YJG8-ESJS] (last visited Apr. 14, 2020).

[9] *About Us*, BROCKTON PUB. SCHS., https://www.bpsma.org/schools/brockton-high-school/about-us [https://perma.cc/W3EF-VZQN] (last visited Apr. 14, 2020).

[10] *See About Us*, PARKLAND, FLA., https://www.cityofparkland.org/59/About-Us [https://perma.cc/QCZ8-X55W] (last visited Apr. 14, 2020); Driving Directions from Brockton High School to Marjory Stoneman Douglas High School, GOOGLE MAPS, http://maps.google.com [https://perma.cc/CAA6-YEEP] (follow "Directions" hyperlink; then search starting point field for "Brockton High School" and search destination field for "Marjory Stoneman Douglas High School").

[11] Vanessa Romo & Greg Allen, *1st Day of School at Marjory Stoneman Douglas High, 6 Months After Mass Shooting*, NPR (Aug. 15, 2018, 9:51 PM), https://www.npr.org/2018

secure, and engaging environment where students are encouraged to think critically and communicate and collaborate effectively ensuring they are prepared for life after high school."[12] In the 2018–2019 school year, the school pursued these goals from thirty-four portable classrooms located adjacent to the old, sealed three-story building, preserved by the State Attorney's Office as evidence of the tragedy that occurred there on February 14, 2018.[13] Prior to that date, Brockton High School and Marjory Stoneman Douglas High School would have seemed nearly indistinguishable.

But just five days into the 2018–2019 school year at Brockton High School, school administrators, teachers, students, and parents had cause to fear that they would be the next Parkland.[14] The BHS administration received reports from several students that they had observed a threat of gun violence posted on social media.[15] The threat was communicated via Snapchat, a popular messaging app for smartphones, and suggested a gunman would target students during "fourth block."[16] Principal Clifford Murray sprang into action, alerting parents in a robocall about the possible threat to their children's safety.[17] BHS administrators assured parents that the faculty and administration had taken "all the necessary precautions," including requesting increased police presence on campus and arming each classroom with emergency kits: five-gallon buckets containing a wooden doorstop, a hammer, a fifty-foot length of rope, and duct tape.[18] "It's a sad comment on the times when someone can perpetrate something like this and try to affect the school day of thousands of students," Mr. Murray said before reassuring parents that the school was prepared to carry on regular business.[19]

The Brockton High School administration's resolve not to become the next Stoneman Douglas was reflected in its swift response.[20] Despite the school's apparent preparedness, however, it is difficult to imagine that Brockton administrators could have anticipated that such a threat would originate nearly 1,000 miles away at Brunswick High School in Brunswick, Georgia.[21]

Shortly after issuing the threatening message, which students shared and reshared until it reached the suburban Boston's "BHS" from south Georgia's "BHS," law

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/08/15/639081757/1st-day-of-school-at-marjory-stoneman-douglas-high-6-months-after-mass-shooting [https://n.pr/2MSYa1n].

[12] *Mission Statement*, STONEMAN DOUGLAS HIGH SCH., https://www.browardschools.com/Page/16940 [https://perma.cc/M8CA-QKHX] (last visited Apr. 14, 2020).

[13] *See* Romo & Allen, *supra* note 11.

[14] *See* Cody Shepard & Joe Pelletier, *Brockton High School's False Alarm Originated in Georgia, Officials Say*, WICKED LOC.: BROCKTON (Sept. 11, 2018, 9:39 AM), http://brockton.wickedlocal.com/news/20180911/brockton-high-schools-false-alarm-originated-in-georgia-officials-say [https://perma.cc/H2QB-2NRF].

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See id.*

[21] *See id.*

enforcement arrested a sixteen-year-old Brunswick High School student in connection with the scare.[22] The student used the AirDrop function on an iPhone to send his message instantaneously onward, and it was shared multiple times until it landed at the wrong "BHS."[23] The message had drawn an immediate response from local, state, and federal law enforcement officials in Georgia who quickly deemed the threat "empty,"[24] but the damage had already been done.[25] In addition to the disturbance at Brockton High School, Brunswick–area parents flocked to Brunswick High School en masse to retrieve their children.[26] Approximately thirty-six percent of students at Brunswick High School were absent the following day.[27] Law enforcement charged the student with terroristic threats and disrupting a public school as a result of the disorder his message wrought.[28]

In an era of instantaneous, smartphone-driven communication among students, how was Brockton High School supposed to know the threat was a sham? How should Brunswick High School have responded to identify the perpetrator of the threat?

Smartphones are pervasive fixtures in American schools and bring new challenges to the classroom. According to a 2015 survey, the majority of elementary, middle, and high school students use smartphones regularly.[29] In fact, one look around a law school classroom while the professor has her head down—perhaps making use of her own smartphone—demonstrates that this phenomenon carries into professional school, too.[30] This subject has led some to dub smartphones in school "the most vexing issue of the digital age for teachers and administrators."[31]

And the issue expands far beyond a lack of student attention in the classroom to the ability to perpetrate serious and disruptive crimes locally or some distance away,

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[22] *See id.*

[23] *See* Shepard & Pelletier, *supra* note 14; *see also* Larry Hobbs, *Police Presence Up, Attendance Down at BHS Tuesday*, BRUNSWICK NEWS (Sept. 12, 2018), https://thebrunswicknews.com/news/local_news/police-presence-up-attendance-down-at-bhs-tuesday/article_b7093d8e-1355-5d7d-b0ee-39b2354c3c84.html [https://perma.cc/MF34-HQWS] (explaining how the message was also misinterpreted as a threat against Bowmanville High School in Ontario, Canada).

[24] *See* Shepard & Pelletier, *supra* note 14.

[25] *See id.*

[26] *See* Hobbs, *supra* note 23.

[27] *Id.*

[28] *See* Shepard & Pelletier, *supra* note 14.

[29] Harris Poll, *Pearson Student Mobile Device Survey 2015: National Report: Students in Grades 4–12*, PEARSON, https://www.pearsoned.com/wp-content/uploads/2015-Pearson-Student-Mobile-Device-Survey-Grades-4-12.pdf [https://perma.cc/RJ6W-P8GB].

[30] This proposition is based on personal anecdotal experience at Emory University School of Law, a "top-ranked law school" with a "rigorous curriculum attuned to the needs of the legal profession." *About Emory Law*, EMORY U. SCH. L., http://law.emory.edu/about/index.html [https://perma.cc/9QE7-KZRU] (last visited Apr. 14, 2020).

[31] Linda Matchan, *Schools Seek Balance for Cellphones in Class: Are They a Teaching Tool or a Distraction?*, BOS. GLOBE (June 16, 2015), https://www.bostonglobe.com/lifestyle/style/2015/06/15/cellphones-school-teaching-tool-distraction/OzHjXyL7VVIXV1AEkeYtiJ/story.html [https://perma.cc/3EUG-XE39].

as in the BHS example, in which case charges may be warranted. Recent data demonstrate that teens almost always have smartphone access, regardless of income level,[32] and data show threats against schools are delivered most often through social media.[33] Meanwhile, following the Parkland shooting and amid a flood of "copycat" threats, tips, and false alarms, school and law enforcement officials across the country have resorted to charging students more frequently with terroristic threats.[34] The increase in smartphone use coupled with the uptick in terroristic threats charges being levied for threats made via social media beg a closer look at how to balance school safety concerns with students' Fourth Amendment privacy rights.

This Comment argues that the United States Supreme Court should articulate a more appropriate standard for searching juveniles' smartphones in the school context, which this Comment calls "reasonable suspicion-plus."[35] This proposal will resolve an important discrepancy between two landmark Supreme Court cases, *New Jersey v. T.L.O.*[36] and *Riley v. California*,[37] that bear on a modern reality—that students carry smartphones[38]—and require reconciliation. Recognizing that protecting schools is an important interest, this Comment recommends that the scope of searches be tailored to the particularity with which school officials allege a violation of school policy, and that school officials memorialize the reason for and scope of their search in order to prevent unreasonable violations of Students' Fourth Amendment rights.[39] It also endorses treating school resource officers like law enforcement for the purposes of searching students' smartphones and argues that school officials should likewise require probable cause to search students' phones when acting in concert with law enforcement.[40] Finally, this Comment promotes one focused, research-based policy that can help curb threats and eliminate charges.[41]

Part I of this Comment shows the upsurge in terroristic threats charges levied against juveniles across the country in the wake of the Marjory Stoneman Douglas High School shooting in Parkland, Florida.[42] In addition to identifying and defining

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[32] *See* Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/ [https://perma.cc/7VEW-5W83].

[33] Amy Klinger & Amanda Klinger, *Violent Threats and Incidents in Schools: An Analysis of the 2017–2018 School Year*, EDUCATOR'S SCH. SAFETY NETWORK, https://static1.squarespace.com/static/55674542e4b074aad07152ba/t/5b685da703ce64d6290738f5/1533566404851/www.eSchoolSafety.org_Violent+threats+and+incidents+in+schools+report+2017-2018.pdf [https://perma.cc/EQL8-XH7L] (last visited Apr. 14, 2020).

[34] *See* Bosman, *supra* note 6.

[35] *See infra* notes 357–58 and accompanying text.

[36] 469 U.S. 325 (1985).

[37] 573 U.S. 373 (2014).

[38] *See infra* Part II.

[39] *See infra* Conclusion.

[40] *See infra* Conclusion.

[41] *See infra* Conclusion.

[42] *See infra* Part I.

this trend, it discusses the tenuous nature of the relationship between students and school administrators, the increased referral of student misbehavior by school officials to law enforcement, the unique role of school resource officers in school discipline, and an explanation of how these issues contribute to the school-to-prison pipeline, including information about the long-term effects of incarceration on juveniles.[43]

After pinpointing this issue, Part II discusses the ubiquitous nature of cell phones and their role in students' lives, the classroom, and school discipline. This Part pays special attention to smartphones' many functions and their implications.[44] In addition, this Part highlights how smartphones have affected school discipline, feeding the school-to-prison pipeline.[45]

Part III lays out the history of the Fourth Amendment and juveniles' privacy rights in the school context, focusing on the evolution of the Fourth Amendment, the current state of school search jurisprudence, and how the Fourth Amendment applies to smartphones.[46] It also highlights issues that exist at the intersection of the Fourth Amendment, cell phones, and schools, and are ripe for Supreme Court consideration.[47]

Finally, Part IV shows how the Supreme Court has lapsed in articulating a workable, modern standard for searching students' phones at school.[48] In doing so, it argues that violations of students' Fourth Amendment privacy rights go unchecked.[49] Because smartphones are so prevalent, and because they have changed the landscape of school discipline, this Part suggests a new standard, "reasonable suspicion-plus," whereby school officials would document their reasoning and scope if they decide to search a student's smartphone.[50] This new standard, as well as a clear delineation between school officials and law enforcement for Fourth Amendment purposes, would work to serve the competing interests of school safety and order, and student privacy.[51] In addition, this Part offers one policy recommendation that school administrators could implement to protect their students and their students' rights.[52]

## I. THREATS IN SCHOOLS POST-PARKLAND: THE PROBLEM, RESPONSE, AND RESULTS

Since the April 20, 1999, Columbine shooting, and with renewed dynamism following the December 14, 2012, tragedy at Sandy Hook Elementary School in Newtown, Connecticut, many Americans have called for increased safety measures at schools,[53] including the presence of armed law enforcement officers in our

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[43] *See infra* Part I.
[44] *See infra* Part II.
[45] *See infra* Part II.
[46] *See infra* Part III.
[47] *See infra* Part III.
[48] *See infra* Part IV.
[49] *See infra* Part IV.
[50] *See infra* Part IV.
[51] *See infra* Part IV.
[52] *See infra* Part IV.
[53] *See, e.g.*, David Nakamura & Tom Hamburger, *Put Armed Police in Every School,*

schools.[54] Recent studies demonstrate that police presence in schools has increased since 2000, just after Columbine, corresponding with escalations in U.S. Department of Justice funding in the same period of time.[55] Despite criticism from some groups that increased police presence is an ineffective school safety measure,[56] the federal government and several state assemblies authorized legislation aimed at hiring law enforcement officers, installing greater security measures in schools, and improving school safety,[57] the effects of which are borne out in the below data.

Increased police presence in schools is not resulting in fewer charges against juveniles; rather, schools are increasingly relying on law enforcement to maintain order.[58] School administrators routinely refer students to law enforcement for misconduct that occurs at school, resulting in a growing number of juveniles having brushes with the criminal justice system and juvenile courts.[59] In particular, school

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*NRA Urges*, WASH. POST (Dec. 21, 2012), https://www.washingtonpost.com/politics/put-armed-police-officers-in-every-school-nra-head-says/2012/12/21/9ac7d4ae-4b8b-11e2-9a42-d1ce6d0ed278_story.html [https://perma.cc/88Q3-PTXJ] (noting that Wayne LaPierre, Executive Vice President and CEO of the National Rifle Association, has proposed putting an armed police officer in every school in the country as a way to prevent mass shootings).

[54] *See infra* Part IV; *see also* Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 926 (2016) ("In response to [the Sandy Hook Elementary School] tragedy, many Americans demanded that lawmakers and school officials intensify school security measures and increase the presence of law enforcement officers in our nation's schools.").

[55] *See* Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 JUST. Q. 619, 644 (2013).

[56] *See, e.g.*, Michael Hansen, *There Are Ways to Make Schools Safer and Teachers Stronger—but They Don't Involve Guns*, BROOKINGS (Feb. 27, 2018), https://www.brookings.edu/blog/brown-center-chalkboard/2018/02/27/there-are-ways-to-make-schools-safer-and-teachers-stronger-but-they-dont-involve-guns/ [https://perma.cc/9F2R-N7HG]; *see also* Radley Balko, *Putting More Cops in Schools Won't Make Schools Safer, and It Will Likely Inflict a Lot of Harm*, WASH. POST (Feb. 22, 2018, 4:49 PM), https://www.washingtonpost.com/news/the-watch/wp/2018/02/22/putting-more-cops-in-schools-wont-make-schools-safer-and-it-will-likely-inflict-a-lot-of-harm/?utm_term=.26b4bef3ac1 [https://perma.cc/E7HK-9GLU]; Rebecca Klein, *Why School Cops Won't Fix School Shootings*, HUFFINGTON POST (Feb. 16, 2018, 4:51 PM), https://www.huffingtonpost.com/entry/school-cops-shootings_us_5a8715c8e4b05c2bcaca7c29 [https://perma.cc/CK4F-MJ8U]; Dara Lind, *Why Having Police in Schools Is a Problem, in 3 Charts*, VOX (Oct. 28, 2015, 12:10 PM), https://www.vox.com/2015/10/28/9626820/police-school-resource-officers [https://perma.cc/D62A-4DKG]; *More Police—In Schools and Out—Not the Answer*, JUST. POL'Y INST. (Jan. 16, 2013), http://www.justicepolicy.org/news/4829 [https://perma.cc/E8VH-9A2J].

[57] *See* Nance, *supra* note 54, at 947–48.

[58] *See* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 864 (2012).

[59] *See id.* at 862 (citing Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591, 599 (2006)) (discussing emerging prevalence of police officers in schools); *see also* Philip J. Cook et al., *School Crime Control and Prevention*, *in* 39 CRIME AND JUSTICE: A REVIEW OF RESEARCH 313, 314 (Michael Tonry ed., 2010) (observing "greater recourse to arrest and the juvenile courts rather than school-based discipline"); Michael P. Krezmien et al., *Juvenile Court Referrals*

administrators are referring students accused of making threats against teachers, administration, or other students to law enforcement at new rates.[60] The sheer volume of juveniles being referred to law enforcement by school officials calls into question zero-tolerance policies.[61] Now, in a post-Parkland world, this discussion is gaining new traction and renewed attention across the country.

This Part frames the gravity of post-Parkland terroristic threats charges against juveniles, focusing on extreme examples in order to highlight the absurd range of results accruing under the present legal regime. In addition, it discusses the tenuous nature of the relationship between students and school administrators and the increased reporting of student behavior by school officials to law enforcement, paying special attention to the unique role of school resource officers in school discipline. It also includes an overview of relevant information about the school-to-prison pipeline, which contextualizes the severity of the problem and demonstrates the need to address it.

### *A. The Problem: The Post-Parkland Escalation of Threats and Charges Against Juveniles*

Since the Parkland shooting in February 2018, school administrators are turning over students who allegedly threaten to commit violent acts at school to law enforcement at escalating rates.[62] According to a *Wall Street Journal* review of school district discipline reports, police arrests, and other news stories, approximately 350

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*and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 275 (2010) (examining data on rising incidence of school-based arrest); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 280, 286 (2009) (analyzing role of police officers in schools).

[60] *See* Hobbs, *supra* note 4 (discussing how approximately 350 students were charged with making threats in the U.S. in the two months following the Parkland shootings).

[61] Susan Ferris, *How Does Your State Rank on Sending Students to Police?*, TIME (Apr. 10, 2015), http://time.com/3818075/student-police-ranking/ [https://perma.cc/SCW4-96CD] (describing how statistics show, an average, six out of every thousand children nationwide are referred to a law enforcement agency—some states, like Virginia at sixteen per thousand, nearly tripled the national average).

[62] *See, e.g.*, Joe Henke, *What Can Happen to Students Who Post School Shooting Threats?*, 11ALIVE (Feb. 26, 2018, 5:46 PM), https://www.11alive.com/article/news/local/what-can-happen-to-students-who-post-school-shooting-threats/85-523534167 [https://perma.cc/U56D-C7QF] (noting that twelve days after Parkland, at least twenty-seven Atlanta-area threats resulted in twenty arrests and Cobb County District Attorney Vic Reynolds "let [his] juvenile prosecutors know they take these charges extremely serious and they're going to pursue them as aggressively as they can"); Lily Jackson, *At Least 46 Alabama Students Disciplined for Making Threats Since Parkland*, AL.COM (July 7, 2018), https://www.al.com/news/index.ssf/2018/07/approximately_46_school_terror.html [https://perma.cc/R65H-3TJ5]; Claire McInerny, *Number of Texas Students Accused of Making 'Terroristic Threats' Tripled After Parkland*, KUT (July 24, 2018), http://www.kut.org/post/number-texas-students-accused-making-terroristic-threats-tripled-after-parkland [https://perma.cc/Z3B5-8JSP] ("The number of students in Texas accused of making terroristic threats or exhibiting a firearm increased significantly in the first five months of 2018 compared with last year.").

students were detained for threatening behavior directed toward faculty, administration, or other students between the February 14, 2018, Parkland tragedy and April 22, 2018.[63] The charges ranged from misdemeanors to felonies, with many schools opting to expel students in addition to referring them to the police for their alleged threats.[64] The anecdotal evidence and data show that school threats are on the rise and many occur via social media, creating a new challenge for schools and law enforcement.

In some instances, school and law enforcement action thwarted potential violence.[65] While patrolling the hallways, a Los Angeles County high school security officer overheard a student discussing an attack just two days after the Parkland shooting.[66] Law enforcement officers detained the student, obtained a warrant to search his home, and uncovered two AR-15 rifles, two handguns, and roughly ninety rifle magazines that could hold as many as thirty rounds per magazine.[67] At least one rifle was unregistered.[68] In taking the threat seriously, detaining the student, and obtaining a search warrant, school officials at El Camino High School possibly avoided what could have been a major tragedy.

In other cases, law enforcement involvement at school resulted in obtuse, hard-to-justify actions against juveniles.[69] Four days after the threat in Los Angeles County, police in Oakdale, Louisiana, detained a twelve-year-old girl overnight after she allegedly spoke to other students about a threat against her school, which she claimed to have received on social media.[70] School administrators interviewed the girl and determined she never received such a threat.[71] Even so, they turned over control of the incident to Oakdale area police, who charged the sixth grader with felony "terrorizing."[72]

Law enforcement officials have arrested several students in the wake of Parkland in connection with threats posted via social media apps like Twitter and Snapchat.[73] In Orono, Minnesota, a student posted on Twitter: "Orono is not safe. Today at 12:00 p.m. I will shoot up the school myself."[74] In South Carolina, a high school student posted a photo of himself on Snapchat wearing a mask and holding an assault rifle

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[63] Hobbs, *supra* note 4.

[64] *See id.*

[65] *See, e.g.*, Alex Horton, *A Safety Officer Overheard a Threat. Police Say That May Have Helped Thwart a School Shooting*., WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/education/wp/2018/02/21/school-shooting-thwarted-thanks-to-a-security-guards-tip-police-say/?utm_term=.001813c3a021 [https://perma.cc/MG6Z-YM9A] (describing how one security officer overheard a potential threat and questioned a student who was later found to be in possession of multiple firearms).

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] *See, e.g.*, Hobbs, *supra* note 4.

[70] *See id.*

[71] *See id.*

[72] *See id.*

[73] *See* Bosman, *supra* note 6.

[74] *Id.*

with the caption "Round 2 of Florida tomorrow."[75] In Fall River, Massachusetts, a student posted on Snapchat that there would be a "Florida Pt. 2" at his high school.[76] Many other instances of threats against schools on Facebook, Snapchat, and Instagram led to student arrests in the days immediately following the Parkland shooting, including several in Texas and Florida, and incidents in Bullitt County and Nicholasville, Kentucky; Norfolk, Virginia; Abbeville, South Carolina; Nutley, New Jersey; and elsewhere across the country.[77]

Demonstrable data ground the anecdotal evidence, too. In the week following the Parkland shooting, schools across the country reported at least fifty threats or violent incidents each day, five times as many threats as are usually reported per day including fraudulent threats and false alarms.[78] In the week after the shooting, Kentucky saw twenty-four threats, Ohio had twenty-nine incidents, and Florida experienced more threats of school violence than any other state, with thirty-one incidents of threatened violence.[79]

School safety experts from the Educator's School Safety Network pointed to the national conversation surrounding and the media coverage of the Parkland shooting as a potential causal factor of the upsurge in school-based threats post-Parkland.[80] Researchers with the Network found that threats of violence and actual violence at schools are both on the rise at alarming rates.[81] For instance, according to the Network there were about 3,380 threats recorded in the 2017–2018 school year, jumping up 62% from the 2,085 threats in the 2016–2017 school year.[82] The data indicate that

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[75] Horton, *supra* note 65.

[76] Alex Newman, *Durfee High Increases Security After 'Florida Pt. 2' Threat*, PATCH (Feb. 16, 2018, 8:33 AM), https://patch.com/massachusetts/seekonk-swansea/durfee-high-increases-security-after-florida-pt-2-threat [https://perma.cc/V352-R75T].

[77] *See* CNN, *Threats to Schools Mount Since Parkland Shooting*, ABC ACTION NEWS (Feb. 20, 2018, 6:31 AM), https://www.abcactionnews.com/news/national/threats-to-schools-mount-since-parkland-shooting [https://perma.cc/5SE9-GUJL].

[78] *See* Bosman, *supra* note 6.

[79] *See id.*

[80] *See* Klinger & Klinger, *supra* note 33, at 9–10.

[81] *See id.* at 3, 6, 14 ("For the purposes of this research, 'violent incidents' and 'threats of violence' are defined as those with the potential for loss of life, such as explosive devices, firearms, and other potentially lethal devices such as knives etc. Lower levels of school violence, such as fights, harassment etc. are not included.").

[82] *See id.* at 1; *see also* STATES OF CONCERN: AN ANALYSIS OF U.S. STATES WITH HIGH RATES OF SCHOOL-BASED VIOLENT THREATS AND INCIDENTS 2017–2018 SCHOOL YEAR EDITION, EDUCATOR'S SCH. SAFETY NETWORK, https://static1.squarespace.com/static/55674542e4b074aad07152ba/t/5b7ae94a562fa7c4f8ed200c/1534781776199/States+of+Concern+An+Analysis+of+U.S.+States+with+High+Rates+of+School-Based+Violent+Threats+and+Incidents.+17-18.pdf [https://perma.cc/54GZ-C2GE] (last visited Apr. 14, 2020) ("In the 2017–2018 school year, the 11 states of most concern accounted for 36% of all threats and 42% of all incidents, despite accounting for only 28% of the U.S. population."); *Overview and Summary*, EDUCATOR'S SCH. SAFETY NETWORK, http://eschoolsafety.org/concern [https://perma.cc/J9GG-MSBL] ("The states of greatest concern based on data from the 2017–2018 school year are

38.8% of threats in the 2017–2018 school year were shooting threats, 22.5% were bomb threats, and the remainder were nonspecific threats of violence or threats of a combination of multiple forms of violence.[83] But these data also demonstrate the significance of Parkland as a data point. The data show that "1,494 more threats occurred in the spring of 2018 than the fall of 2017, resulting in an increase of 159%" in the second semester.[84] More specifically, 43 % of all threats recorded in the study occurred in the thirty days immediately following Parkland.[85] Most alarmingly, the data show that 279 realized incidents of violence happened in the 2017–2018 school year, an increase of 113% over the 131 actual instances of violence in the 2016–2017 school year.[86] 27 % of school-based violent incidents occurred in the thirty days immediately following Parkland.[87] Exact data is difficult to ascertain, given that many threats and instances of violence go unreported.[88] Researchers argue, though, that while Parkland may not be the sole "catalyst" for the rise of threats and violence, the figures are, at least, "a horrific example of the overall increase in violence . . . during the 2017–2018 school year."[89]

Though difficult to measure, data suggest that Parkland is likelier the product of school violence than the reverse. One thing appears to be certain, however: with the rise in threats and violent incidents at schools in the wake of Parkland, school officials and police are taking all reports seriously.[90] The result is that more juveniles are being referred to law enforcement for terroristic threats than in previous years.[91]

### *B. The Response: Increased School-Law Enforcement Coalescence and the Emergence of the SRO*

In addition to increases in reported threats and violent incidents in schools, school officials and law enforcement are cooperating at previously unseen levels, leading to an increased presence of law enforcement officers in school buildings across the

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Michigan, Ohio, Alabama, Kentucky, Washington, Pennsylvania, Mississippi, Florida, North Carolina, Colorado, and Idaho.").

[83] *See* Klinger & Klinger, *supra* note 33, at 4 ("This is a slight change from the 2016–2017 school year when bomb threats were the most common (34.6%), followed by shooting threats (30%) and unspecified threats (26%).").

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See id.*

[90] *See* Bosman, *supra* note 6.

[91] *See* Deborah Fowler & Morgan Craven, *Collateral Consequences: The Increase in Texas Student Arrests Following the Parkland and Santa Fe Tragedies*, TEX. APPLESEED (July 11, 2018), http://stories.texasappleseed.org/collateral-consequences [https://perma.cc/EZ6D-9PQA] (explaining that "referrals to Texas juvenile probation departments in the wake of the Parkland tragedy" increased dramatically, at a rate of 156% for terroristic threats).

country.[92] Tragic, but well-known and highly publicized instances of violence at American schools, including the shootings at high schools in Columbine,[93] Parkland,[94] and most recently Santa Fe,[95] appear to be driving measures to increase law enforcement presence in schools.[96] But while police are more involved in searches of students and their property, including students' smartphones,[97] and are more likely to be involved in subsequent discipline,[98] they are not the only law enforcement personnel in American schoolhouses. As a result of these salient tragedies, school resource officers have emerged as a commonplace feature of the American public-school system, giving rise to questions about their efficacy and legal status.

School resource officers (SROs)[99] are rapidly becoming a fixture in many schools,[100] making their role one of central importance for juvenile students' Fourth Amendment rights. There are two federal statutory definitions for SROs, which shed light on the expected role of SROs in schools. First, the Community Oriented Policing Services (COPS) authorization measure focuses on the SRO's role in community policing and suggests that SROs should fill a more traditional law enforcement role.[101]

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[92] *See* Nance, *supra* note 54, at 926; Kristi North, *Recess Is Over: Granting* Miranda *Rights to Students Interrogated Inside School Walls*, 62 EMORY L.J. 441, 469 (2012); *see also* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1077–78 (2003).

[93] *See Columbine High School Shootings Fast Facts*, CNN (Aug. 23, 2019, 8:33 PM), https://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/index.html [https://cnn.it/1Hkfvsu] (stating that twelve students and one teacher were killed by two students).

[94] *See* Jonathan Sperling, *Florida School Shooting: These Are the 17 Victims*, NBC NEWS (Feb. 16, 2018, 4:26 PM), https://www.nbcnews.com/news/us-news/florida-school-shooting-these-are-17-victims-n848706 [https://perma.cc/P4SA-9P4N] (stating fourteen students and three faculty members were killed by one student).

[95] *See* Manny Fernandez et al., *In Texas School Shooting, 10 Dead, 10 Hurt and Many Unsurprised*, N.Y. TIMES (May 18, 2018), https://www.nytimes.com/2018/05/18/us/school-shooting-santa-fe-texas.html [https://perma.cc/PBA3-JCSF] (stating there were ten fatalities—eight students and two teachers were killed by one student).

[96] *See* Pinard, *supra* note 92, at 1067.

[97] *See* discussion *infra* Sections II.B, III.D, IV.A.

[98] *See Developments in the Law: Policing*, 128 HARV. L. REV. 1706, 1755 (2015).

[99] *See Frequently Asked Questions: General FAQs*, NASRO, https://nasro.org/faq/ [https://perma.cc/SW7E-TEZL] (last visited Apr. 14, 2020) [hereinafter NASRO] ("A school resource officer, by federal definition, is a career law enforcement officer with sworn authority who is deployed by an employing police department . . . to work in collaboration with one or more schools. NASRO recommends that . . . officers receive[] at least 40 hours of specialized training in school policing before being assigned.").

[100] *See* Kerrin C. Wolf, *Assessing Students' Civil Rights Claims Against School Resource Officers*, 38 PACE L. REV. 215, 225 (2018).

[101] *See* 34 U.S.C. § 10389 (2017) (formerly cited as 42 U.S.C.A. § 3796dd-8); *see also* NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 21 (2013); LEADERSHIP FOR EDUCATIONAL EQUITY, EMERGING MODELS FOR POLICE PRESENCE IN SCHOOLS, https://educational

Meanwhile, the Safe Drug Free Schools and Communities Act suggests SROs should focus on educating students about crime and safety,[102] which is consistent with the legislation's purpose.[103] Both definitions firmly establish SROs as law enforcement officers.[104]

Even so, it is challenging to understand the function of SROs in schools, as they often straddle the line between law enforcement and school official. SROs are regularly assigned to one or several schools pursuant to agreements between the local police and the school district.[105] And SROs can be expected to play any of three parts: law enforcement, counselor, or educator.[106] On the one hand, SROs are "expected to form meaningful relationships with students to help guide them away from delinquency and towards success in school"; on the other hand, SROs can assist in "arresting misbehaving students for alleged violations of criminal law."[107] The close relationship between schools and police departments, manifesting in the form of the

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equity.org/sites/default/files/documents/emerging_models_for_school_resource_officers_final.pdf [https://perma.cc/7AWG-PC9N] (last visited Apr. 14, 2020) [hereinafter EMERGING MODELS]. An SRO is

> a career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with schools and community-based organizations—(A) to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school; (B) to develop or expand crime prevention efforts for students; (C) to educate likely school-age victims in crime prevention and safety; (D) to develop or expand community justice initiatives for students; (E) to train students in conflict resolution, restorative justice, and crime awareness; (F) to assist in the identification of physical changes in the environment that may reduce crime in or around the school; and (G) to assist in developing school policy that addresses crime and to recommend procedural changes.

34 U.S.C. § 10389.

[102] An SRO is

> a career law enforcement officer, with sworn authority, deployed in community oriented policing, and assigned by the employing police department to a local educational agency to work in collaboration with schools and community based organizations to—(A) educate students in crime and illegal drug use prevention and safety; (B) develop or expand community justice initiatives for students; and (C) train students in conflict resolution, restorative justice, and crime and illegal drug use awareness.

20 U.S.C. § 7161 (2012) (repealed 2015).

[103] *See id.* § 7171; *see also* JAMES & MCCALLION, *supra* note 101, at 21; EMERGING MODELS, *supra* note 101.

[104] *See* 34 U.S.C. § 10389; 20 U.S.C. § 7161.

[105] *See* Wolf, *supra* note 100, at 221.

[106] *See id.* at 220.

[107] *See id.* at 221.

SRO, creates confusion among students whom SROs might mentor one day and arrest the next.[108] Courts are likewise puzzled when it comes to spelling out the legal status of SROs.[109]

The emergence of the SRO can be traced back to the 1990s.[110] Since that time, there has been a "massive increase in the police and security presence in schools,"[111] but it is hard to tell how many SROs are operating in schools across the country.[112] The U.S. Department of Justice sought once to count the number of SROs and found that there were more than 17,000 SROs deployed in public schools nationwide.[113] The National Association of School Resource Officers estimates there are between 14,000 and 20,000 SROs currently working in public schools across the country.[114] A 2018 survey by the National Center for Education Statistics, a subagency of United States Department of Education, noted that 42% of public schools reported that they had at least one SRO present at least one day a week.[115] However, because many SROs serve more than one school and some schools have more than one SRO, it is difficult to "reliably extrapolate the number of SROs from the percentage of schools" in the survey data.[116]

Despite the proliferation of SROs in American schools, it is difficult to ascertain whether SROs are effective at promoting school safety.[117] The Congressional Research Service summarized the available research on the effectiveness of SROs:

> Studies of SRO effectiveness that have measured actual safety outcomes have mixed results, some show an improvement in safety and a reduction in crime; others show no change. Typically, studies that report positive results from SRO programs rely on participants' perceptions of the effectiveness of the program rather than on objective evidence. Other studies fail to isolate incidents

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[108] *See id.* at 224.

[109] *See* Pinard, *supra* note 92, at 1081–82; *see also* discussion *infra* Section III.D.

[110] *See* EMERGING MODELS, *supra* note 101.

[111] ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 10 (2010), https://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf [https://perma.cc/X4UX-ANGP].

[112] *See* NASRO, *supra* note 99.

[113] *See id.* (noting DOJ has not repeated the data collection since 2007).

[114] This information is based on DOJ data and the number of SROs that NASRO has trained. *See id.*

[115] *See* Lauren Musu-Gillett et al., *Indicators of School Crime and Safety: 2017*, U.S. DEP'T EDUC. (Mar. 29, 2018), https://nces.ed.gov/pubs2018/2018036.pdf [https://perma.cc/VX32-CD8C].

[116] *See* NASRO, *supra* note 99.

[117] *See* JAMES & MCCALLION, *supra* note 101, at 10 ("Despite the popularity of SRO programs, there are few available studies that have reliably evaluated their effectiveness.").

> of crime and violence, so it is impossible to know whether the positive results stem from the presence of SROs or are the results of other factors.[118]

A 2011 study suggests, however, that the percentage of reports of crimes involving "non-serious violent offenses" increased as schools increased their use of law enforcement in schools.[119] In particular, schools that employed SROs demonstrated "a 12.3% higher percentage of reporting non-serious violent crime to law enforcement than those that did not add SROs."[120] Schools with SROs also showed a higher number of disorderly conduct incidences than did schools without SROs.[121] So, while the data are not conclusive, SROs may be contributing to the criminalization of school misbehavior.[122]

While increased law enforcement presence in school seems like a wise strategy for curbing student misbehavior, it can lead to negative results. Michael Pinard, professor of criminal law and procedure and Co-Director of the Clinical Law Program at the Maryland Francis King Cary School of Law, highlights four effects of the increased presence of law enforcement in schools.[123] First, Fourth Amendment jurisprudence "has *undervalued* the manner and extent to which law enforcement personnel are involved in student searches."[124] Second, the increased presence of law enforcement has contributed to the increased use of the juvenile and criminal justice systems to handle problems that would otherwise be adjudicated through school disciplinary processes.[125] Whereas schools used to resolve more minor indiscretions internally, they increasingly outsource this task.[126] Third, many courts tend to interchange law enforcement officers and school officials when analyzing Fourth Amendment claims arising from searches they conduct on public school grounds.[127] This leads to jurisdictional splits in Fourth Amendment jurisprudence, a lack of clarity for both students and schools, and an inconsistent application of the Fourth Amendment's probable cause requirement to law enforcement (including SROs).[128] Finally, the trend of zero tolerance policies in schools compounded by the presence of law enforcement at

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[118] *See id.* at 9 (internal citations omitted).

[119] *See* Na & Gottfredson, *supra* note 55, at 619.

[120] *See id.* at 640. While it is difficult to ascertain whether this increase in reporting led to more criminal convictions, it logically fostered more connections between the juveniles involved and the criminal justice system. This is problematic for a host of reasons, only a few of which this Comment discusses. *See* discussion *infra* Section I.C.

[121] Theriot, *supra* note 59, at 285.

[122] *See* discussion *infra* Section I.C; *see also* EMERGING MODELS, *supra* note 101.

[123] *See* Pinard, *supra* note 92, at 1069.

[124] *See id.*

[125] *See id.*

[126] *See id.* at 1102.

[127] *See id.* at 1069; *see also infra* Section III.D.

[128] *See* discussion *infra* Section III.D.

schools has amplified the "criminalization of youth behavior."[129] Simply put, this means more children are subject to more points of contact with the criminal justice system and, therefore, more chances to be affected by it. These results, together, feed the school-to-prison pipeline.

*C. The Results: The School-to-Prison Pipeline*

Evidence also suggests that as law enforcement officers, particularly SROs, become more omnipresent in schools, more students are subjected to the school-to-prison pipeline.[130] The school-to-prison pipeline refers to "the practice of funneling students currently enrolled in school to the juvenile justice system or removing students from school temporarily or permanently, thereby creating conditions under which the students are more likely to end up in prison."[131] Experts have studied and recorded the negative consequences of the school-to-prison pipeline for students, including diminished classroom instruction due to suspension or expulsion, demonstrated difficulty with coursework, higher dropout rates, and more.[132] More specifically, Udi Ofer, Director of the Campaign for Smart Justice at the American Civil Liberties Union, warns, "Children who are removed from the learning environment, even for a few days, are more likely to drop out, use drugs, face emotional challenges, become involved with the juvenile justice system, and develop criminal records as adults."[133]

The National Association of School Resource Officers maintains that widespread utilization of SROs does not contribute to the school-to-prison pipeline.[134]

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[129] *See* Pinard, *supra* note 92, at 1069.

[130] *See* EMERGING MODELS, *supra* note 101; *see also* Theriot, *supra* note 59, at 286–87.

[131] *See* Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 83 (2014); *see also* ADVANCEMENT PROJECT ET AL., FEDERAL POLICY, ESEA REAUTHORIZATION, AND THE SCHOOL-TO-PRISON PIPELINE 2 (2011), http://b.3cdn.net/advancement/ceb35d4874b0ffde10_ubm6baeap.pdf [https://perma.cc/X66J-4YZC]; *Case: School to Prison Pipeline*, NAACP LEGAL DEF. & EDUC. FUND (Feb. 16, 2018), http://www.naacpldf.org/case/school-prison-pipeline [https://perma.cc/24J3-8AGE].

[132] *See* Hawker v. Sandy City Corp., 774 F.3d 1243, 1245 (10th Cir. 2014) (taking judicial notice of this trend).

[133] Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1401 (2011–12).

[134] Do school resource officers contribute to a school-to-prison pipeline? No. Carefully selected, specially trained school resource officers who follow NASRO's best practices do not arrest students for disciplinary issues that would be handled by teachers and/or administrators if the SROs were not there. On the contrary, SROs help troubled students avoid involvement with the juvenile justice system. In fact, wide acceptance of NASRO best practices is one reason that the rates of juvenile arrests throughout the U.S. fell during a period when the proliferation of SROs increased.

NASRO, *supra* note 99; *see also* MAURICE CANADY ET AL., TO PROTECT & EDUCATE: THE SCHOOL RESOURCE OFFICER AND THE PREVENTION OF VIOLENCE IN SCHOOLS, NASRO7

But scholars maintain that SROs and law enforcement officers are compounding the issue. One such scholar, Jason P. Nance, Associate Director for Education Law and Policy at the Center on Children and Families and Professor of Law at the University of Florida Levin College of Law, argues that "strict security measures in and of themselves can harm the educational climate by alienating students and generating mistrust, which, paradoxically, may lead to even more disorder and violence."[135] The number of students suspended or expelled in secondary schools nationwide for trivial infractions of school rules or offenses increased from one in thirteen for 1972 to 1973 to one in nine for 2009 to 2010,[136] and school-based referrals to law enforcement have increased.[137] When students are found delinquent or convicted of crimes, schools sometimes refuse to readmit them; or, if readmitted, students face stigma and increased monitoring by school officials and SROs.[138] Evidence suggests that "incarcerating juveniles limits their future educational, housing, employment, and military opportunities[,] . . . negatively affects a youth's mental health, reinforces violent attitudes and behavior, and increases the odds of future involvement in the justice system."[139] In addition to these ramifications and their disproportionate impact on minority juvenile students,[140] the economic costs of incarcerating juvenile students are likewise overwhelming.[141]

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(2012), https://nasro.org/cms/wp-content/uploads/2013/11/NASRO-To-Protect-and-Educate-nosecurity.pdf.

[135] *See* Nance, *supra* note 54, at 948–49.

[136] *See id.* at 952–53.

[137] *See id.* at 953–54 ("For example, in North Carolina, the number of school-based referrals increased by 10 percent from 2008 to 2013. In an empirical study to compare referrals across multiple states, researchers Michael Krezmien, Peter Leone, Mark Zablocki, and Craig Wells found that in four of the five states studied (Arizona, Hawaii, Missouri, and West Virginia), referrals from schools comprised a larger proportion of total referrals to the juvenile justice system in 2004 than in 1995. That study also demonstrated that schools in Missouri, Hawaii, and Arizona referred greater proportions of their students in 2004 than in 1995. The number of school-based arrests also increased in the Philadelphia Public School District (from 1,632 in 1999–2000 to 2,194 in 2002–2003); Houston Independent School District (from 1,063 in 2001 to 4,002 in 2002); Clayton County, Georgia (from 89 in the 1990s to 1,400 in 2004); Miami-Dade County, Florida (a threefold increase from 1999 to 2001, and from 1,816 in 2001 to 2,566 in 2004); and Lucas County, Ohio (from 1,237 in 2000 to 1,727 in 2002). Similar to the increase of suspensions and expulsions, there is substantial evidence that the vast majority of these school-based referrals were for relatively minor offenses.").

[138] *See id.* at 955 (noting that an arrest or court appearance increases the likelihood that students will drop out of school).

[139] *See id.* at 954.

[140] *See id.* at 957.

[141] *See id.* at 954–55 ("The national average expense for detaining one juvenile per year is $148,767 . . . . [a]nd . . . some estimate that the long-term costs to our society of detaining youth (which include lost future earnings, recidivism, lost future tax revenue, and additional Medicare and Medicaid spending) range from $7.9 billion to $21.47 billion per year." (internal citations omitted)).

Following the Parkland tragedy, terroristic threats charges originating in schools and attributable to juvenile students rose steeply.[142] Salient instances of violence, like Parkland, have exacerbated the trend of coalescence between school officials and law enforcement, the best example being the augmented presence of SROs in our public schools.[143] As a result of these developments, students have been increasingly exposed to the criminal justice system for adjudication and punishment, which schools previously would have conducted internally; and the criminalization of school misbehavior feeds the school-to-prison pipeline. However serious the issue seems in light of these facts, it is made exponentially more complicated by the proliferation of smartphones in schools.

## II. THE RISE OF SMARTPHONES IN THE CLASSROOM

Smartphone ownership is a visible phenomenon that pervades American life, and the trends[144] suggest smartphones are here to stay—at least until the next technological jump.[145] The craze has spread to the schoolyard, hallways, and classrooms of American middle and high schools.[146] This Part discusses the rise of smartphones in schools, including the data supporting this trend and the issues and implications it poses for school safety and discipline. Given smartphones' capabilities, they have become the cause of "digital distraction,"[147] a conduit of classroom—and even criminal—misbehavior,[148] and the impetus for school policies and

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[142] *See generally* Hobbs, *supra* note 4.

[143] *See generally* Bob Erwin, *How States Are Addressing School Safety*, NCSL BLOG (Apr. 5, 2018), https://www.ncsl.org/blog/2018/04/05/how-states-are-addressing-school-safety.aspx [https://perma.cc/H52U-9MZU] (last visited Apr. 14, 2020).

[144] *See* MONICA ANDERSON, PEW RESEARCH CTR., TECHNOLOGY DEVICE OWNERSHIP, 7–8 (Oct. 29, 2015), http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/ [https://perma.cc/M4V2-9YZB] (estimating that 68% of American adults had smartphones in 2015, up from 35% in 2011, and 92% of American adults have a mobile phone of some kind).

[145] *See* Matt Weinberger, *The Smartphone Is Eventually Going to Die, and Then Things are Going to Get Really Crazy (AAPL, GOOG, GOOGLE, MSFT)*, BUS. INSIDER (Apr. 2, 2017, 4:36 PM), https://www.businessinsider.com/death-of-the-smartphone-and-what-comes-after-2017-3 [https://perma.cc/W2XT-T5XZ] (arguing that in the next decade, smartphones will give way to Amazon, Google, and human-machine fusion).

[146] *See* Paul Barnwell, *Do Smartphones Have a Place in the Classroom*?, ATLANTIC (Apr. 27, 2016), https://www.theatlantic.com/education/archive/2016/04/do-smartphones-have-a-place-in-the-classroom/480231/ [https://perma.cc/Q5P3-3APF] (detailing a high school English teacher's experience with smartphones in school).

[147] *See* Edward C. Baig, *Cellphones at School: Should Your Kid Have One?*, USA TODAY (Aug. 14, 2018, 6:02 AM), https://www.usatoday.com/story/tech/columnist/baig/2018/08/14/should-smartphones-allowed-classroom/959154002/ [https://perma.cc/V2F7-2TVN].

[148] *See* Jennifer Ludden, *Opinion: Please Take Away My Kids' Cellphones at School*, NPR (Aug. 18, 2018, 8:27 AM), https://www.npr.org/2018/08/18/639651703/opinion-please-take-away-my-kids-cellphones-at-school [https://perma.cc/XV3A-4UHH].

criminal crackdowns,[149] which result in school-based punishments or criminal charges.[150]

*A. Data Show Smartphones Saturate the American Classroom*

Smartphones are a pervasive fixture of the American school,[151] and most students bring these "minicomputers"[152] to school every day. It is easy to understand why smartphones saturate the classroom—nearly every student owns one. Approximately 95% of teens say that they have access to a smartphone, a 22% increase from 2014 to 2015.[153] In addition to their widespread use among youth, smartphone ownership is remarkably universal among teens of different genders, races, ethnicities, and socioeconomic backgrounds.[154] Over 90% of boys and girls reported owning smartphones.[155] Hispanic, black, and white teens reported nearly identical levels of smartphone ownership, at between 94% and 95% of students reporting.[156] And the percentage of smartphone ownership changed very little among teens of different socioeconomic strata.[157] Of teens whose parents have less than or the equivalent to some college education, approximately 94% reported having access to smartphones, compared to 96% of teens whose parents have a college education or advanced degree.[158]

Smartphone ownership eclipses computer ownership among the same population of teens. Nearly 45% of those surveyed say they use the Internet "almost constantly," and that figure has nearly doubled from 24% in 2014–2015.[159] Another 44% say they go online several times a day, meaning roughly nine of every ten teens go online "at least multiple times per day."[160] However, the number of teen smartphone owners in the above categories who have access to desktops or laptops drops dramatically.[161] Therefore, these teens are usually using their smartphones to access the Internet, and frequently.

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[149] *See* discussion *infra* Section II.B.

[150] *See id.*

[151] *See* Barnwell, *supra* note 146 (detailing a high school English teacher's experience with smartphones in school).

[152] Riley v. California, 573 U.S. 373, 393 (2014).

[153] *See* Anderson & Jiang, *supra* note 32, at 7.

[154] *See id.*

[155] *See id.*

[156] *See id.*

[157] *See id.* (stating that 93% of teens whose parents earn between $0–74,999 per year reported having access to smartphones at home compared to 97% of teens whose parents owned $75,000 or more per year).

[158] *See id.*

[159] *See id.* at 8.

[160] *See id.*

[161] *See id.* at 7–8 (stating that approximately 75% percent of students whose parents earn less than $30,000 per year have access to desktops or laptops, compared to ninety-three percent of the same teens with access to smartphones).

Moreover, smartphone usage has increased across all grade levels, though older students use smartphones more frequently than younger students.[162] In 2015, 53% of elementary school students, 66% of middle school students, and 82% of high school students reported using smartphones regularly.[163] These numbers are up from 44%, 58%, and 75%, respectively, in 2014.[164] And these increases are likewise reflected in students' self-reported desire to use smartphones in school.[165] Seven in ten elementary school students, two-thirds of middle school students, and over half of high school students reported that they would like to use mobile devices more often in the classroom.[166]

The data paint a clear picture: the overwhelming majority of teens are accessing the Internet, most teens are almost certainly accessing it via smartphones, and many are doing it at school.

### *B. Smartphones and Student Misconduct: Issue and Implications*

Smartphones' omnipresence in schools means more than juvenile students texting each other in the hallway or checking the score of the Braves game during Algebra. Rather, possessing a smartphone is like holding a box filled with inestimable boxes (known as "apps"[167]) packed with countless other boxes, each occupied by any number of (potentially incriminating) things—photographs, video clips, voice recordings, data and more—leaving one to wonder if Zeus could have done more damage had he given Pandora[168] an iPhone XR[169] in lieu of her infamous box.

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[162] *See* Harris Poll, *supra* note 29, at 28.

[163] *See id.*

[164] *See id.*

[165] *See id.* at 18.

[166] *See id.*

[167] *See Understanding Mobile Apps*, FED. TRADE COMMISSION: CONSUMER INFO., https://www.consumer.ftc.gov/articles/0018-understanding-mobile-apps [https://perma.cc/T2U9-K8VM] (last visited Apr. 14, 2020) ("A mobile app is a software program you can download and access directly using your phone or another mobile device, like a tablet or music player.").

[168] *Pandora's Box*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/Pandora%27s%20box [https://perma.cc/6EHY-A5EX] (last visited Apr. 14, 2020) ("Anything that looks ordinary but may produce unpredictable harmful results."). The Greek god Prometheus stole fire from other Greek gods and gave it to mankind. As retribution, the gods created the first woman, Pandora, whom Zeus gave a box containing the then-unpredictable evils of the world. He told her never to open the box, but, of course, she opened it the moment he left and loosed those evils on the world. *See Pandora*, ENCYCLOPEDIA BRITANNICA, https://www.bri tannica.com/topic/Pandora-Greek-mythology [https://perma.cc/B868-ZUQA] (last visited Apr. 14, 2020).

[169] *See iPhone XR*, APPLE, https://www.apple.com/iphone-xr/ [https://perma.cc/HAK5-TFTU] (last visited Apr. 14, 2020).

Smartphone apps are as ever-present as smartphones themselves, and average smartphone users in 2018 had between sixty and ninety apps on their smartphone.[170] These apps access, pull, and store a wide array of personal information. For instance, a cybersecurity company examined the top 100 free Android and iOS apps on May 3, 2018.[171] One such app, Android's "Brightest Flashlight LED—Super Bright Torch," requested of its ten million downloaders precise user location, access to user's contacts, access to text messages (SMS), permission to directly call phone numbers, permission to reroute outgoing calls, access to camera, access to microphone to record audio, read and write permissions on the phone's storage, and read permission for phone status and identity.[172] But does a flashlight app needs these permissions to function?[173] While would-be users have the discretion to deny some of these permissions, or simply forgo downloading the app, "users can still find it difficult to keep track of what they are consenting to. . . . In short, while you may be sure of your ground when it comes to a single app with a single privacy policy, once additional apps are plugged into it, the picture becomes increasingly complex. . . ."[174] If adults can be "[b]amboozled by privacy policies,"[175] it is reasonable to assume that juveniles, whose "brains continue to mature and develop throughout childhood and adolescence and well into early adulthood," can be likewise confused or unsure of what information their smartphones collect and hold.[176]

The issue, therefore, goes far beyond the calls and texts juvenile students place and spans to the other sorts of information their phones contain or can access at the moment those phones are searched. Widespread use of smartphones—and their several and varied functions—in schools has become problematic because it disrupts classrooms, allows students to commit school policy infractions or crimes instantaneously and virtually (as in the BHS anecdote), and creates novel issues of juvenile student privacy.

The implications of smartphones are illuminated by existing data. First, data suggests that smartphones, in addition to other smart devices like laptops and tablets, affect the classroom experience. According to one recent survey, seventy percent of surveyed high school teachers say student use of smartphones causes "tension and disruption" in the classroom.[177] 50% of those teachers report weekly disruptions due to

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[170] Gillian Cleary, *Mobile Privacy: What Do Your Apps Know About You?*, SYMANTEC THREAT INTELLIGENCE BLOG (Aug. 16, 2018), https://www.symantec.com/blogs/threat-intelligence/mobile-privacy-apps [https://perma.cc/6HZY-KNYR].

[171] *See id.*

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See id.*

[176] *See id.*; *see also Teen Brain: Behavior, Problem Solving, and Decision Making*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Sept. 2016), https://www.aacap.org/aacap/families_and_youth/facts_for_families/fff-guide/the-teen-brain-behavior-problem-solving-and-decision-making-095.aspx [https://perma.cc/7MS6-WT96].

[177] *See Tech in the Classroom*, MIDAMERICAN NAZARENE U. (last visited Apr. 14, 2020),

students' smartphone use; 36% say disruptions occur daily.[178] While these teachers laud technology like Wi-Fi, laptops, learning software, smartboards, and school-specific web portals as having a positive effect on the classroom, they view smartphones negatively.[179] Distraction due to smartphone use is so pervasive that the California State Teachers' Pension Fund, an investor in Apple, recently drafted an open letter calling on Apple to study the issue and make it easier to limit juvenile students' use of the devices.[180]

Second, smartphone-generated crimes and school policy infractions, like cyber-bullying[181] and social media–based terroristic threats,[182] are new phenomena affecting American schools. The National Center for Education Statistics and Bureau of Justice Statistics indicated in 2015 that, nationwide, approximately 21% of students ages twelve to eighteen experienced bullying.[183] In a separate study, the Centers for Disease Control and Prevention estimated that 14.9% of high school students were electronically bullied in 2017.[184] The most common mediums for cyber-bullying include social media, like Facebook, Instagram, Snapchat, and Twitter; text messages;

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https://www.mnu.edu/graduate/blogs-ideas/tech-in-the-classroom [https://perma.cc/MKV3-FN2P].

[178] *See id.*

[179] *See id.*

[180] *See* Anya Kamenetz, *Laptops and Phones in the Classroom: Yea, Nay or a Third Way?*, NPR (Jan. 24, 2018), https://www.npr.org/sections/ed/2018/01/24/578437957/laptops-and-phones-in-the-classroom-yea-nay-or-a-third-way [https://perma.cc/2ZCV-F8LE]; *New Letter from Jana Partners and CALSTRS to Apple, Inc.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 19, 2018), https://corpgov.law.harvard.edu/2018/01/19/joint-shareholder-letter-to-apple-inc/ [https://perma.cc/ZL4U-8QDT].

[181] *See What Is Cyberbullying*, STOPBULLYING.GOV (last modified May 30, 2019), https://www.stopbullying.gov/cyberbullying/what-is-it/index.html [https://perma.cc/8MSL-7SPY] ("Cyberbullying includes sending, posting, or sharing negative, harmful, false, or mean content about someone else. It can include sharing personal or private information about someone else causing embarrassment or humiliation. Some cyberbullying crosses the line into unlawful or criminal behavior."). "Sexting," or "the 'transmission of sexually charged materials' (typically photos) between students through text messages or other forms of file transmission" is a subcategory of cyber-bullying, which this Comment does not discuss. *See* A. James Spung, *From Backpacks to Blackberries: (Re)examining* New Jersey v. T.L.O. *in the Age of the Cell Phone*, 61 EMORY L.J. 111, 119 (2011).

[182] *See* Bosman, *supra* note 6; Fowler & Craven, *supra* note 91.

[183] *See* CHRISTINA YANEZ & DEBORAH LESSNE, STUDENT VICTIMIZATION IN U.S. SCHOOLS: RESULTS FROM THE 2015 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY, U.S. DEP'T EDUC. 1, 9 (2015), https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2018106rev [https://perma.cc/7R49-S5AK] (noting that, from 2007 until 2013 the School Crime Supplement to the National Crime Victimization Survey included separate questions about cyber-bullying, but the definition of bullying has been updated to consider cyber-bullying as a subset of bullying and not a separate type of bullying).

[184] *See* CDC, YOUTH RISK BEHAVIOR SURVEY: DATA SUMMARY & TRENDS REPORT 2007–2017, at 1, 31 (2017), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/trendsreport.pdf [https://perma.cc/4AYJ-S54F].

instant messaging apps, which often run through email providers or social media; and email.[185] Likewise, threats issued against other students and schools, which may materialize into criminal terroristic threats charges, are perpetrated through the same channels.[186] Taken together, smartphones are producing new challenges for teachers, administrators, and SROs.

Third, because smartphones give rise to cyberinfractions and cybercrimes in the schoolhouse, teachers, administrators, and SROs more often search the contents of these devices in investigating "accusations, suspicions, or disputes" related to these cyber-incidents.[187] But because smartphones possess troves of information, a routine search can quickly veer off course, raising difficult Fourth Amendment questions regarding juveniles' privacy rights in their smartphones.

Given the prevalence of smartphone access among teens, as well as smartphones' inherent portability, disruptive capabilities, and capacity to act as conduits of school policy violations or crimes, schools are grasping for answers to complex issues of school safety. Meanwhile, scholars are crusading for greater protections for juvenile students in this new context.[188] However, scholars wisely recognize that

> [w]hen 38-year-old James Madison worked on his first draft of the Fourth Amendment 200 years ago, he could not possibly have envisioned a time when a person would have in his pocket a device that could be used not only to communicate . . . but to store . . . personal correspondence, medical records, [and] addresses of family members and friends.[189]

## III. THE FOURTH AMENDMENT ON SCHOOLS AND SMARTPHONES

The Fourth Amendment is a frequently litigated provision of the U.S. Constitution, and it is easy to understand why. According to one view, the Fourth Amendment does nothing more than "prescribe that government intrusions be limited to reasonable

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[185] *See What Is Cyberbullying*, *supra* note 181.

[186] *See supra* Section I.A.

[187] *See* Spung, *supra* note 181, at 118; *see also, e.g.*, Jackson v. McCurry, 303 F. Supp. 3d 1367, 1367 (2017).

[188] For example, two scholars, Randee J. Waldman, Clinical Professor of Law and Director of the Barton Juvenile Defender Clinic at the Emory University School of Law, and Barbara A. Fedders, Assistant Professor of Law and Co-director of the Youth Justice Clinic at the University of North Carolina School of Law, have recently presented on this topic to national audiences. *See generally* Program for *2014 Advanced Juvenile Defender Training*, UNC: SCH. GOV'T (Mar. 12–14, 2014), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/2014%20Advd%20Juve%20Defender%20Electronic%20Materials_0.pdf [https://perma.cc/VC2W-5Q3G].

[189] *See* H. Morley Swingle, *Smartphone Searches Incident to Arrest*, 68 J. MO. B. 36, 37 (2012).

measures."[190] The opposing view asserts that the Fourth Amendment "rules handcuff the police in their never[-]ending battle to bring criminals to book."[191] Often, whether the Fourth Amendment was properly followed determines whether someone's freedom can be inhibited. Negotiating this balance is difficult on the streets, and the same holds true in schools where the government's interest in protecting students is understandably commanding. This Part explains some of the Fourth Amendment's history, including the general rule and the exceptions that apply when dealing with schools and smartphones; it details seminal case law, including *New Jersey v. T.L.O.*,[192] *Riley v. California*,[193] and important cases in-between; and it lays the groundwork for a compromise in Part IV.

### *A. A History of the Fourth Amendment*

The modern notion of the Fourth Amendment includes three pillars for all searches and seizures: (1) a general warrant requirement, (2) a general probable cause requirement, and (3) the exclusion of all evidence obtained illegally.[194] However, Supreme Court jurisprudence is somewhat disordered—some would say an "embarrassment."[195] Rather than rehash the work of other scholars who have detailed the Fourth Amendment's complex past and intricacies,[196] this Section reviews the Fourth Amendment's history as it applies to the seminal cases discussed below. In particular, it discusses the Fourth Amendment's warrant and probable cause requirements,[197] two important exceptions to those requirements,[198] and the Fourth Amendment's application to students.[199]

#### 1. The Fourth Amendment's Warrant and Probable Cause Requirement

The Supreme Court has recognized a warrant requirement, generally, in the Fourth Amendment: "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining

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[190] *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993).

[191] *See id.* at 198.

[192] 469 U.S. 325 (1985).

[193] 573 U.S. 373 (2014).

[194] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

[195] *See id.*

[196] *See id.* at 761–80; *see also* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 221–68 (1993); Maclin, *supra* note 190, at 202–28; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 825–30 (1994); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–411 (1995).

[197] *See infra* Section III.A.1.

[198] *See infra* Section III.A.2.

[199] *See infra* Section III.D.

of a judicial warrant."[200] The text of the Fourth Amendment mandates that warrants be predicated on probable cause,[201] and case law has necessitated a narrow scope for searches and seizures—hence, probable cause is required absent "'a few specifically established and well-delineated exceptions.'"[202] This general conception of the Fourth Amendment is "echoed" in many state constitutional provisions.[203] But, scholars agree[204] that even the state provisions derive from the same few cases, each of which reflects a concern the Founders faced.[205] For example, some parent cases to the Fourth Amendment arose when the English were exercising general warrant authority to search political dissidents' papers and books.[206] Those cases marked in common law the importance of a privacy interest in homes and chattel and suggested that arrests must be grounded in cause.[207] Other earlier colonial American cases, though arising in different posture, raised the same concerns—privacy and trepidation over unlimited government discretion—as their English counterparts.[208] These examples, taken together, underpin the Fourth Amendment warrant and probable cause requirements, which are reflected in modern case law and read into the Amendment's text.[209] Today, "[T]hese rules unquestionably limit the investigation of ordinary crimes" because they bind government officials' discretion,[210] including state officials.[211] From these rules, all Fourth Amendment debates issue.

2. Two Exceptions to the Requirement: Exigent Circumstances and Special Needs

As complex as the history of the warrant and probable cause requirements is, the exceptions to the warrant and probable cause requirement are likewise several and varied.[212] Even so, the two exceptions most pertinent to this Comment's analysis are

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[200] Riley v. California, 573 U.S. 373, 382 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)); *see also* Amar, *supra* note 194, at 762 (citing Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971); Johnson v. United States, 333 U.S. 10, 14–15 (1948)).

[201] *See* U.S. CONST. amend. IV.

[202] City of Ontario v. Quon, 560 U.S. 746, 760 (2010) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

[203] *See* Stuntz, *supra* note 196, at 396 (citing JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 38 (1966); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1176 (1991); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 361–62 (1921)).

[204] *See* Stuntz, *supra* note 196, at 447.

[205] *See* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 6 (1978).

[206] *See* Stuntz, *supra* note 196, at 397.

[207] *See id.* at 399–400.

[208] *See id.* at 406–07.

[209] *See id.* at 407.

[210] *See id.*

[211] *See* Elkins v. United States, 364 U.S. 206, 213 (1960) (applying the Fourth Amendment to state officials).

[212] *See* Jennifer Y. Buffaloe, *"Special Needs" and the Fourth Amendment: An Exception*

the "exigent circumstances" exception, of which the "search incident to arrest" variety is particularly important, and the "special needs" exception.[213]

Of the exceptions to the Fourth Amendment, "[b]y far the largest category of exceptions are those based on exigency."[214] The law has recognized for centuries "that a search of an arrestee's person and the immediately surrounding area into which he might reach to obtain a weapon or destroy evidence is permissible as an incident of the arrest, and thus may be conducted without a search warrant."[215] The lawful arrest itself serves as the legal pretext for searching the arrestee and the justification is twofold: protecting law enforcement from unseen dangers such as concealed weapons[216] and preventing the destruction of evidence.[217] In many of these cases, given enough manpower, the police could "almost always obtain a warrant without suffering the consequences of the exigency. . . . But the Court . . . has frequently been willing to define exigency broadly, in light of the realities of law enforcement."[218] Therefore, in many situations where obtaining a warrant would not be impossible, but rather inexpedient, police are excepted from obtaining a warrant.[219]

Three cases inform this exception. *Chimel v. California* illustrates the modern approach to the search incident to arrest exception to the Fourth Amendment's warrant requirement.[220] In the context of a search of an arrestee's home incident to his arrest, the *Chimel* Court held that it is reasonable to search the area "into which an arrestee might reach in order to grab a weapon or evidentiary items," but searching other rooms of the arrestee's home or "other closed or concealed areas in that room itself" is improper without a warrant.[221] The Court applied *Chimel* to a search of an arrestee's person in *United States v. Robinson*.[222] In *Robinson*, an officer conducted a pat-down, discovered a cigarette package, and searched the package, uncovering heroin.[223] Even

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*Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 530 (1997).

[213] Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 18–19 (1991).

[214] *Id.* at 19.

[215] Marc C. McAllister, *Rethinking Student Cell Phone Searches*, 121 PA. ST. L. REV. 309, 315 (2016).

[216] "The peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds, if connected with the crime." People v. Chiagles, 142 N.E. 583, 584 (N.Y. 1923).

[217] *See* Arizona v. Gant, 556 U.S. 332, 339 (1978); United States v. Robinson, 414 U.S. 218, 232 (1973).

[218] Slobogin, *supra* note 213, at 21.

[219] *See id.*

[220] *See* Chimel v. California, 395 U.S. 752, 768 (1969).

[221] *Id.* at 763; s*ee also Gant*, 556 U.S. at 350 (overruling the Court's decision in New York v. Belton, 453 U.S. 454 (1981), and eliminating the automatic right to search the glovebox of a vehicle as an incident to a vehicle occupant's arrest).

[222] *See generally* 414 U.S. 218.

[223] *See id.* at 220, 223.

though there was no specific concern, per the *Chimel* rationales, that Robinson was armed or would destroy evidence, the Court concluded that the search of Robinson's pockets and the search of his cigarette package were reasonable,[224] as the package was "personal property . . . immediately associated with the person of the arrestee."[225] As in *Robinson*, the Supreme Court in *Arizona v. Gant* recognized that the *Chimel* concerns motivate the search incident to arrest exception.[226] These cases, establishing the *Chimel* risks, the *Robinson* diminished privacy interest of the arrestee, and the *Gant* standard for allowing a warrantless search amid reasonable belief it will uncover evidence of the crime, form the analytical framework for the Court's analysis in *Riley v. California*.[227]

The second exception to the Fourth Amendment's warrant requirement relevant to this Comment is the so-called "special needs" exception.[228] Justice Blackmun, in his concurrence in the seminal case *New Jersey v. T.L.O.*, coined the term when he wrote: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[229] In "special needs" situations, the usual warrant and probable cause requirements of the Fourth Amendment are dispensed with[230] because "ordinary police investigation is not involved"[231] and "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[232]

Though "[t]he special needs jargon has surfaced in several opinions . . . including cases permitting warrantless searches of employees' offices[[233]] and probationers' homes,[[234]] and warrantless substance abuse testing of customs agents[[235]] and railway

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[224] *See id.* at 220, 236.

[225] United States v. Chadwick, 433 U.S. 1, 15 (1977) (clarifying the search incident to arrest exception as applied in *Robinson*).

[226] *Gant*, 556 U.S. at 343 (holding that police could search a vehicle "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search").

[227] 573 U.S. 373 (2014).

[228] *See* Buffaloe, *supra* note 212, at 530–31.

[229] 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

[230] *See* Slobogin, *supra* note 213, at 25 ("Blackmun was willing to label searches of school children's personal effects a special needs situation, . . . eliminating both the warrant and probable cause requirements in that context.").

[231] *Id.* at 27–28.

[232] *Id.* at 25 (quoting *T.L.O.*, 469 U.S. at 340).

[233] *See* O'Connor v. Ortega, 480 U.S. 709, 724 (1987) ("[W]hen employers conduct an investigation, they have an interest substantially different from 'the normal need for law enforcement.'" (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring))); *see also id.* at 732 (Scalia, J., concurring) ("'[S]pecial needs' are present in the context of government employment.").

[234] *See* Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) ("[Probation s]upervision . . . is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.").

[235] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666 (1989) ("It is clear

workers,"[236] its original application to juveniles in public schools derives from *New Jersey v. T.L.O.* For the purposes of this Comment, it is important to remember that Fourth Amendment rights, like First and Fourteenth Amendment rights, "are different in public schools than elsewhere"[237] and "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[238] Thus, schools historically acted *in loco parentis* with respect to juvenile students.[239] As a father would not seek a warrant from an impartial magistrate to search his son's dresser drawer, a school official has not been required to demonstrate probable cause or obtain a warrant to search a student's locker; the Court has found that the "special needs" of the latter situation (or any exigency the particular situation presents) exempt it from the usual Fourth Amendment requirements.[240] This background informed the Court's opinion in *New Jersey v. T.L.O.*

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

Any discussion of Fourth Amendment searches of juveniles or their belongings on school premises begins—and often ends—with *New Jersey v. T.L.O.*[241] This is not surprising, considering that the Supreme Court's decision in *T.L.O.* marked its first time ruling directly on juvenile students' Fourth Amendment rights.[242] The Supreme Court's ruling established the current two-part standard for searching juveniles and their belongings at school,[243] which has remained more-or-less untouched since 1985.[244]

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that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement.").

[236] *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620 (1989) ("The Government's interest in regulating the conduct of railroad employees to ensure safety,'presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" (quoting *Griffin*, 483 U.S. at 873–74)).

[237] Veronica Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995); *see, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (finding that public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns"); Goss v. Lopez, 419 U.S. 565, 581–82 (1975) (finding that due process for a student challenging disciplinary suspension requires only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred").

[238] *Acton*, 515 U.S. at 656.

[239] *See* McAllister, *supra* note 215, at 325.

[240] *See* New Jersey v. T.L.O., 469 U.S. 325, 332 n.2 (1985).

[241] *See id.* at 327.

[242] For a discussion on this point, see Allyson M. Tucker, *Applying the Fourth Amendment to Schools:* New Jersey v. T.L.O., 31 WASH. U. J. URB. & CONTEMP. L. 439, 441 (1987); *see also* Martin Schiff, *The Emergence of Student Rights to Privacy Under the Fourth Amendment,* 34 BAYLOR L. REV. 209, 209, 211 (1982) (contrasting the legal basis for school searches with the Supreme Court's previous opinion that searches conducted without a warrant violate the Fourth Amendment per se).

[243] *T.L.O.*, 469 U.S. at 341.

[244] The Supreme Court decided *New Jersey v. T.L.O.* in 1985 and has not overturned its standard for school searches. *Id.*

The Supreme Court was asked to consider whether the exclusionary rule[245] applied to searches of juvenile students conducted by public school officials.[246] Instead of answering that question, the Supreme Court laid out the Fourth Amendment standard for searches by public school officials of juvenile students,[247] carving out the "special needs" exception to the Fourth Amendment's warrant requirement.[248] In a landmark decision, the Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applied to searches of juveniles conducted by public school officials, like principals and teachers.[249] The legality of those searches, however, depends not on probable cause, but on reasonable suspicion—the reasonableness of the search under the circumstances;[250] and the disputed search in *T.L.O.* was reasonable.[251]

A teacher caught T.L.O., age fourteen, smoking in her high school's bathroom in violation of school policy.[252] As a result of this violation, the school principal called T.L.O. into his office and searched her purse.[253] While searching T.L.O.'s purse, the principal uncovered a disciplinarian's treasure trove: cigarettes, rolling papers, a small amount of marijuana, a pipe, a number of empty plastic bags, a roll of one-dollar bills, and an index card and notes indicating students whom T.L.O. sold drugs and from whom she had not yet collected payment.[254] The principal turned over this contraband to the police, and the State brought delinquency charges against T.L.O.[255]

As with most cases that land before the Supreme Court, the lower courts' conflicting findings drove the Court to action. The New Jersey Supreme Court agreed with the juvenile trial court that a school official's warrantless search, if reasonable,

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[245] *Exclusionary Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/exclusionary_rule [https://perma.cc/HLS8-JNRE] (last visited Apr. 14, 2020) ("The exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution. . . . [T]he exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment[,] . . . improperly elicited self-incriminatory statements gathered in violation of the Fifth Amendment, and to evidence gained in situations where the government violated the defendant's Sixth Amendment right to counsel.").

[246] *See T.L.O.*, 469 U.S. at 327.

[247] *See id.* at 328.

[248] *See id.* at 351 (Blackmun, J., concurring); *see also* Bernard James, T.L.O. *and Cell Phones: Student Privacy and Smart Devices After* Riley v. California, 101 IOWA L. REV. 343, 348 (2015) (citing *T.L.O.*, 469 U.S. at 339–40).

[249] *See T.L.O.,* 469 U.S. at 340.

[250] *See id.* at 341–43.

[251] *See id.* at 337–42.

[252] *See id.* at 328. Note, however, that this policy only prohibited smoking in the bathroom of the freshmen and sophomore buildings. *See id.* at 384. Had T.L.O. smoked in the correct building, it is unclear whether the Court would have annunciated the same standard for school searches.

[253] *See id.* at 328.

[254] *See id.*

[255] *See id.* at 328–29.

would not violate the Fourth Amendment's warrant requirement;[256] however, it believed that the juvenile trial court erred when it ruled that searching T.L.O.'s purse was reasonable.[257] Specifically, the New Jersey Supreme Court held that even if the search were based on reasonable suspicion—and the majority believed it was not—possession of cigarettes (not smoking them) did not violate school rules and the principal's "rummaging" through T.L.O.'s purse was excessive.[258] The United States Supreme Court, after ordering reargument on the broader question of "what limits, if any, the Fourth Amendment placed on the activities of school authorities," disagreed.[259]

Finding that the Fourth Amendment applies to school officials' searches of juvenile students,[260] the Court enunciated a two-part "special needs" exception to the Fourth Amendment's warrant requirement,[261] grounded in the "reasonableness, under all the circumstances, of the search."[262] First, the search must have been "justified at its inception."[263] "[A] search of a [juvenile] student by a teacher or school official [is] (justified at its inception) when there are reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[264] Second, the search must have been "reasonably related in scope to the circumstances which justified the interference in the first place."[265] A search is legitimate in its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[266] The Court believed that this two-pronged approach would (1) "recognize[] that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures" and (2) "respect[] the value of preserving the informality of the student-teacher relationship."[267]

The Court aimed its test at balancing "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds" "against the child's interest in privacy,"[268] but school safety tipped the scale.[269] While it recognized that students have legitimate expectations of privacy,[270] "the school

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[256] *See id.* at 330–31.
[257] *See id.* at 331.
[258] *See id.* (quoting State *ex rel.* T.L.O., 94 N.J. 331, 347 (1983)).
[259] *Id.* at 332–33.
[260] *See id.* at 337.
[261] *See id.* at 340–41; *see also id.* at 351 (Blackmun, J., concurring).
[262] *Id.* at 341 (majority opinion).
[263] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
[264] *Id.* at 341–42.
[265] *Id.* at 341 (quoting *Terry*, 392 U.S. at 20).
[266] *Id.* at 342.
[267] *See id.* at 339–40.
[268] *See id.* at 339.
[269] *See id.* at 339–40.
[270] *See id.* at 339 ("Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a

setting require[d] some easing of the restriction to which searches by public authorities are ordinarily subject."[271] In applying its test to the search of T.L.O.'s purse, the Court found that the school's interest in prohibiting smoking in certain parts of the school outweighed T.L.O.'s expectation of privacy in her purse[272]—the search was justified at inception because of the teacher's report that T.L.O. was smoking in the bathroom generated sufficient suspicion and the search was justified in its scope to uncover evidence of T.L.O. smoking in the bathroom.[273]

### *C. School Searches After* T.L.O.

A number of cases demonstrate how the *T.L.O.* test has been applied and shed light on the current status of juvenile students' rights in schools.[274]

*Vernonia School District 47J v. Acton*[275] and *Board of Education v. Earls*[276] dealt with public school drug testing schemes. In 1995, ten years after its decision in *T.L.O.*, the Supreme Court in *Acton* evaluated the constitutionality of an Oregon public school district's random drug testing of student athletes.[277] The district believed student athletes were instigating drug use among other student populations, allegedly provoking misbehavior and, therefore, disciplinary referrals and action.[278] Applying its rationale from *T.L.O.*, the Court applied the "special needs" exception and dispensed with the Fourth Amendment's probable cause and warrant requirements when obtaining a urine specimen from student athletes for drug testing purposes.[279] Because student athletes voluntarily choose to "go out for the team," get the requisite physical examination to participate, and change and shower in communal spaces,

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minimum must bring . . . the supplies needed for their studies, . . . keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons . . . such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, . . . there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.").

[271] *Id.* at 340.

[272] *See id.* at 343–46; *see also id.* at 342 n.9. *But see id.* at 382–84 (Stevens, J. dissenting).

[273] *See id.* at 345–47 (majority opinion).

[274] *See, e.g.*, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 364 (2009) (finding an unreasonable *T.L.O.* search where the known evidence and inferences did not support invasive strip search to locate contraband); Bd. of Educ. v. Earls, 536 U.S. 822, 822 (2002) (recognizing the diminished privacy expectations of any student that participates in extracurricular activities in analyzing a drug-testing program); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995) (recognizing students' and student athletes' reduced privacy expectations in determining the constitutionality of a drug-testing scheme).

[275] 515 U.S. 646.

[276] 536 U.S. 822.

[277] *Acton*, 515 U.S. at 648.

[278] *See id.* at 648–49.

[279] *See id.* at 652–53, 57–58 (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

they "have reason to expect intrusions upon normal rights and privileges, including privacy."[280] The district's collection of urine specimens from students was not any more intrusive than that to which students subjected themselves voluntarily.[281] In 2002, in *Earls*, the Court likewise found the random drug testing of students involved in after-school competition-based extracurriculars to be reasonable,[282] comparing it to being "vaccinat[ed] against disease" or "submit[ting] to physical examinations."[283]

In 2009, in *Safford United School District #1 v. Redding*, school officials searched a student's backpack, clothing, and eventually strip-searched the female student, all on the suspicion that she was distributing over-the-counter and prescription drugs in violation of school policy.[284] The Court found that the searches of the student's backpack and clothing were reasonable, but the Justices drew the line at searching the student's undergarments because "nondangerous school contraband does not raise the specter of stashes in intimate places."[285] The school officials' motive in removing drugs from school was valid;[286] however, their choice to "make the quantum leap from outer clothes and backpacks to exposure of intimate parts" was not based on "any indication of danger to the students from the power of the drugs or their quantity" or "any reason to suppose that [the student] was carrying pills in her underwear."[287]

As a result of the Court's interpretation of *T.L.O.* through subsequent cases, we know juveniles' "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[288] At the same time, "school officials need not obtain a warrant before searching a student who is under their authority."[289] School officials require only "reasonable suspicion,"[290] and the Court affords "high degree of deference . . . to [their] professional judgment" in deciding when to search and

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[280] *See id.* at 657.

[281] *See id.* at 658.

[282] *See* Bd. of Educ. v. Earls, 536 U.S. 822, 825–26 (2002).

[283] *See id.* at 830–31 (citing *Acton*, 515 U.S. at 656).

[284] 557 U.S. 364, 368–69 (2009).

[285] *See id.* at 373–74, 376 (noting that the reports prompting the search were several days old and did not implicate the student's underwear).

[286] *See id.* at 377–79 (awarding school officials qualified immunity due to the complicated nature of the Court's holding in *T.L.O.*, as evidenced by other courts' inability to use the precedent correctly).

[287] *Id.* at 376–77.

[288] *Acton*, 515 U.S. at 656. However, the Court does not distinguish between schools' responsibilities to the individual child and their responsibilities to the student body in general. *See id.* Indeed, this Comment implicitly asserts that these might be separate considerations and, at times, at odds with each other when an individual child's privacy is compromised in the furtherance of school safety.

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

[290] *See id.* at 345 (reasonable suspicion in the school context is "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").

with what scope.[291] But while this standard appears clear and succinct, it differs from the general warrant requirement for police officers[292] and begs an answer to the question: What, legally, is a "school official" for the purposes of a Fourth Amendment search of a juvenile student at school?

### *D. Who Is a "School Official" for Purposes of the Fourth Amendment?*

The Supreme Court in *New Jersey v. T.L.O.* and its progeny fails to delineate who is a "school official" for the purposes of a Fourth Amendment search of a juvenile student at school.[293] The lack of a definition for "school official" and the confusing status of SROs raises the question: "[D]o SROs, who fill both law enforcement and educational roles in their schools, need probable cause . . . to conduct a constitutionally permissible search of a student in school?"[294] Lower courts have attempted to answer the question for themselves, and four distinct categories have emerged: (1) "School Officials Acting Alone," (2) "Police Officers Acting Alone," (3) "SRO[s] Acting Alone," and (4) "School Officials Acting in Concert with Law Enforcement."[295]

First, *T.L.O.* was clear that school officials, like teachers and principals, require only reasonable suspicion to search students at schools.[296] This lower standard "strikes the balance between the student's legitimate expectation of privacy and the school's

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[291] *See Redding*, 557 U.S. at 377.

[292] *See* Riley v. California, 573 U.S. 373, 382 (2014) (quoting *Acton*, 515 U.S. at 653).

[293] *See* 469 U.S. at 341 n.7 ("We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question."). This is likely because the Court decided *T.L.O.* in 1985—over a decade before Columbine—and SROs are a more recent phenomenon in response to recent violence in schools. *See* discussion *supra* Section I.B.

[294] Wolf, *supra* note 100, at 230; *accord* PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 170 (2005) ("[Probable cause is a] practical, non-technical evidentiary showing of individualized wrongdoing that amounts to more than reasonable suspicion, but less than proof beyond a reasonable doubt."); *see also* Texas v. Brown, 460 U.S. 730, 742 (1983) ("[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of caution in the belief,' . . . that certain items may be contraband . . . or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." (internal citations omitted)); *cf. id.* ("[Reasonable suspicion] amounts to less than probable cause and considerably less than preponderance of the evidence, but more than an inchoate hunch.").

[295] Katayoon Majd et al., *Defending Clients Who Have Been Searched and Interrogated at School: A Guide for Juvenile Defenders*, NAT'L JUV. DEFENDER CTR. 8–9 (2013), https://njdc.info/wp-content/uploads/2013/11/Defending-Clients-Who-Have-Been-Searched-and-Interrogated-at-School.pdf [https://perma.cc/RZ5J-9RCE].

[296] *See T.L.O.*, 469 U.S. at 340–41.

interest in maintaining a safe and effective learning environment."[297] The rationale behind this approach is to "'ensure that the interests of students will be invaded no more than is necessary' to preserve school order."[298]

Second, the standard applied to police searches is likewise clear: When police officers who are acting alone search juvenile students at school, they are typically required to have probable cause.[299] Courts are likelier to require probable cause of police officers in a few instances. A police officer who is not working as an SRO, for example, and conducts a search of a juvenile student at school is generally required to have probable cause.[300] If the purpose of the search is to uncover criminal conduct, then the officer in question will likely require probable cause.[301] Also, if the officer initiated the search, rather than a school official, he will likely require probable cause.[302]

Third, the SRO's dubious legal status is reflected in a split among jurisdictions as to which standard—probable cause or reasonable suspicion—will apply when a SRO conducts search of a juvenile student at school.[303] Courts typically consider "who employs the officer, who the officer reports to, and the officer's assigned duties" in determining which standard will apply.[304] "The majority of jurisdictions find that reasonable suspicion is required based on a finding that a police officer acting as an SRO is more closely connected to the school than the police department,"[305] despite the fact that SROs assist police in arresting juvenile students for criminal conduct and are statutorily considered law enforcement.[306] Other courts have "distinguished between . . . officers employed by the school district (which require reasonable suspicion [to search]) and those employed by an outside police department and assigned to the schools (which require probable cause)."[307]

Finally, when school officials act in concert with law enforcement, jurisdictions have likewise disagreed as to the appropriate standard by which they measure the validity of a school search.[308] Reasonable suspicion may be required when the school exercises primary control over the search,[309] law enforcement is minimally involved in the search, "school officials initiate the investigation and law enforcement officers

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[297] *See* Majd et al., *supra* note 295, at 8.

[298] *Id.* (quoting *T.L.O.*, 469 U.S. at 343).

[299] *See* Majd et al., *supra* note 295, at 8.

[300] *See* Pinard, *supra* note 92, at 1082 n.68; *see also* Majd et al., *supra* note 295, at 8.

[301] *See* Pinard, *supra* note 92, at 1082.

[302] *See id.*

[303] *See* Majd et al., *supra* note 295, at 8.

[304] *Id.* (internal citations omitted).

[305] *Id.*

[306] *See supra* Section I.B.

[307] *See* Majd et al., *supra* note 295, at 8 (internal citations omitted). This Comment proposes adopting the position of these courts in order to make clear the parameters of SROs' authority to search students and provide all parties concerned with a bright-line rule and accompanying certainty. *See* discussion *infra* Part IV.

[308] *See* Majd et al., *supra* note 295, at 9.

[309] *Id.*

search a student at the request or direction of school officials," and school officials search juvenile students "based on information from, or in the presence of, law enforcement officers."[310] Probable cause, however, is usually required when a "law enforcement officer generally works outside of the school system and is simply on assignment at the school (if the officer is not acting under [the] school's direction)"; "when [a] school official is acting at the behest of law enforcement"; or, "in a few jurisdictions for all searches performed by law enforcement, regardless of who initiated the search."[311]

Given the dramatic difference in the standards applied to law enforcement officers' searches and school officials' searches, it becomes clear why the legal classification of SRO searches matters. If SROs are treated as school officials for the purposes of school searches, including smartphone searches on school premises, then SROs possess two substantial advantages: (1) they require less than the probable cause standard applied to police to conduct a search, and (2) SROs can suspect the student of violating a school rule, "such as possessing cell phones . . . considered contraband in school" but not elsewhere, in order to initiate a search.[312] SROs could then provide the fruits of their search to police. Likewise, the different standards applied to school officials' searches when conducted in concert with law enforcement seems like a loophole for law enforcement to circumvent probable cause. Thus, what might be an advantage for SROs, law enforcement, and school officials in their quest for school safety could have detrimental effects on students.

### *E.* Riley v. California

The Supreme Court in *Riley v. California*,[313] reconciling two companion cases, held that the government's interests in (1) protecting officers' safety[314] and (2) preventing the destruction of evidence[315] did not justify jettisoning the Fourth Amendment's warrant requirement with respect to searching smartphones[316] incident to

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[310] *Id.* (citing State v. McKinnon, 558 P.2d 781, 784–85 (Wash. 1977)).

[311] *Id.* (citing State v. K.L.M., 628 S.E.2d 651, 653 (Ga. 2006); A.J.M. v. State, 617 So.2d 1137, 1138 (Fla. App. 1993), *distinguished by* State v. N.G.B., 806 So.2d 567, 569 (Fla. Dist. Ct. App. 2002)).

[312] *See* Wolf, *supra* note 100, at 226–27.

[313] 573 U.S. 373 (2014).

[314] *See id.* at 387. *See generally* Arizona v. Gant, 566 U.S. 332 (2009); Chimel v. California, 395 U.S. 752 (1969).

[315] *See Riley*, 573 U.S. at 387–88. *See generally Gant*, 566 U.S. 332; *Chimel*, 395 U.S. 752.

[316] In Chief Justice Roberts's opinion, he notes, "According to Riley's uncontradicted assertion, the phone was a 'smart phone,' a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity." *Riley*, 573 U.S. at 379. While the Justices refer to "cell phones," they noted Riley possessed a "smartphone" with additional capabilities, not a "cell phone," which traditionally had only the ability to place calls, send text messages, and, possibly, take phonographs. *See id.* at 393 ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact

arrest.[317] The virtue of *Riley* lies primarily in its narrow holding. Unlike the broad question it answered in *T.L.O.*, the Supreme Court in *Rile*y resolved a much more tailored issue: "Our answer to the question of what police must do before searching a [smartphone] incident to an arrest is accordingly simple—get a warrant."[318]

Lower courts split on deciding two factually similar cases: the principal case, which played out in California state courts, and the companion case, which the federal court considered.[319] In the principal case, police stopped Riley for driving with expired tags.[320] During the stop, police discovered that Riley's license was suspended and, pursuant to department policy, impounded the car and conducted an inventory search.[321] The warrantless search led the police to uncover two concealed firearms and arrest Riley.[322] Incident to that arrest, police searched Riley's pockets and seized a smartphone.[323] During a search of Riley's smartphone, police uncovered "a lot of stuff"—videos, texts, and pictures—that demonstrated gang involvement.[324] The State subsequently charged Riley with a number of crimes in connection with an earlier gang-related shooting, including firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder.[325]

Recognizing "reasonableness" as the "ultimate touchstone of the Fourth Amendment," the Court evaluated the merits of a warrantless search of Riley's smartphone incident to his lawful arrest, and diverged from the lower court.[326] The California state courts allowed the search of Riley's smartphone under the search-incident-to-arrest exception to the Fourth Amendment because the phone was in Riley's lawfully searched pockets at the time of his arrest.[327] The Supreme Court disagreed.[328]

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minicomputers that also happen to have the capacity to be used as a telephone."). Accordingly, this Comment replaces "cell phone" with "smartphone" where applicable.

[317] *See id.* at 386–89; *cf. id.* at 404–06 (Alito, J., concurring in part) ("I am not convinced at this time that the ancient rule on searches incident to arrest is based exclusively (or even primarily) on the need to protect the safety of arresting officers and the need to prevent the destruction of evidence . . . . It has long been accepted that written items found on the person of an arrestee may be examined and used at trial. But once these items are taken away from an arrestee (something that obviously must be done before the items are read), there is no risk that the arrestee will destroy them. Nor is there any risk that leaving these items unread will endanger the arresting officers.").

[318] *Id.* at 403 (majority opinion).

[319] *See id.* at 379–81. In the interest of brevity and given that both cases were similar enough for the Supreme Court to consolidate them for the same appeal, I will only discuss the principal case.

[320] *Id.* at 378.

[321] *Id.*

[322] *See id.*

[323] *See id.* at 378–79.

[324] *See id.* at 379 (internal citations omitted).

[325] *See id.*

[326] *Id.* at 381, 385–86 (internal citations omitted).

[327] *See id.* at 379–80.

[328] *See id.* at 386.

Applying the same balancing test it did in *T.L.O.*[329] and weighing the government's *Chimel* interests of protecting law enforcement and preserving evidence,[330] the Court found Riley's privacy interest in his smartphone's contents weightier.[331] The Justices did not believe that California's enunciated government interests—protecting law enforcement and preventing destruction of evidence—were at stake for two reasons[332]: (1) the data stored on smartphones does not pose an immediate risk of harm to law enforcement officers[333] and (2) once seized, suspected offenders cannot destroy the contents of their smartphones.[334]

The Court distinguished searching a smartphone from searching personal property incident to an arrest[335] and maintained that requiring a warrant to search a smartphone would neither place law enforcement at a disadvantage nor proscribe such a search in an exigent circumstance.[336] Because of their supercomputing capabilities and vast storage, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack,[337] a wallet, or a purse."[338] A search of a smartphone's contents incident to arrest is more comparable to a search of an "arrestee's entire house[,] . . . a substantial invasion beyond the arrest itself."[339] Considering the unique nature of smartphones and lacking "precise guidance from the founding era,"[340] the Supreme Court held that the "diminished privacy interests" of arrestees were not enough to outweigh their privacy interests in their smartphones;[341] therefore, absent exigent circumstances, law enforcement must obtain a warrant to search them, even incident to an arrest.[342]

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[329] *See id.* at 385; *cf.* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (explaining that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search").

[330] *Riley*, 573 U.S. at 386.

[331] *See id.* at 386–94.

[332] *See id.* at 386.

[333] *See id.* at 386–87.

[334] *See id.* at 388.

[335] *See id.* at 392–93 ("[Smartphones] could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers" due to their "immense storage capacity. . . . Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read . . . . [a]nd if they did, they would have to drag behind them a trunk of the sort held to require a search warrant.").

[336] *See id.* at 382–93. Other exceptions to the warrant requirement of the Fourth Amendment, such as the exception for exigent circumstances, would still apply as needed.

[337] *See generally* United States v. Robinson, 414 U.S. 218 (1973).

[338] *See Riley*, 573 U.S. at 393.

[339] *See id.* at 391–92.

[340] *See id.* at 385.

[341] *See id.* at 392–93.

[342] *See id.* at 400–01.

Given these cases discussed in Part III, this Comment suggests in Part IV a way to negotiate the void between protecting juvenile students' constitutional rights and maintaining the ability of school officials, police, and SROs to keep schools safe.

## IV. CURBING THREATS AND ELIMINATING CHARGES

Taking *T.L.O.* and the Supreme Court's (relatively static) holdings in *T.L.O.*'s progeny together with *Riley*, and considering the recent developments in school discipline following the Parkland tragedy, it is imperative to reconsider whether our current standards for searching juvenile students still suffice. In *T.L.O.,* in defense of school officials' "substantial interest" in school safety and discipline, Justice White remarked, "Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms."[343] That decision was issued in 1985 and, as the saying goes, that was then. It is difficult to imagine that Justice White could have predicted the wrinkle of modern technology, particularly smartphones, in school order or forms of disorder uglier than the likes of Parkland, among other American schools.

In *Riley*, nearly thirty years after *T.L.O.* was decided, Justice Alito issued a challenge to the Court:

> [W]e should not mechanically apply the rule used in the pre-digital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.[344]

This Part seeks to answer Justice Alito's call. First, it recommends a new standard, "reasonable suspicion-plus," which stakes out a compromise between the reasonable suspicion standard traditionally applied to students in *T.L.O.*[345] and the probable cause warrant requirement applied to searches of smartphones in *Riley*.[346] This new standard would require that school officials memorialize the reason for and scope of every search of a juvenile student's smartphone, absent exigency.[347] To illustrate how this would work in practice, this Part also applies "reasonable suspicion-plus" to the BHS example detailed in the Introduction.[348] And it recommends that SROs and school officials working in concert with law enforcement should be treated as law

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[343] New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).
[344] *Riley*, 573 U.S. at 406–07 (Alito, J., concurring in part).
[345] *See supra* Sections III.B, III.C.
[346] *See supra* Section III.E.
[347] *See infra* Section IV.A.
[348] *See supra* Introduction.

enforcement, not school officials, for the purposes of a Fourth Amendment smartphone search in school.[349] Second, this Part proposes one policy schools could implement in order to curb school threats while maintaining students' privacy.[350] Legislatures, acting more nimbly than the courts, should implement school-based threat assessment,[351] a viable alternative to zero tolerance policies that balances schools' interest in protecting students with students' interest in their own individual well-being.

### *A. Answering Alito's Call: Reimagining the* T.L.O. *Test Through a* Riley *Lens*

Currently, cases involving searches of juvenile students almost exclusively apply *T.L.O.*[352] At first glance, this makes sense because *T.L.O.* deals squarely with a classic search of students caught violating school policy.[353] In such cases, school officials do not need a warrant if the search is justified at its inception and reasonable in scope.[354] *Riley* is typically an afterthought in these cases, if it is considered at all, because *Riley* involved a search incident to arrest and requires law enforcement to obtain warrants before searching smartphones.[355] As far as juvenile students and schools are concerned, an application of either case without consideration of the other is disadvantageous. If, as is currently the case, *T.L.O.* is applied without *Riley*, students' privacy rights are secondary to the discretion of school officials and SROs, who are treated like school officials in many jurisdictions[356] and do not need warrants in "special needs" zones.[357] On the other hand, if *Riley* were adopted wholesale, school officials would be required to obtain warrants in order to search smartphones in relation to violations of school policy, like cyber-bullying in school, or alleged crimes, like threatening to bring a gun to school. Such a requirement would force principals and teachers to act as both student mentor and enforcer of the law, playing the same role for which SROs are so often criticized,[358] straining an already overwrought relationship.

The *T.L.O.* analysis lapses when applied to juvenile students' smartphones because it fails to consider, as the Supreme Court did in *Riley*, how invasive searches of smartphones actually are.[359] Searching a carton of cigarettes in student's pocket or bag, as in *Robinson* or *T.L.O.*, is not the same thing as searching a smartphone in 2019.[360] For one thing, cigarette cartons—like pockets, backpacks, lockers, and even undergarments—are containers, the contents of which are constrained by their physical

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[349] *See supra* Section III.D.
[350] *See infra* Section IV.A.
[351] *See infra* Section IV.B.
[352] *See supra* Section III.C.
[353] *See* New Jersey v. T.L.O., 469 U.S. 325, 328 (1985).
[354] *See supra* notes 257–63 and accompanying text.
[355] *See supra* Section III.E.
[356] *See supra* Section I.B.
[357] *See supra* Section III.A.2.
[358] *See* Pinard, *supra* note 92, at 1120.
[359] *See supra* Section III.B.
[360] *See* discussion *supra* Part III.

form and size.[361] Smartphones, however, are more akin to Mary Poppins' bottomless magic carpet bag, with seemingly endless apps that pull, send, and store information about their owner, aside from stored text messages, phone records, geolocation data, photos, and videos, that may be conjured up with a touch. School officials and law enforcement need only reach in, and they will surely find something they can use. Similarly, pockets are not password protected, nor can they be opened with a glance.[362] For this reason, the Court in *Riley* afforded smartphone owners with a higher expectation of privacy in their smartphones than in their pockets.[363] The question, then, is how that heightened level of privacy should affect a search of a smartphone in a school, a "special needs" zone.[364]

This Comment assumes four facts in answering that question: (1) students own smartphones and will bring them to school, regardless of school policies to the contrary;[365] (2) students use smartphone apps like Instagram and Snapchat to act out, which may include threatening other students' safety;[366] (3) school officials' interest in school safety and discipline can outweigh students' interests in privacy, a point on which the Supreme Court appears unwilling to compromise according to *T.L.O.*,[367] *Acton*,[368] *Earls*,[369] and *Redding*;[370] and (4) as Justice Roberts stated in *Riley*, a search of a smartphone is more exposing than "the most exhaustive search of a house" because a phone "contains a broad array of private information never found in a home in any form."[371] These assumptions, rooted in data and precedent, illuminate the present-day challenges schools face. The Supreme Court's failure to reconcile *T.L.O.* and its progeny with *Riley* only exacerbates these issues, allowing school officials and SROs to search students' smartphones for school policy infractions under the less stringent reasonable suspicion standard[372] in the interest of school safety and discipline,[373] circumventing *Riley*'s probable cause requirement for searching smartphones,[374] violating students' privacy,[375] and creating more points of contact between students and the criminal justice system.[376]

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361 *See supra* Sections III.A.2 and III.B.
362 *See iPhone XR*, *supra* note 169.
363 *See supra* Section III.E. *See generally* Riley v. California, 573 U.S. 373 (2014).
364 *See supra* Section III.A.2.
365 *See* discussion *supra* Part II.
366 *See* discussion *supra* Part I.
367 New Jersey v. T.L.O., 469 U.S. 325 (1985).
368 Veronica Sch. Dist. 475 v. Acton, 515 U.S. 646 (1995).
369 Bd. of Educ. v. Earls, 536 U.S. 822 (2002).
370 Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009).
371 *Riley*, 573 U.S. at 396–97.
372 *See supra* Section III.D.
373 *See* New Jersey v. T.L.O., 469 U.S. 325, 339 (1985); *see also supra* Sections III.B, III.D.
374 *See supra* Section III.E.
375 *See supra* Sections I.B, I.C, II.B.
376 *See* discussion *supra* Part I.

In order to balance students' privacy with school officials' substantial interest in safety and discipline,[377] and recognizing both that "special needs may, in certain circumstances, justify a search policy designed to further non–law enforcement ends" and that smartphones occupy a unique position in modern American culture warranting heightened privacy,[378] this Comment suggests a new legal standard for searching smartphones in schools, dubbed "reasonable suspicion-plus." First, school officials—principals and teachers—should articulate the rationale underpinning their searches and their intended scope in order to justify invading the heightened privacy interest the Court vested in smartphones.[379] Second, if teachers go beyond the scope of what they communicate to the district representative, whatever evidence they uncover should be excluded from use in either school disciplinary proceedings or criminal trial.[380] Third, SROs should be considered law enforcement, not school officials, for Fourth Amendment purposes, and any joint school official–law enforcement search of a student's smartphone should require probable cause.[381] These changes will not only respect the Court's special needs concerns enunciated in *T.L.O.*,[382] but they will also apply *Riley*[383] to juvenile students for the first time, allow school officials and law enforcement the flexibility and agility they need to avert school violence, and prevent students from being relegated to the school-to-prison pipeline.

First, when school officials determine they will search a student's smartphone, they should memorialize the reason for that search and the scope of that search in an email to the district superintendent, general counsel, or another individual whom the school district elects as a representative to receive notice.[384] The Supreme Court allows school officials a "high degree of deference . . . to [their] professional judgment" in deciding when to search students or their possessions.[385] So, school officials' searches, in effect, are presumptively reasonable at their inception.[386] However, a reading of *Riley* makes clear that citizens' privacy interests in their smartphones is derivative of smartphones' expansive capacity for both the storage and transmission

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[377] *See T.L.O.*, 469 U.S. at 339; *see also supra* Sections III.B, III.D.

[378] Pinard, *supra* note 92, at 1100; *see supra* Sections II.A, III.E.

[379] *See supra* Sections II.A, III.E.

[380] *See supra* note 245.

[381] *See supra* Section III.D.

[382] *See T.L.O.*, 469 U.S. at 339; *see also supra* Sections III.B, III.D.

[383] Riley v. California, 573 U.S. 373 (2014).

[384] This Comment is not concerned with the authority presumed by the representative for notice, nor that individual's legal training (though, that person would ideally be well-versed in Fourth Amendment search jurisprudence). Indeed, this person would merely serve as an impartial record-keeper so that later ex-post challenges to the school official's search could be free from tainted evidence: emails edited after-the-fact, misplaced memoranda, verbal notice, and more.

[385] Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 377 (2009).

[386] *See supra* Sections III.B, III.C, III.D.

of personal information.[387] Therefore, applying reasonable suspicion-plus would realistically only restrict the scope of school officials' searches of smartphones.

When considering the scope of a search of a juvenile student at school, *Redding*[388] proves informative. Although the Supreme Court in *Acton*[389] and *Earls*[390] highlighted the diminished expectation of privacy students experience,[391] the Court drew an important line when it invalidated the strip-search of the juvenile student in *Redding*.[392] In doing so, the Supreme Court didn't reject *T.L.O.*; instead, the Court said the search was unreasonable because the suspicion "[did] not raise the specter" of searching the student in that intrusive way.[393] In other words, the scope of the search was unreasonable. Similarly, according to reasonable suspicion-plus, the scope of a smartphone search should correspond with the particular suspicion that instigated the search and should not go beyond the articulated scope without justification.[394] This respects *T.L.O.*'s reasonable suspicion standard for "special needs" zones.[395] It is also supported by the deference *T.L.O.* affords school officials for determining what searches are reasonable at their inception;[396] after all, the Supreme Court told us in *Redding* that "the legitimacy of a [school] rule usually goes without saying."[397] And it simultaneously honors *Riley*'s focus on the specific facts of each smartphone search.[398]

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[387] *See supra* Section III.E.

[388] 557 U.S. 364; *see also* Section III.C.

[389] Veronica Sch. Dist. 475 v. Acton, 515 U.S. 646 (1995); *see also* Section III.C.

[390] Bd. of Educ. v. Earls, 536 U.S. 822 (2002); *see also* Section III.C.

[391] *See supra* Section III.C.

[392] 557 U.S. 364; *see also* Section III.C.

[393] *See Redding*, 557 U.S. at 376.

[394] For example, if a teacher emailed the district superintendent and said she had reasonable suspicion (and the requisite facts) to believe Tommy was bullying Gina on Facebook, and upon searching Tommy's Facebook messages to Gina she uncovered evidence of a drug distribution scheme, including a list of names, photographs of drugs, and indications that Tommy texted Gina about her next customer, that teacher has developed probable cause to believe Tommy's text messages to Gina contain additional evidence of their drug conspiracy. She can lawfully, under *T.L.O.* or reasonable suspicion-plus, search Tommy's text messages. Likewise, under *Riley*, law enforcement would have probable cause to obtain a warrant to search Tommy's smartphone.

[395] *See supra* Section III.B.

[396] *See supra* Section III.B.

[397] *Redding*, 557 U.S. at 371 n.1; *see also supra* Section III.C.

[398] > 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 . . . . The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.

Riley v. California, 573 U.S. 373, 402 (2014). *Acton*, *Earls*, and *Redding* all dealt with the schools' interest in keeping drugs out of the hands of students, which the Court never

Importantly, this would not impose a warrant requirement on school officials who "need not obtain a warrant before searching a student who is under their authority."[399] Moreover, reasonable suspicion-plus would not require approval from the representative for notice, or the sort of administrative warrant other scholars support.[400] A wait-to-search requirement, while appealing for its ability to curb the criminalization of youth misbehavior,[401] is not grounded in the current dueling standards of *T.L.O.*[402] and *Riley*.[403] The reasonable suspicion-plus standard, however, is flexible enough to allow school officials because it doesn't require approval, which could prove difficult to acquire or untimely when it eventually comes.[404] Instead, school officials could simply send an email articulating the rationale and scope of their search, conduct the search, and swiftly achieve their stated interest of maintaining students' safety or discipline. The thirty seconds to five minutes it would take to write and send the email would not prevent school officials from acting swiftly to restore classroom order. And school officials could always confiscate a student's phone pursuant to school policy to restore order in the shorter term, and then proceed to draft and send a "search-scope" email.

Likewise, school officials would not be bound by the reasonable suspicion-plus standard in emergency circumstances. *Riley* carved out an exception to the Fourth Amendment's probable cause and warrant requirements for exigent circumstances in the criminal context,[405] and threats alluding to the sort of violence visited upon Parkland would fit reasonably within that exception. In exigent circumstances—threats of gun violence, bomb threats, or other threats of mass violence, all of which have criminal implications—police, SROs, and school officials would be covered.[406]

Where do exigent circumstances end and Fourth Amendment protections for juvenile students and their smartphones begin? Recall the example of Brockton High School in Massachusetts and Brunswick High School in Georgia.[407] In that example,

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questioned. *See supra* Section III.C. In *Riley*, the Supreme Court approved the government's interest in protecting officers and preventing the destruction of evidence. *Riley*, 573 U.S. at 387–88. The Court only debated the scope of each search, not the reason for it. *See id.*

[399] New Jersey v. T.L.O., 469 U.S. 325, 349 (1985).

[400] *See* McAllister, *supra* note 215, at 314 (calling for "independent review of a school official's desire to search a student cell phone, along with an administrative warrant that a head school official must sign before a student's cell phone may be searched").

[401] *See id.* ("[F]reedoms are necessarily curtailed due to the level of supervision required in public schools.").

[402] 469 U.S. at 340 ("Maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures.").

[403] 573 U.S. at 406–07 (Alito, J., concurring in part) ("[W]e should not mechanically apply the rule used in the predigital era to the search of a cell phone.").

[404] Imagine, for example, that the district superintendent is on vacation. School officials cannot be expected to wait until she returns to reinstate order and safety in their classrooms.

[405] *See* Pinard, *supra* note 92, at 1100.

[406] *See supra* Section III.A.2.

[407] *See supra* notes 1–23 and accompanying text.

the contours of exigency were clear. Due to the seriousness of the threat, it would have been covered by the exigency exception to the Fourth Amendment's warrant requirement.[408] Moreover, Brunswick-area law enforcement officers would have had probable cause to search the student-perpetrator's phone, and they probably could have obtained a warrant.[409] However, the situation could have been much more complicated at Brockton High School. Under either the exigency exception or the Supreme Court's current interpretation of *T.L.O.*, school officials, SROs, and police probably could have searched any student's smartphone: The goal of protecting the Brockton student body would have been reasonable at its inception, and searching students' smartphones to identify the perpetrator of a threat of mass violence could be considered reasonable in scope, particularly given the proximity of this scare to the Parkland tragedy. In this case, the perpetrator of the threat would have been sitting nearly 1,000 miles away in Brunswick, while Brockton students' phones were searched, possibly resulting in unrelated criminal charges.[410] Fortunately, Brunswick-area officers identified the threat before any Brockton students faced violations of their privacy.[411]

Under the standard this Comment proposes, the ultimate outcome of this story would likely remain unchanged, but students' privacy interests would be bolstered. School officials in Brockton could confiscate students' phones if officials had reason to believe students were involved in the threat.[412] But once the threat was neutralized, the exigency (and the authority it provided) would dissolve.[413] Assuming that Brockton school officials had reasonable suspicion to believe some students were continuing to share the Brunswick-based threat via Instagram, for example, they would be required to employ the reasonable suspicion-plus standard to search students' phones: Curbing the transmission of threats is a reasonable goal at its inception, but the scope of Brockton school officials' searches (as articulated in an email to the school district's representative for notice) would be limited to Instagram absent another ground for searching outside that scope. Without more, school officials would have to rely on law enforcement to thoroughly investigate, obtain probable cause and a warrant, and search the phones as *Riley* requires.[414]

Second, if teachers search beyond the scope of what they stipulate to the district representative, whatever evidence they uncover should be excluded from use in criminal trial.[415] Under the reasonable suspicion-plus standard, a search of a student's

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[408] *See supra* Section III.A.2.

[409] *See supra* Section III.A.1; *see also supra* note 294.

[410] This Comment does not assert that school safety from threats of mass violence is not a legitimate policy goal that justifies a search of a juvenile student's smartphone. It only recommends caution through its proposed standard.

[411] *See supra* notes 1–23 and accompanying text.

[412] *See supra* Section III.A.2.

[413] *See supra* Section III.A.2.

[414] Riley v. California, 573 U.S. 373, 403 (2014); *see also supra* Section III.E.

[415] *See supra* notes 245, 419–92 and accompanying text. Recall, *T.L.O.* dealt with a

smartphone that ventures beyond articulated scope is per se violative of the Fourth Amendment because it is unreasonable. The Court in *T.L.O.* noted that "to receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is 'prepared to recognize as legitimate.'"[416] The Court in *Riley* recognized that society has a unique expectation of privacy in smartphones.[417] Therefore, the Fourth Amendment's "prohibition on unreasonable searches and seizures applies to searches conducted by public school officials"[418] and logically extends to smartphone searches.

Since *Mapp v. Ohio,* evidence seized in violation of the Fourth Amendment has been excluded from admission in a criminal prosecution.[419] The Supreme Court addressed exclusion in *T.L.O.*, noting:

> The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case.[420]

So, whether evidence should be excluded should depend on this two-part inquiry. And this Comment argues (1) that any search beyond the scope a school official articulates in his reasonable suspicion-plus email or memorandum would violate the Fourth Amendment, as argued above, and (2) the exclusionary rule is generally the appropriate remedy for evidence seized from searches that violate the Fourth Amendment.[421]

If school officials chose to search after the BHS threat had dissipated, then any evidence of other unrelated illicit behavior would be suppressed ex post in a criminal prosecution unless it was obtained within the articulated reasonable suspicion-plus scope or under a different theory of cause. That way, students' privacy interests

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violation of school policy, not a crime, and violations of school policy should be treated differently than crimes. *See generally* New Jersey v. T.L.O. 469 U.S. 325 (1985). Even so, students should not be penalized for unwarranted intrusions into their privacy that result in evidence of violations of school protocol.

[416] *T.L.O.*, 469 U.S. at 338 (quoting Hudson v. Palmer, 468 U.S. 587, 526 (1984)).

[417] *See supra* Section III.E. *See generally Riley*, 573 U.S. 373.

[418] *T.L.O.*, 469 U.S. at 333.

[419] 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.").

[420] *T.L.O.*, 469 U.S. at 333 n.3. Note, however, that the Court recognized that, at the time of its decision, only Georgia state courts "held that although the Fourth Amendment applies to the schools, the exclusionary rule does not." *Id.* at n.2.

[421] *See Mapp*, 367 U.S. at 660 (holding evidence seized in violation of the Fourth Amendment cannot generally be used against the person whose Fourth Amendment rights were violated); Weeks v. United States, 232 U.S. 383, 398 (1914).

in their smartphones would most likely remain intact at both BHS campuses, students would avoid the school-to-prison pipeline, and the schools' important interest in protecting their students and maintaining discipline would be served.

Third, SROs should be considered law enforcement for Fourth Amendment purposes, and any joint school official–law enforcement search of a student's smartphone should require probable cause. Because SROs occupy a unique position, straddling the line between law enforcement and school official,[422] they are often treated differently in different jurisdictions. Given the proliferation of SROs in American schools, the fact that they are sometimes armed, that they are statutorily considered law enforcement, and that they work in concert with and are often employed by police departments, it is more appropriate to treat SROs as law enforcement for Fourth Amendment purposes.[423] Likewise, school officials acting in concert with law enforcement should be subjected to a probable cause standard for searches. Probable cause is already required when school officials conduct a search at the behest of law enforcement.[424] But it can't be said that the search is any less intrusive when school officials maintain control of the search.[425] Either situation results in law enforcement uncovering potentially incriminating evidence. A bright-line rule mandating a probable cause standard for SROs and school officials working in concert with law enforcement (including SROs) would eliminate confusion and remain consistent with the Court's annunciation of the "special relationship" between students and school officials:

> The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils.[426]

Thus, SROs and school officials acting in concert with law enforcement, even in the post-exigency BHS example, would be required to follow the Court's black-letter command as it applies to smartphones: "[G]et a warrant."[427]

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[422] *See supra* Section I.B.

[423] *See supra* Sections I.B, III.D. Other scholars support this proposition. *See generally* Pinard, *supra* note 92.

[424] *See supra* Section III.D.

[425] In this case, most jurisdictions would apply a reasonable suspicion standard, focusing on who is exercising control over the search. *See supra* Section III.D.

[426] New Jersey v. T.L.O., 469 U.S. 325, 349–50 (1985) (Powell, J., concurring).

[427] Riley v. California, 573 U.S. 373, 403 (2014).

*B. A Key Policy Recommendation for Schools*

Justice Alito notes in *Riley* that the courts cannot solve this problem alone.[428] He argues in the final lines of *Riley*,

> [I]t would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than [courts] are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.[429]

Indeed, state legislatures and Congress must act to address this complicated issue and help strike the right balance between protecting students and protecting students' privacy. In particular, due to the decentralized nature of American K–12 education, state legislatures and local school districts can likely act more nimbly than Congress and tailor remedies to the ideal of each state or locale. To aid them in that task and with special attention paid to diverting students from the school-to-prison pipeline, this Comment adopts one particular research-based alternative to zero tolerance policies—school-based threat assessment.[430]

School-based threat assessment affords schools a research-based method of assessing when a student's behavior compels law enforcement intervention and, therefore, targets the exact issue discussed here: What do schools do when students make a threat of violence?[431] Following a tragedy like Parkland, schools are understandably concerned that their failure to take swift action will result in severe consequences.[432] There are, however, consequences when schools overact in response to threats.[433] This method attempts to strike a balance between inaction and action.

The foremost inquiry of school-based threat assessment is "whether a student poses a threat, not whether a student has made a threat."[434] The model also requires the creation of a panel of law enforcement, school officials, mental health professions, and other professionals who work in schools, one of whom should know the student being assessed.[435] The panel decides whether the student poses a safety risk,[436] not

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[428] *See id.* at 408 (Alito, J., concurring in part).

[429] *Id.*

[430] *Texas Appleseed* recommends school-based threat assessment as an alternative to school zero-tolerance policies, and that recommendation serves as the basis for this Section. *See* Fowler & Craven, *supra* note 91.

[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] *Id.*

[435] *Id.* Coaches, guidance counselors, and SROs would likely fit in this category.

[436] This recommendation is not free from flaws. For example, the discretion of the panel

"solely . . . whether the student's behavior falls within the elements of a Penal or Education Code violation."[437] Because, as one psychologist notes, "Kids make threats frequently when they are angry, upset, or just trying to gain some attention"; evaluating and curbing these threats requires a process "calibrated to deal with kids, not adults."[438]

Studies detailing the use of this model show that "the majority of threats (70%)" are benign.[439] Importantly, though, the model does not ignore these threats; instead, the response to these threats would be "proportional." For instance, if the panel were to determine a student's Facebook threat were benign, the panel likely would not involve police. But the consequence should "aim to teach students why even a threat of violence is harmful."[440]

The advantages of this system are clear. Threats that aren't substantive are still punished so that behaviors are curbed in the future, and students are not immediately arrested.[441] Therefore, school officials and law enforcement officers cease to waste law enforcement and criminal justice system resources, criminalize natural behaviors of undeveloped adolescent brains, and feed the school-to-prison pipeline.[442] Moreover, school-based threat assessment complements the legal standard this Comment suggests for searches of juvenile students' smartphones because it helps school officials determine the appropriate scope of a search. Thus, while both ideas are imperfect, they could work in tandem to more appropriately balance school safety and student privacy.

## CONCLUSION

The Parkland tragedy highlighted a forgotten axiom: Each new generation of juvenile students brings change with them—new culture, new technology, and new

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is arguably subject to abuse, groupthink mentality, and bias. To counteract this, the school district could impose a strict documentation requirement on the panel and have the panel's recommendation independently verified by an outside source. As cost is always a consideration when implementing new policy, school districts could partner with local universities and utilize psychologists-in-training, under the supervision of duly accredited psychology professors, to verify the panel's findings and recommendations. As is the case for law school clinics, these psychology "clinics" could benefit juvenile students and future psychology professionals while offering a low-cost check on the panel's decisions. *Cf. Barton Juvenile Defender Clinic*, EMORY U. SCH. L., http://law.emory.edu/academics/clinics/barton-juvenile-defender-clinic.html [https://perma.cc/5LMC-H6AD] (last visited Apr. 14, 2020) ("Student attorneys represent child clients in juvenile court and . . . the Juvenile Defender Clinic aspires to help students understand the impact of the legal system on a community.").

[437] *See* Fowler & Craven, *supra* note 91.

[438] *Id.*

[439] *Id.*

[440] *See id.*

[441] *See id.*

[442] *See id.*

behavior. With the advent of the smartphone, juvenile students carry a device capable of much more than the Supreme Court could have predicted when it decided *T.L.O.* in 1985.[443] In 2014, when the Supreme Court handed down its decision in *Riley*, it attempted to modernize, recognizing the illimitable information smartphones can access, send, and store by vesting a heightened privacy interest in smartphones.[444] But the Court has been hesitant to apply *Riley* to *T.L.O.*, to extend Fourth Amendment privacy rights fully to juvenile students.[445]

Instead, the Parkland shooting and other salient instances of school violence have prompted school officials, SROs, and law enforcement to work together as a stopgap solution, filling the void by referring our youth to the criminal justice system at recently increasing rates.

However, the solution requires more than criminalizing student misbehavior; it demands a compromise that respects both a school's legitimate interest in keeping students safe and a student's heightened privacy interest in her smartphone. This Comment, in reconciling *T.L.O.* and *Riley*, suggests that compromise. Its "reasonable suspicion-plus" standard, accounting for the proliferation of smartphones among juvenile students, would require school officials to memorialize the reason for and scope of their searches in order to prevent unreasonable violations of students' Fourth Amendment rights. It also recommends imposing a probable cause standard on SROs and school officials acting in concert with law enforcement. This would close the loophole left open by courts' exclusive application of *T.L.O.* in the school search context.

This new standard would allow schools to act deftly to protect students from violence, and it would protect students' privacy interests in their smartphones while respecting the Supreme Court's classification of schools as "special needs" zones.[446] Moreover, when coupled with a research-based policy like school-based threat assessment, fewer juvenile students will be forced into the criminal justice system. The resulting rebalance of schools' interests and students' privacy with the added flourish of research-based policy could curb threats and reduce criminal charges for our youth in this post-Parkland era.

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[443] *Mobile Phones: 1985 to 2015*, MYBROADBAND.COM (Jan. 8, 2015), https://mybroadband.co.za/news/smartphones/116476-mobile-phones-1985-to-2015.html [https://perma.cc/EJQ3-F4XX] (last visited Apr. 14, 2020).

[444] *See* Riley v. California, 573 U.S. 373, 403 (2014).

[445] *See supra* Section III.E.

[446] *See supra* Section III.E.