T.L.O. and Cell Phones: Student Privacy and Smart Devices After *Riley v. California*

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I. INTRODUCTION

A ruling by the United States Supreme Court will often alter a single element of a rule of law in a manner that effects change throughout the doctrine itself. This is plainly evident in the search-and-seizure case of *Riley v. California*.[1] The Court in *Riley* affirmed the vitality of the so-called "search-incident-to-arrest" exception to the warrant requirement of the Fourth Amendment.[2] However, the Justices severely limited the exception in an emerging context—when the property of the arrestee happens to be a cell phone or device that contains smart technology. The *Riley* decision categorically makes the warrantless seizure and harvesting of the digital contents of smart devices unlawful absent additional justification by police. *Riley* accomplishes this with aplomb, placing cell phones on a unique footing as a matter of constitutional law because "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person" and "ha[ve] several interrelated consequences for privacy."[3]

A change in Fourth Amendment doctrine in light of *Riley* is predictable, if not difficult to discern, in accord with the law of unanticipated consequences.[4] In education law, *Riley* sits uncomfortably alongside *New Jersey v. T.L.O.*[5] and its dominant role in resolving assertions of student privacy in the context of campus safety and school discipline. *T.L.O.* establishes a "search-incident-to-school-discipline" exception to the Fourth Amendment, authorizing searches and seizures of students and their property based upon mere reasonable suspicion.[6] Under *T.L.O.*, educators enjoy generous deference from judicial review because "standards of conduct for schools are for school administrators to determine without second-guessing by courts."[7] Except in cases both rare and egregious, most student searches are upheld because "maintaining security and order in the schools requires a certain

1. Riley v. California, 134 S. Ct. 2473 (2014).

2. *Id.* at 2482–84; *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

3. *Riley*, 134 S. Ct. at 2489; *see also id.* ("[M]any of these devices are in fact minicomputers . . . .").

4. *See* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 895 (1936) ("[T]he *consequences* of purposive action are limited to those elements in the resulting situation which are exclusively the outcome of the action, i.e. those elements which would not have occurred had the action not taken place. Concretely, however, the consequences result from the interplay of the action and the objective situation, the conditions of action.").

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

6. *Id.* at 341–42.

7. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 371 n.1 (2009) (citing *T.L.O.*, 469 U.S. at 342 n.9).

degree of flexibility in school disciplinary procedures, and [courts] have respected the value of preserving the informality of the student-teacher relationship."[8]

This Essay takes up the question posed by the law of unintended consequences: whether and to what extent the rule of *Riley* affects a student's right to privacy in the contents of a cell phone.[9] The interplay of *Riley* and *T.L.O.* is inevitable; a study estimates that 77% of teenagers take their phones with them to campus every school day.[10] Student possession of these devices place juveniles at risk of searches and seizures, and at least 65% of public schools have codes of conduct that prohibit possession and/or use of cell phones.[11]

The *Riley*–*T.L.O.* interplay raises two principal questions: (1) does the higher-order privacy interest of citizens in the digital contents of cell phones and smart devices apply to students in the school setting?; and (2) if yes, then what rules apply when school discipline involves a search and seizure of the digital contents of a cell phone?

As the discussion below sets forth, the law in *Riley* veers off from its initial criminal-procedure context to prompt singular changes in privacy law.[12] *Riley* and *T.L.O.* are reconcilable, but only in a framework that allows educators to maintain discipline while allowing for the emerging higher-order privacy interest of students in their smart devices. Consequently, *Riley* modifies *T.L.O.*, stopping just short of requiring school officials to obtain warrants to justify searching students' smart devices. The single most important element of this reconciliation is the "reasonable scope" limitation on school searches already

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8. *T.L.O.*, 469 U.S. at 340. The rare and egregious case typically occurs in the strip-search context. Compare the quote above from *T.L.O.* with the increased judicial scrutiny in *Safford*, which held that "the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short." *Safford*, 557 U.S. at 376.

9. *See* Merton, *supra* note 4, at 898–99. Merton describes the different justifications that explain how actions may have unexpected consequences—positive, negative, or merely neutral. An exegesis of the doctrine is beyond the scope of this Essay. It is enough now to use Merton's seminal thesis as a metaphor for understanding how *T.L.O.* must be modified: "[I]n the study of human behavior . . . the set of consequences of any repeated act is not constant but there is a range of consequences, *any one of which may follow the act in any given case*." *Id.*

10. *See* Amanda Lenhart et al., *Chapter Four: How Parents and Schools Regulate Teens' Mobile Phones*, PEW RES. CTR. (Apr. 20, 2010), http://www.pewinternet.org/2010/04/20/chapter-four-how-parents-and-schools-regulate-teens-mobile-phones.

11. NAT'L ORG. OF SCH. RES. OFFICERS, SCHOOL SAFETY POLICY SURVEY (2014) (on file with author). The survey results for the question "How often does your Safe School Plan conduct cell phone searches?" were as follows: Always, 4.4%; Often, 23.2%; Little, 37.1%; Never, 32.7%; Not Applicable, 2.6%. *Id.*

12. *See* JOHN MANSFIELD, THE NATURE OF CHANGE OR THE LAW OF UNINTENDED CONSEQUENCES: AN INTRODUCTORY TEXT TO DESIGNING COMPLEX SYSTEMS AND MANAGING CHANGE, 4 ("[H]uman designers fail to understand the nature of change."); *id.* at 6 ("[A]ll systems are co-evolutionary in nature. . . . In complex systems change is inevitable and small local changes propagating through the system can cause global changes in system behaviour.").

built into the *T.L.O.* framework.[13] *Riley*'s primary effect on *T.L.O.* is to make more rigid the "reasonable scope" limitation on school discipline involving student cell phones and tablets. What emerges is an altered *T.L.O.,* prohibiting searches of cell phones and smart devices unless the educator has the additional justification of reasonable suspicion of danger or reasonable suspicion of the student's resort to the device as a hiding place for evidence of wrongdoing.

The guiding principle going forward is grounded in both logic and rule of law by carefully applying the decision of the Court from another higher-order privacy case—the strip search decision of *Safford Unified School District #1 v. Redding*.[14] Hence, the expectation of privacy students possess in the digital contents of their cell phones after *Riley* is now at least equal to the higher-order privacy interest that prohibits strip searches by educators without additional justification. Despite this increased rigor, the most unanticipated consequence of *Riley* is the modest practical constraint on school disciplinary policies. When the fundamentals of school discipline and the educators' duty to protect students are properly accounted for, the increase in student autonomy is not as much as one might imagine at the outset.

II. SEMINAL CASES

A. RILEY V. CALIFORNIA

Any attempt to predict how *Riley* will affect education law must begin with an understanding of the case itself. In *Riley*, police seized and harvested the contents of a driver's and passenger's cell phones during an arrest for, among other things, possessing two loaded handguns.[15] The contents of the cell phone established through files, photographs, and videos that the driver was associated with a street gang, which allowed the prosecutor to impose additional charges to enhance any sentence handed down after conviction.[16] In a companion case, another suspect was arrested for selling drugs and, after searching two cell phones in his possession, used information in the phone to secure a warrant to search the suspect's house.[17]

Lower courts diverged in deciding these similar cases.[18] In the first case, the state courts decided to allow the search under the usual "search-incident-

13. *T.L.O.*, 469 U.S. at 341 ("Determining the reasonableness of [a student] search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' [and] second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" (second alteration in original) (citations omitted) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968))).

14. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009).

15. Riley v. California, 134 S. Ct. 2473, 2480 (2014).

16. *Id.* at 2481.

17. *Id.* at 2481–82.

18. *Id.*

to-arrest" exception to the Fourth Amendment, reasoning that the cell phone was in the possession of the suspect during the arrest.[19] In the second case, the federal appellate court decided against applying the exception and reversed the district court's denial of the suspect's motion to suppress the contents of the cell phone search.[20] The court reasoned that cell phones were unique from other physical possessions that are searched incident to arrest without a warrant.[21]

The U.S. Supreme Court agreed with the federal court that the search-incident-to-arrest exception did not apply.[22] As expected, the Court unanimously upheld the authority of police to seize and secure a suspect's cell phone along with other personal property pursuant to an arrest.[23] However, the Justices also unanimously ruled that cell phones are unique devices and their digital contents cannot be harvested pursuant to the search-incident-to-arrest exception to the Fourth Amendment. The foundation of the Court's reasoning is twofold. First, the Justices asserted that cell phones and other smart devices are unique because of the amount of personal data they contain.[24] Second, the Justices expressed confidence that police would not be at a disadvantage if the search-incident-to-arrest exception was taken away because: (1) in the typical arrest cell phones pose only a negligible threat to the interests of law enforcement; and (2) other exceptions to the warrant requirement are still in play.[25]

The arrest itself is not an adequate justification for harvesting the contents of a cell phone, because the privacy interest of the citizen is different for these devices than for other seized personal property. The popularity of digital storage and social networking is changing expectations of privacy in America, requiring some alteration in Fourth Amendment doctrine to accommodate the technology. For example, the Court noted that a cell phone or other smart device can contain "millions of pages of text, thousands of pictures, or hundreds of videos" consisting of all of the owner's digital activity for long periods of time.[26] In addition, the Justices noted that smart devices, when linked to "cloud computing," create a network such that police searching a cell phone may be accessing information that is "well beyond [any] papers and effects in the physical proximity of an arrestee.[27] In other words, the contents of these devices exceed what could ever be possessed by a citizen whose property is seized and searched during the typical arrest

19. *Id.* at 2481.
20. *Id.* at 2482.
21. *Id.*
22. *Id.* at 2485.
23. *Id.* at 2486.
24. *Id.* at 2485.
25. *Id.* at 2493–95.
26. *Id.* at 2489.
27. *Id.* at 2491.

scenario. The Court cited previous case law as precedent that a citizen does not forfeit all Fourth Amendment rights when arrested, especially when a search incident to arrest would constitute a "weighty enough"[28] invasion of privacy, such as a "top-to-bottom search of a man's house."[29] Placing the searches of cell phones in this category, the Court concluded that from now on the harvesting of digital contents of such a device would be unconstitutional without additional justification by police.[30]

Riley is properly summed up in three parts:

1. Incident to arrest, police are free to examine the components of the cell phone or other smart device to determine if it poses a threat of any kind.
2. Incident to arrest, police are not free to search the digital contents of a cell phone without additional justification.
3. As circumstances develop in an arrest, other exceptions to the warrant requirement of the Fourth Amendment remain in play (e.g., plain view of cell phone content, consent to search the contents, emergency).

B. NEW JERSEY V. T.L.O.

New Jersey v. T.L.O. announces the "school safety" exception to the warrant requirement of the Fourth Amendment.[31] The exception is limited to searches and seizures incident to school discipline. For three decades, *T.L.O.* has reshaped the education landscape of education law, primarily for the benefit of children who are compelled to attend school and ostensibly for educators who have a duty to keep kids safe.

In *T.L.O.*, the U.S. Supreme Court ruled in favor of a school administrator who expelled and turned over to the police drugs and drug materials that the educator discovered after harvesting the contents of the purse of a student, Tammy Lee Owens. The 14-year-old student was breaking school rules by smoking in the bathroom.[32] The school administrator's search first uncovered a pack of cigarettes and a container filled with tobacco rolling papers.[33] A further search of the purse revealed drugs and evidence that Ms. Owens was selling drugs to other students, including the names of other students.[34] The Justices upheld the school search, relaxing the application of

28. *Id.* at 2488 (quoting Maryland v. King, 133 S. Ct. 1958, 1979 (2013)).
29. *Id.* (quoting Chimel v. California, 395 U.S. 752, 766–67 n.12 (1969)).
30. *Id.* at 2485.
31. New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985).
32. *Id.* at 328.
33. *Id.*
34. *Id.*

the Fourth Amendment for on-campus searches under the following rationale:

> [W]e have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.[35]

In addition, the *T.L.O.* Court reasoned that, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[36] The following rules govern the "school safety" search-incident-to-school-discipline exception:

> Determining the reasonableness of [a student] search involves a twofold inquiry: first, one must consider "whether the . . . action was *justified at its inception*," [and] second, one must determine whether the search as actually conducted "was *reasonably related in scope to the circumstances which justified the interference in the first place*." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[37]

T.L.O. represents a significant departure from the language of the text of the Constitution. Consequently, one must be constantly aware of two forms of "reasonableness" jurisprudence in privacy cases that might arise involving students. On the warrant—or *Riley*—requirement side of the line, a reasonable search must be based on probable cause to believe that a violation of the law has occurred and a search warrant. This standard is in play for school resource officers and other police officials who act independently of school officials in enforcing the law.[38]

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35. *Id.* at 340–41.

36. *Id.* at 341.

37. *Id.* (emphasis added) (footnotes omitted) (citations omitted) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

38. At the writing of this Essay, courts are swiftly including school resource officers as "school officials" when acting in concert with educators to promote campus safety through some type of collaborative agreement. Wilson v. Cahokia Sch. Dist. #187, 470 F. Supp. 2d 897, 910 (S.D. Ill. 2007) ("[T]he weight of authority holds . . . that a search of a student on school grounds by a school resource officer at the request of school officials should be deemed a search by a school employee for Fourth Amendment purposes and thus is subject to the reasonableness standard, not the probable cause standard."); *see also, e.g.*, Cason v. Cook, 810 F.2d 188, 191–92 (8th Cir. 1987); People v. William V. (*In re* William V.), 4 Cal. Rptr. 3d 695, 699–700 (Ct. App. 2003); *In re* Josue T., 989 P.2d 431, 436–37 (N.M. Ct. App. 1999); Russell v. State, 74 S.W.3d

However, on the *T.L.O.* side of the line, neither probable cause nor a warrant is required for searches incident to school discipline. Instead, courts presume the validity of a school-search policy implemented in good faith to prevent misconduct by students that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[39] The searches of the contents of lockers,[40] purses,[41] backpacks,[42] cars,[43] and clothing[44] have all been upheld as reasonable searches without the need for additional justification when educators have a reasonable suspicion that the student was violating either the law or the rules of the school. This novel form of "reasonableness" is of the U.S. Supreme Court's own making when it decided that "[t]he

887, 892–93 (Tex. App. 2002); State v. Angelia D.B. (*In re* Angelia D.B.), 564 N.W.2d 682, 687 (Wis. 1997).

39. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). This quote is often combined with *T.L.O.* to complete the characterization of the authority of educators to keep children safe. See, for example, *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822 (2002), where the Court lowered the *T.L.O.* standard further to uphold school drug-testing policies:

> While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

Id. at 829–30 (alteration in original) (citations omitted) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995)) (citing *Tinker*, 393 U.S. at 506).

40. *See, e.g.*, State v. Jones, 666 N.W.2d 142 (Iowa 2003); State v. Barrett, 683 So.2d 331 (La. Ct. App. 1996); Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998).

41. *See, e.g.*, *T.L.O.*, 469 U.S. 325; *Cason,* 810 F.2d 188.

42. *See, e.g.*, DesRoches v. Caprio, 156 F.3d 571 (4th Cir. 1998); Rhodes v. Guarricino, 54 F. Supp. 2d 186, 190 (S.D.N.Y.1999); *In re* F.B., 555 Pa. 661 (1999). Two cases erroneously applied the student rights doctrine in ways that are not easily corrected. First, in *Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349 (8th Cir. 2004), school officials are said to lose their *in loco parentis* authority when working with law enforcement to maintain a safe campus. Doe is sufficiently inscrutable that even the 8th Circuit is loath to apply its "inference[s] from the [available] evidence" test to other cases. Smook v. Minnehaha Cty., 457 F.3d 806, 812 (8th Cir. 2006). Second, in *Dennis v. Board of Education of Talbot County*, 21 F. Supp. 3d 497 (D. Md. 2014), the court held that school officials were not allowed to search bags upon suspicion of alcohol use by student athletes on a bus to a school-sponsored athletic event. *Dennis* is best explained as a failure to adhere to the rule that individualized suspicion is only one factor in assessing the reasonableness of a search. It is not always required for a search to be reasonable. *See, e.g.*, *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. at 661–62; *Rhodes*, 54 F. Supp. 2d 186; Brousseau v. Town of Westerly, 11 F. Supp. 2d 177 (D.R.I. 1998); *In re F.B.*, 555 Pa. 661.

43. *See, e.g.*, Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735 (S.D. Tex. 2001); Anders *ex rel.* Anders v. Fort Wayne Cmty. Sch., 124 F. Supp. 2d 618 (N.D. Ind. 2000); Enter. City Bd. of Educ. v. C.P., 698 So. 2d 131 (Ala. Civ. App. 1996); State v. Michael R. (*In re* Michael R.), 662 N.W.2d 632 (Neb. App. 2003); State v. Best, 959 A.2d 243 (N.J. Super. 2008); State v. Slattery, 787 P.2d 932 (Wash. App. 1990); State v. Schloegel, 769 N.W.2d 130 (Wis. App. 2009).

44. Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996); *Cason*, 810 F.2d at 191; State v. Burdette, 225 P.3d 736 (Kan. App. 2010); *In re* D.D., 554 S.E.2d 346 (N.C. App. 2001); State v. Alaniz, 815 N.W.2d 234 (N.D. 2012).

accommodation of . . . the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause."[45]

T.L.O. can be summed up with two maxims:

1. A student's expectation of privacy in the school setting is reduced.[46]
2. Educators have a compelling interest in protecting the vulnerable children who assemble within the confines of a public school—one of the few compelling interests any government official can assert.[47]

III. RECONCILING *RILEY* AND *T.L.O.*

A. THE COURTS AND THE PROPER TEST FOR PROTECTING STUDENT PRIVACY INTEREST IN CELL PHONES

In the short term, the courts must decide on which side of the Fourth Amendment line to fall when deciding future student-search cases in public schools. The *Riley* side of the line effectively discards *T.L.O.*, requiring educators to obtain warrants before searching smart devices. However, the *T.L.O.* side of the line—without modification—negates the unique privacy interest of students who take cell phones onto campus. On this matter, it is important to emphasize that *Riley* exists precisely to exert a persistent influence on the resolution of civil-rights cases involving assertions of privacy of cell phones and smart devices. Therefore, any attempt to reconcile the two cases must proceed in constant awareness of two facts. First, smart devices combine with digital storage technology to create a unique type of personal property. The rising expectation of privacy and the increased rigor of constitutional protections follow that property. Second, students who possess these devices will take this higher-order right in through the schoolhouse gate, particularly as smart devices replace books as the primary learning tool.[48]

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45. *T.L.O.*, 469 U.S. at 341.

46. *Earls*, 536 U.S. at 829–30 ("Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children.").

47. *Id.* at 829 ("[I]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." (first alteration in original) (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989))); *id.* ("'[S]pecial needs' inhere in the public school context.").

48. *See* VA. DEP'T OF EDUC., BEYOND TEXTBOOKS: YEAR ONE REPORT (2011), http://www.doe.virginia.gov/support/technology/technology_initiatives/learning_without_boundaries/beyond_textbooks/year_one_beyond_textbooks_report.pdf; *see also, e.g.*, Linda Z. Cooper, *Developmentally Appropriate Digital Environments for Young Children*, 54 LIB. TRENDS 286 (2005); Donald C. Jones, *Thinking Critically About Digital Literacy: A Learning Sequence on Pens, Pages, and Pixels*, 7 PEDAGOGY 207 (2007); Eric J. Simon, *Electronic Textbooks: A Pilot Study of Student E-Reading Habits*, FUTURE PRINT MEDIA J., Winter 2001, at 1.

In other words, *Riley*'s declaration of a new, higher-order privacy interest in smart devices must logically apply in the school setting. Nevertheless, the courts would err greatly by placing the new school-discipline framework on the *Riley* side of the line. Powerful constraints, discussed below, work together to keep courts on the *T.L.O.* side of the line. The single most important constraint is the commitment of the U.S. Supreme Court to the *T.L.O.* framework as a viable tool to provide the rigor necessary to protect legitimate expectations of student privacy.

To begin with, *T.L.O.*'s school-safety exception is designed to permanently separate educators from other government officials to whom the Fourth Amendment's warrant requirement would apply.[49] The most succinct statement of the Court's intention in this regard is found in the rationale of *Board of Education v. Earls*, a student-privacy case involving a suspicionless drug testing. The justices uphold the school policy with the following observation: "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[50]

Scholars have spoken of this unique status of educators often, observing that "having compelled students to attend school and thus 'associate with the criminal few—or perhaps merely the immature and unwise few—closely and daily,' [the educator] 'owes those students a safe and secure environment.'"[51] Hence, it is not surprising that nearly all pre-*Riley* courts placed cell phones on the *T.L.O.* side of the line, treating cell phones like any other personal property. The devices were all treated like the seized personal property in Tammy Lee Owens' purse. Seizures of the devices for violating policies prohibiting cell phones on school property during school hours were upheld.[52] Searches of the contents of student phones were also upheld.[53] Of

49. See the statement of the Court on the relationship of educators to the Fourth Amendment in *Earls*, 536 U.S. at 829–30.

50. *Id.* at 844 (alteration in original) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 666 (1995)).

51. 5 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(b) (5th ed. 2012) (citing State v. Young, 216 S.E.2d 506 (1975)).

52. *See, e.g.*, Laney v. Farley, 501 F.3d 577 (6th Cir. 2007); J.W. v. Desoto Cty. Sch. Dist., No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059 (N.D. Miss. Nov. 1, 2010); Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007); Koch v. Adams, 361 S.W.3d 817 (Ark. 2010); Price v. N.Y.C. Bd. of Educ., 855 N.Y.S.2d 530 (App. Div. 2008).

53. *See, e.g.*, G.C. v. Owensboro Pub. Sch., 711 F.3d 623, 627, 633–34 (6th Cir. 2013) (ruling that educators lacked reasonable suspicion to search contents of a cell phone when the seizure was not related to unlawful cell-phone use and fears that the student was "thinking about suicide again" did not justify violation of privacy); *J.W.*, 2010 WL 4394059 (upholding both seizure and search of cell phone used in violation of school policy); Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009) (granting a temporary restraining order to stop the District Attorney from initiating criminal charges regarding nude photographs after officials confiscated several students' cell phones, examined them, and discovered that the students were engaged in "sexting"); Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622 (E.D. Pa. 2006) (explaining

course, the pre-*Riley* courts neither considered nor decided the question of whether cell phones increase the expectation of privacy of students enough to justify abrogation of *T.L.O.* and the school-safety exception to the Fourth Amendment. Nevertheless, now that courts must decide the issue, the answer is more straightforward than one might realize.

In addition, the *T.L.O.* analysis has proven to be a double-edged sword, capable of producing considerable rigor as the student's expectation of privacy increases, and its sharper edge is brought into contact with abusive school policies. In fact, the strongest support for the conclusion that the *T.L.O.* framework will control judicial review after *Riley* comes from another decision by the U.S. Supreme Court in which the cutting edge is on full display.

That case is the 2009 decision of *Safford v. Redding* in which the court applies *T.L.O.* to an unconstitutional strip search by educators. In *Safford*, the Court ruled that educators violated the constitutional rights of a 13-year-old student when they conducted a strip search on suspicion that she hid over-the-counter ibuprofen or other drugs in her underwear.[54] The ruling affirmed the authority of school officials to ban drugs, but imposed specific, singular guidelines on strip searches because of the higher-order privacy interest that students have to refuse a search of the body itself.[55] The Court said the search violated the rights of the student because school officials had no reason to suspect that the student was hiding drugs in her underwear.[56]

In applying the Fourth Amendment to invalidate the strip search, the Court rejected an obvious opportunity to redefine the student/educator relationship, choosing instead to leave *T.L.O.* in place. Justice Stevens emphasizes this point, saying, "[n]othing the Court decides today alters this basic framework."[57] Rather, the Court "simply applies *T.L.O.* to declare unconstitutional a strip search of a 13-year-old honors student that was based

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that the trial court agreed that the seizure of a student's cell phone and search of the phone-number directory and call log was valid, although the court ruled that school officials crossed the line when they pretended to be the student while sending an instant message to the student's brother and when they called nine other students listed in the phone-number directory).

54. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 368–69, 379 (2009).

55. After *Safford*, a student strip search is lawful if: (1) there is an "indication of danger to the students" because of the nature of the item sought; or (2) there is suspicion that the student is concealing the item sought in his or her underwear. *Id.* at 376–77.

56. In the words of the Court:

> Nor could [school officials] have suspected that [the student] was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students . . . hid[e] contraband in or under their clothing[]" . . . . But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short.

Id. at 376 (third and fourth alterations in original).

57. *Id.* at 379 (Stevens, J., concurring in part and dissenting in part).

on a groundless suspicion that she might be hiding medicine in her underwear."[58] The *Safford* Court uses the phrase "patently intrusive" to describe the student's expectation of privacy against a strip search. In the words of the Court, the intrusiveness was "inherent" in the experience of being embarrassed, frightened, and humiliated during a strip search.[59] Justice Souter, writing the *Safford* majority opinion, simply applies *T.L.O.* to the facts of the case:

> The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*, that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." . . . Here, the content of the suspicion failed to match the degree of intrusion.[60]

Thereafter, any tension between *Riley* and *T.L.O.* should diminish in favor of *T.L.O.* It is a straightforward task to import *T.L.O.*'s framework and rigor (as applied in *Safford*) to resolve litigation over cell-phone searches. One must logically conclude that the higher-order privacy interest of students to resist a strip search is equal to (if not greater than) the higher expectation of privacy students now possess in the digital contents of their cell phones. It is not simply a matter of using *Safford* as an object lesson or syllogism. *T.L.O.* stands on its own bottom as additional support for the conclusion that the *Riley* framework should not control the judicial review of school cell-phone policies going forward. There is the "reasonable scope" assessment—whether the content of the suspicion justifies harvesting the digital contents of the phone.

T.L.O.'s emphasis on the relationship between the content of the suspicion and the degree of intrusion is more than enough to protect the higher-order privacy interests of students. The function of *T.L.O.* in this regard compliments both the rationale and the outcome in *Riley*. This is evident in statements in both opinions. The *T.L.O.* Court warns that the "reasonable scope" element of its framework will add rigor in school cases where the content of the suspicion fails to match the degree of intrusion. Foreshadowing the *Safford* ruling that would come some 25 years later, the Court highlights this rigor with a bright-line test: "To the extent that deeply intrusive searches are ever reasonable [in the school] context, it surely must only be to prevent imminent, and serious harm."[61]

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58. *Id.* at 379–80.

59. *Id.* at 374–75 (majority opinion).

60. *Id.* at 375 (first alteration in original) (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

61. *T.L.O.*, 469 U.S. at 382 n.25.

The *Riley* Court uses the same language to protect the higher-order privacy expectations of citizens on the warrant-requirement side of the line when it notes:

> 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 that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. 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.[62]

On the whole, any fundamental differences between the *Riley* and the *T.L.O.* framework consist neither in rigor nor results; the authority of both educators and police will diminish in light of citizens' unique privacy interests in smart devices. However, the difference going forward is in the consequences of the chosen test on constitutional doctrine. There is no credible argument in law for applying *Riley* to school officials in a manner that places searches incident to school discipline on the warrant-requirement side of the Fourth Amendment line. To do so would obscure the bright line between *T.L.O.* and the warrant requirement of the Fourth Amendment, ignore the capacity of *T.L.O.* to produce the necessary rigor, and impair the very foundation of the authority of educators to maintain discipline while pursuing the educational mission. An additional, and perhaps even more important, harm would be the judicial fatigue caused by increasingly competitive litigation over which side of the Fourth Amendment line to place other aspects of the student/educator relationship. The U.S. Supreme Court has a longstanding disinclination to micromanage school policymaking in the way that supervision of the warrant requirement would instigate. This reluctance was first given voice in the 1975 student-suspension case of *Goss v. Lopez*: "The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action."[63]

Of course, after *Riley*, a lower court judge could simply declare a "cell phone exception" to *T.L.O.*, effectively requiring a warrant whenever school officials seek to harvest the digital contents. The point, obvious in *Safford*, is

62. Riley v. California, 134 S. Ct. 2473, 2494 (2014) (citations omitted).

63. Goss v. Lopez, 419 U.S. 565, 580 (1975).

that *T.L.O.* must be allowed to work as the Court envisioned. It is important to note here that lower courts have some practice with *T.L.O.*'s "reasonable scope" assessment through a multitude of court decisions—previously lesser known—that will now serve as corroboration for invalidating school disciplinary actions when the content of the educator's suspicion fails to justify harvesting the digital contents of a student's phone.[64]

B. School Officials and the Proper Justification for Searching Student Cell Phones

The law should leave educators on the *T.L.O.* side of the line with one enormous additional obligation: *T.L.O.* inherits *Riley*'s characterization of the higher-order privacy interest in cell phones and other devices with "smart" technology. Educators cannot be too careful to remember that cell phones and other smart devices represent personal property that create a unique expectation of privacy for students. That higher-order interest heightens judicial review of cell phone search policies to the more rigorous end of *T.L.O.*

This automatically upgrades disputes over cell-phone search policies to the more rigorous end of *T.L.O.* Here, it is important to examine, for a moment, the notion of the presumption of validity of school rules. For though it may escape notice at first glance, it is true that when school searches of cell phones are incident to violations of the code of conduct, the promise of rigor under the *T.L.O.* framework will connect to the "reasonable scope" feature of *T.L.O.*'s two-pronged framework and not to the "justified at its inception" element.[65] In other words, except for arbitrary and discriminatory abuses of the authority to search cell phones, *T.L.O.* will impose liability on school officials only when "the content of the suspicion fail[s] to match the degree of intrusion."[66]

There is no getting away from the weakness of the "justified at its inception" element. To begin with, courts are finished with the business of second guessing the validity of the government's interest, choosing instead to focus on whether or not the interest can withstand the rigor of the standard

64. *See, e.g.*, Knisley v. Pike Cty. Joint Vocational Sch. Dist., 604 F.3d 977 (6th Cir. 2010); Phaneuf v. Fraikin, 448 F.3d 591 (2nd Cir. 2006); Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598 (6th Cir. 2005); Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349 (8th Cir. 2004); Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001); H.Y. *ex rel.* K.Y. v. Russell Cty. Bd. of Educ., 490 F. Supp. 2d 1174 (M.D. Ala. 2007); Carlson *ex rel.* Stuczynski v. Bremen High Sch. Dist. 228, 423 F. Supp. 2d 823 (N.D. Ill. 2006); Fewless *ex rel.* Fewless v. Bd. of Educ. of Wayland Union Sch., 208 F. Supp. 2d 806 (W.D. Mich. 2002); Bell v. Marseilles Elementary Sch., 160 F. Supp. 2d 883 (N.D. Ill. 2001); Konop *ex rel.* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189 (D.S.D. 1998); Oliver *ex rel.* Hines v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995); Kennedy v. Dexter Consol. Sch., 10 P.3d 115 (N.M. 2000).

65. *T.L.O.*, 469 U.S. at 342.

66. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 375 (2009).

of judicial review in light of the right the citizen is asserting.[67] The typical Fourth Amendment case is no different; the government's interest to conduct a search is competing with the citizen's expectation of privacy. The ruling in *Riley* is based on this balancing test that just happens to favor the unique expectation of privacy in cell phones. In the words of the Court, the interests of law-enforcement officers are not weighty enough to support an exception for a warrantless search of a cell phone incident to arrest: "On the government interest side . . . harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data."[68]

Similarly, in the typical school-search case, the interest of educators to maintain a safe campus by enforcing school rules is competing with the student's right to privacy. The point here is that just as courts tend to balance rather than quibble with the validity of the interest of the police in law enforcement, all judges vigilantly avoid second-guessing the interest of educators to implement and enforce codes of conduct. The validity of the interest is taken as a given. The dispositive issue is one of scope: whether the degree of the suspicion is weighty enough to outweigh the expectation of privacy of the student. As *T.L.O.* put it:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[69]

The *Safford* Court, after recognizing the higher-order privacy interest of students to resist strip searches, puts it more bluntly:

> When the object of a school search is the enforcement of a school rule, a valid search assumes, of course, the rule's legitimacy. But the legitimacy of the rule usually goes without saying as it does here. The Court said plainly in *New Jersey v. T.L.O.* that standards of conduct

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67. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) ("'[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' . . . rather than with the federal courts." (citation omitted) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986))); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities."); Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws . . . .'" (footnote omitted) (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955))); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

68. Riley v. California, 134 S. Ct. 2473, 2484–85 (2014).

69. *T.L.O.*, 469 U.S. at 341–42 (footnote omitted).

> for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed. Except in patently arbitrary instances, Fourth Amendment analysis takes the rule as a given . . . . There is no need here either to explain the imperative of keeping drugs out of schools, or to explain the reasons for the school's rule banning all drugs, no matter how benign, without advance permission.[70]

Notice the effect this presumption creates when *T.L.O.* is applied in the typical school-search dispute. When the search is incident to school discipline, the satisfaction of the first prong of *T.L.O.*—"justified at its inception"—is taken as a given. And so it will be on the more rigorous end of *T.L.O.* when applied to cell-phone search policies after *Riley*. Once more, it is the strip-search case of *Safford* that acknowledges the weakness of the "inception" prong with almost sheepish prose:

> A number of our cases on probable cause have an implicit bearing on the reliable knowledge element of reasonable suspicion, as we have attempted to flesh out the knowledge component by looking to the degree to which known facts imply prohibited conduct . . . .
>
> Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a "fair probability," or a "substantial chance" of discovering evidence of criminal activity. *The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing*.[71]

This conclusion does not carry over to the "reasonable scope" prong of the *T.L.O.* framework. The judicial review is purposefully formidable and not to be trifled with, particularly in its more rigorous form. Educators that desire to avoid liability for searches conducted on cell phones cannot afford to forget its rigor in the *Safford* case or the lessons it teaches:

1. The validity of any school search is circumstantial in relation to the reason "which justified the interference in the first place."[72]
2. The search of a student's person (outerwear) and personal property—other than a cell phone—is valid to the extent that it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[73] When searches are related to a

70. *Safford*, 557 U.S. at 371 n.1 (citation omitted).
71. *Id.* at 370–71 (emphasis added) (citations omitted).
72. *T.L.O.*, 469 U.S. at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
73. *Id.* at 342.

violation of law or school policy, no additional justification is needed and the search may expand as suspicions evolve.

3. The search of a student's person (underwear) is inherently intrusive. Even when related to a violation of school policy, these searches are invalid unless they are necessary to prevent imminent and serious harm, or the educator has actual knowledge or corroborated suspicion that evidence of wrongdoing is in the underwear.

4. As with underwear, the search of the digital contents of a student's cell phone is inherently intrusive. When a school allows cell-phone possession and seeks to search the phone of a student whose misconduct does not involve cell-phone use, the search is invalid unless it is necessary to prevent imminent and serious harm, or the educator has actual knowledge or corroborated suspicion that evidence of wrongdoing is in the device.

5. When a school allows cell-phone possession and seeks to search the phone of a student whose misconduct involves cell-phone use, the search is valid because all knowledge and suspicion focuses on the uses to which the device itself has been put. Therefore, no additional justification is needed and the search may expand as suspicions evolve.

6. School officials possess the authority to prohibit cell-phone possession and use on campus. Therefore, when a school prohibits cell-phone possession and seeks to search the phone of a student whose misconduct involves cell-phone use, the search is valid because all knowledge and suspicion focuses on the uses to which the device itself has been put. Therefore, no additional justification is needed and the search may expand as suspicions evolve. However, when a school prohibits cell-phone possession and seeks to search the phone of a student whose misconduct involves mere possession of the cell phone, the search must proceed cautiously, if at all, to ensure that student privacy will be invaded no more than necessary to achieve the legitimate end of preserving order in the schools. Confiscation is the go-to remedy here unless the search is necessary to prevent imminent and serious harm, or the educator has actual knowledge or corroborated suspicion that evidence of wrongdoing is in the device.

Taken together, these lessons provide structure for school discipline policies involving cell phones. The elements of *Safford* are conspicuous and essential; they provide liability insurance for school officials because the privacy interest of students in a strip search is equal to (if not greater than) the expectation of privacy students now possess in the digital contents of their cell phones. Indeed, educators should never avert their eyes from the *Safford*

rationale; *Safford* will guide the implementation of school rules until court decisions begin applying its rationale in cell-phones cases.

The most important single carry-over from *Safford* is the warning on the proper scope of school searches when the student has a higher-order privacy interest:

> We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope *requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing* before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, *place a search that intrusive in a category of its own demanding its own specific suspicions.*[74]

When one converts the language of the *Safford* rule to address searches of a cell phone, an image of the model cell-phone policy begins to emerge:

> The *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or requires the support of reasonable suspicion of the student's resort to the cell phone for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from confiscation of a cell phone to the extreme intrusiveness of a search of its digital contents.

Here, then, is the foundation of school codes going forward after *Riley*. Even when educators have an individualized suspicion that a student "has violated or is violating either the law or the rules of the school"[75] in the use of a cell phone, a search of the cell phone will be unconstitutional unless there is: (1) an indication of danger; or (2) any reason to cast suspicion on the phone as the hiding place of evidence of wrongdoing. This framework has authority. At first glance, this promises to exclude the authority of educators to search a cell phone in all but the exigent circumstances. And as the progeny of the rationale used to invalidate the strip search in *Safford*, this is what it exists to do. Yet, when the fundamentals of school discipline and the educators' duty to protect students are properly accounted for, the increase in student autonomy is not as much as one might imagine at the outset. Simply put, when the search arises out of a violation of school policy specifically pertaining to cell-phone possession and use, the promise of rigor evaporates.

74. *Safford*, 557 U.S. at 377 (emphasis added).

75. *T.L.O.*, 469 U.S. at 342.

IV. MODELS OF *RILEY* AND ITS INFLUENCE ON SCHOOL DISCIPLINE

Table 1. Policy Options in Light of *Riley*

	For Schools That Allow Cell Phone Use on Campus ⬇ **WHEN SEARCH ALLOWED**	**For Schools That Prohibit Cell Phone Use on Campus** ⬇ **WHEN SEARCH ALLOWED**
The student's misconduct does not involve phone use. Student merely has a phone.	1. Only when necessary to prevent imminent and serious harm. OR 2. When there is actual knowledge or corroborated suspicion that evidence of the misconduct is in the device.	1. Only when necessary to prevent imminent and serious harm. OR 2. When there is actual knowledge or corroborated suspicion that evidence of the misconduct is in the device. *NOTE: Confiscation always valid when policy prohibits possession on campus.
The student's misconduct involves phone use.	Confiscation and search are always valid. No additional justification is needed.	Confiscation and search are always valid. No additional justification is needed.

A. CELL PHONES AND SCHOOL DISCIPLINE: FIVE EXAMPLES

Five straightforward scenarios of discipline involving cell phones illustrate the scope of future policymaking by educators.

1. Scenario 1: Violation of School Rules Unrelated to Cell-Phone Possession and Use

Mortimer is a ninth-grade student in the principal's office with three other students, all suspected of being involved in stealing items and money from the locker room. The boys are all asked to empty their pockets; Mortimer's wallet, keys, and cell phone are placed on a table. School officials may search the contents of the wallet, but are not allowed to search the

contents of the cell phone unless they have additional justification.[76] This justification is supplied if searching the cell phone is necessary to prevent imminent and serious harm, or if the educator has actual knowledge or corroborated suspicion that evidence of theft is on the cell phone.

2. Scenario 2: Use of Cell Phone in Actual Misconduct

Mortimer once again finds himself in the principal's office. This time, discipline is being meted out for three violations of the school code: (1) sexting pictures of himself to other students during the lunch period; (2) cheating on the history exam by resorting to Wikipedia on his smart phone for answers; and (3) harassment by repeatedly posting on Twitter threats to harm a seventh grader during the school day.

The search of the cell phone's digital contents is allowed in each of the three acts of misconduct. It is not a matter of the cumulative effect of Mortimer's exploits. More accurately, each incident creates suspicion that focuses directly on the uses to which the device itself has been put. As to each allegation, the educator has actual knowledge that evidence of wrongdoing is in the cell phone or can easily corroborate this suspicion.

In this instance, there is potential for mischief and confusion if lawyers, judges, and school officials pondering the reach of *Riley* extend its rule of law beyond the facts. In *Riley*, the determination of what, if anything, should be done with the confiscated cell phone is "incident-to-arrest" precisely because any attention paid to the device is unrelated to the reasons that led to the arrest in the first place. But it should be easy to see how the search of the cell phone by police would produce no Fourth Amendment controversy of any kind when the arrest arises out of probable cause of a crime involving the uses to which the cell phone itself had been put by the suspects.[77]

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76. Outside the education context, where privacy protections are even greater than on campus, the fact that a suspect is arrested on probable cause does not, in itself, necessarily justify every search. *See* Riley v. California, 134 S. Ct. 2473, 2488 (2014) ("The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search 'is acceptable solely because a person is in custody.'" (quoting Maryland v. King, 133 S. Ct. 1958, 1979 (2013))).

77. For example, all 50 states, the District of Columbia, and federal law criminalize transmitting harassing and fraudulent communications via the telephone. 47 U.S.C. § 223 (2012); ALA. CODE § 13A-11-8 (2015); ALASKA STAT. § 11.61.120 (2014); ARIZ. REV. STAT. § 13-2916 (2013 & Supp. 2014); ARIZ. REV. STAT. § 13-2921 (2013); ARK. CODE ANN. § 5-71-209 (2013); CAL. PENAL CODE § 653m (2010 & Supp. 2015); COLO. REV. STAT. § 18-9-111 (2014); CONN. GEN. STAT. § 53a-183 (2013); DEL. CODE ANN. tit. 11, § 1311 (2013); D.C. CODE § 22-404 (2001 & Supp. 2014); FLA. STAT. § 365.16 (2013); GA. CODE ANN. § 46-5-21 (2004 & Supp. 2014); HAW. REV. STAT. § 711-1106 (1993 & Supp. 2013); IDAHO CODE § 18-6710 (2004); *id.* § 18-6711; 720 ILL. COMP. STAT. 5/26.5-2 (2014); IND. CODE § 35-45-2-2 (2014); IOWA CODE § 708.7 (2015); KAN. STAT. ANN. § 21-5427 (Supp. 2014); KY. REV. STAT. ANN. § 525.080 (West 2006 & Supp. 2014); LA. STAT. ANN. § 14:285 (2004 & Supp. 2015); ME. STAT. tit. 17-A, § 506 (2006 & Supp. 2014); MD. CODE ANN., CRIM. LAW § 3-804 (LexisNexis 2012); MASS. GEN. LAWS ch. 265, § 43A (2012); MICH. COMP. LAWS § 750.540e (2004); MINN. STAT. § 609.749 (2014);

In the same way, there can be no controversy over school discipline that searches the digital contents of a student's cell phone when the misconduct has everything to do with the use of the device itself in violation of a school rule.

3. Scenario 3: Violation of School Rules That Prohibit Cell Phone Possession and Use

Mortimer now challenges a decision by the principal to search the contents of his cell phone because he violated the school policy that prohibits both possession and use of cell phones on campus during the school day. There are no specific allegations about the use to which the phone was put; only that Mortimer was seen on campus using the phone in violation of school rules. As a matter of policy, educators may exercise a broad range of discretion on the decision of whether to search a cell phone in this scenario, and a predictable backlash of criticism is unavoidable no matter what the decision. Nevertheless, as a matter of law, a decision to search on these facts is justified by the *T.L.O.* requirement that there be "a moderate chance" of finding evidence that Mortimer did in fact violate the rules of the school, the suspicions of which the educator already has direct or corroborated knowledge.[78]

The "reasonable-scope" issue is particularly troublesome in Scenario 3 because the nature of the infraction does not suggest any specific use to which the cell phone has been put. *T.L.O.* does not require an educator to investigate the student's motives for violating the rules that prohibit possession and use, although the school official may question the student to gain a better understanding of the nature of the violation. Fortunately, once again, the Court in *T.L.O.* does provide a pragmatic restraint on how rigorous a search should take place. The educator must place the safety of the learning environment far above personal curiosity about the contents of Mortimer's phone. If school officials conduct an exhaustive harvesting of Mortimer's cell

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MISS. CODE ANN. § 97-29-45 (2006); MO. REV. STAT. § 565.090 (2000 & Supp. 2014); MONT. CODE ANN. § 45-8-213 (2013); NEB. REV. STAT. § 28-1310 (2008); NEV. REV. STAT. §201.255 (2013); N.H. REV. STAT. ANN. § 644:4 (2007 & Supp. 2014); N.J. STAT. ANN. § 2C:33-4 (West 2005 & Supp. 2015); N.M. STAT. ANN. § 30-20-12 (2004); N.Y. PENAL LAW § 240.30 (McKinney 2008 & Supp. 2015); N.C. GEN. STAT. § 14-196 (2013 & Supp. 2014); N.D. CENT. CODE § 12.1-17-07 (2012 & Supp. 2013); OHIO REV. CODE ANN. § 2917.21 (2014 & Supp. 2015); OKLA. STAT. tit. 21, § 1172 (2011); OR. REV. STAT. § 166.090 (2013); 18 PA. CONS. STAT. § 2709 (2009 & Supp. 2014); 11 R.I. GEN. LAWS § 11-35-17 (2002); S.C. CODE ANN. § 16-17-430 (2003); S.D. CODIFIED LAWS § 49-31-31 (2004 & Supp. 2015); TENN. CODE ANN. § 39-17-308 (2014); TEX. PENAL CODE ANN. § 42.07 (West 2011 & Supp. 2014); UTAH CODE ANN. § 76-9-201 (LexisNexis 2012); VT. STAT. ANN. tit. 13, § 1027 (2009 & Supp. 2014); VA. CODE ANN. § 18.2-427 (2014); *id.* § 18.2-428; *id.* § 18.2-429; WASH. REV. CODE § 9.61.230 (2014); W. VA. CODE § 61-8-16 (2014); WIS. STAT. § 947.012 (2013–2014); WYO. STAT. ANN. § 6-6-103 (2013).

78. *See supra* note 39 and accompanying text; *see also Safford*, 557 U.S. at 365.

phone, then they must be able to articulate a reason that is related to school safety. Here is how the *T.L.O.* Court puts it:

> This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, *the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.*[79]

4. Scenario 4: The Confiscated Device

Any educator who has read this far will correctly conclude that the mere seizure and confiscation of Mortimer's cell phone is always lawful when school policy prohibits possession of the device on campus. Seizures of cell phones incident to school policy are exempt from *Riley*. *Riley* has no effect on the preexisting authority of educators to ban possession and use of the devices when the discipline is limited to confiscation.[80] The student's higher-order privacy interest kicks in only when the cell phone is searched. Courts will presume the validity of the policy and focus instead on whether the school discipline implicates procedural-due-process protections.[81]

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79. *T.L.O.*, 469 U.S. at 342–43 (emphasis added).

80. *See, e.g.*, DETROIT PUB. SCH., STUDENTS' RIGHTS, RESPONSIBILITIES & CODE OF CONDUCT 12 (2013), http://detroitk12.org/resources/students/codeOfConduct/Student_Code_of_Conduct.pdf ("Use of these devices is prohibited on school property . . . until after dismissal for the day unless permission is granted . . . . Devices will be confiscated if carried in a visible manner or turned on, without permission, during the school day. Devices may be searched if there is reasonable suspicion that the search will uncover evidence of further violations of District policies or law or injury to a student."); *Electronics Cell Phone Use Policy*, BENICIA UNIFIED SCH. DIST., http://bhs.beniciaunified.org/our-school/attendance-procedures-1/electronics-cell-phone-use (last visited Sept. 11, 2015) ("If a cell phone/electronic device rings, vibrates, or is used for any reason without teacher permission, or is visible anytime during class time or if you are caught using it on campus during class time, a staff member may confiscate the device. Refusal to surrender your phone when asked is considered defiance. Defiance may result in disciplinary consequences, including suspension. Parents will be contacted."); *see also Electronic Device/Cell Phone Policy*, HARTLAND HIGH SCH., http://www.hartlandhighschool.us/Parents/School-Documents/Cell-Phone-Policy (last visited Sept. 28, 2015) ("In order to limit the disruptions to your child's education, no personal electronic devices are allowed during school hours. . . . Students violating this policy with have the items confiscated and may face progressive discipline.").

81. *See, e.g.*, Laney v. Farley, 501 F.3d 577, 582 (6th Cir. 2007) (upholding a school policy against a procedural-due-process challenge). In *Laney*, the school policy required "[c]onfiscation of device and return to parent ONLY after 30 days and 1 day of [i]n-school suspension." *Id.* at 579. Students' rights proponents will not concede these points and tend to unfurl the due process protections at this interpretation, advocating a rigorous judicial review of the fit between the code and the method of enforcement. But challengers should not forget the free-speech case of *Bethel*

5. Scenario 5: The Abandoned or Lost Device

When students abandon their property, the expectation of privacy is abandoned as well.[82] The more rigorous end of *T.L.O.* is simply not applicable even when the property in question happens to be a cell phone. Any attempts to add rigor will encounter resistance by the longstanding line of cases that declare that "[t]he abandonment of property is the relinquishing of all title, possession, or claim to or of it—a virtual intentional throwing away of it."[83] Therefore, searching the contents of an abandoned phone is purely a policy matter for school officials; the law makes no claim of interference.

The law does claim to interfere as to the lost and misplaced cell phone; the student's higher-order expectation of privacy triggers the protections of the more rigorous end of *T.L.O.*[84] However, even here there is deference given to the practicalities of the school environment; the law will diminish the student's expectation of privacy to allow school officials to examine the contents of the phone to determine the rightful owner.[85] Indeed, the clearly settled law declares that educators have the duty to attempt to identify and

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School District No. 403 v. Fraser, 478 U.S. 675 (1986). In *Fraser*, the Court upheld both the policy and the validity of school discipline for violating a rule not explicitly stated in the code of conduct:

> We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. . . . The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.

Id. at 686 (citation omitted) (quoting *T.L.O.*, 469 U.S. at 340).

82. *See* State v. Amaya, 739 P.2d 955, 957 (Mont. 1987); *see also* United States v. Harruff, 352 F. Supp. 224, 226 (E.D. Mich. 1972); Smith v. State, 510 P.2d 793, 795 (Alaska 1973); People v. Shepherd, 28 Cal. Rptr. 2d 458, 459 (Ct. App. 1994); State v. Ralston, 257 P.3d 814, 818–19 (Kan. App. 2011).

83. Foulke v. N.Y. Consol. R.R. Co., 127 N.E. 237, 238 (N.Y. 1920); *see also* State v. Purvis, 438 P.2d 1002, 1005 (Or. 1968); 1 LAFAVE, *supra* note 51, § 2.6(b).

84. An item is "lost" rather than "abandoned" if, when viewed, there is no reason to think that the student has intentionally relinquished the privacy interest in it. For example, a phone found in the campus trash dumpster is abandoned. A cell phone will be considered abandoned if a student throws the device on the roof of the schoolhouse in an attempt to evade school discipline. *See* State v. Kolia, 169 P.3d 981, 987 (Haw. App. 2007). These law-enforcement cases apply the more rigorous standard of the Fourth Amendment warrant requirement. It goes without much elaboration that the outcomes on the privacy question would be the same under the more rigorous end of *T.L.O.* Finally, a cell phone discovered in a seat in the school gymnasium is deemed to be lost, as would a device found lying on a desk in an empty classroom or cafeteria.

85. *See* State v. Hamilton, 67 P.3d 871, 877 (Mont. 2003); *see also* People v. Juan, 221 Cal. Rptr. 338, 341 (Ct. App. 1985); State v. Ching, 678 P.2d 1088, 1093 (Haw. 1984).

locate the owner of a lost cell phone.[86] Once the absent-minded owner is identified, educators whose policy forbids cell phones on campus may mete out school discipline.[87] Beyond this, educators are forbidden to search the digital contents absent additional justification.[88]

Educators with practical experience will argue that additional justification for harvesting the contents of a lost phone may be obtained through fortuity, when something unexpected turns up during the search for the owner. This is the lesson that *T.L.O.* itself teaches. When the school administrator, searching for cigarettes, stumbles upon a package of rolling papers, the Court declared that this discovery provided "the suspicion that gave rise to the second—the search for marihuana."[89] The Court allowed the school official to harvest the purse by observing that "[u]nder th[ose] circumstances, it was not unreasonable to extend the search."[90] In other words, what begins as a search for the owner of a lost phone using the least restrictive means, may give rise to a reasonable suspicion that justifies further exploration. Opponents of this view should carefully examine the *T.L.O.* Court's decision to overrule the New Jersey Supreme Court for its "somewhat crabbed notion of reasonableness" when the lower court excluded the evidence of the search of the purse.[91]

Additional justification to search the contents of a lost phone may also be established when circumstances bring the *quantum of danger* element into play. It is enough now to say that a lost cell phone that is found in a book bag that also contains a weapon or dangerous drugs justifies a fuller search in light of the educator's compelling interest to protect students.

V. CONCLUSION

School officials must take *Riley* seriously. The student's assertion of privacy follows the device. Not just any violation of school rules will justify the

86. *See* RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 3.1. (Walter B. Raushenbush ed., 3rd ed. 1975) ("The finder of lost goods is a bailee of them for the true owner with certain rights and obligations."). Mislaid property is presumed to have been left in the custody of the owner or occupant of the premises upon which it is found. *See id.* § 3.4. "[I]f the finder does take mislaid property into his custody, he assumes the obligations of a gratuitous bailee . . . ." *Id.* § 3.5; *see also* 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* §§ 12–14 (2d ed. 2005).

87. *See* Laney v. Farley, 501 F.3d 577, 579, 584 (6th Cir. 2007). In *Laney*, the cell phone of the student was discovered in class when it began ringing. *Id.* at 579. The federal court upheld the confiscation and a one-day in-school suspension. *Id.* at 584. There is no reason to believe that this choice of discipline would be unacceptable if applied to the student of a lost phone that is discovered by school officials under other circumstances.

88. *See Ching*, 678 P.2d at 1093 (upholding the suppression of cocaine in a closed cylinder found in a lost leather pouch as exceeding the limits of a valid search of lost items for identification); *see also* 3 LAFAVE, *supra* note 51, § 2.6(b).

89. New Jersey v. T.L.O., 469 U.S. 325, 343–44 (1985).

90. *Id.* at 347.

91. *Id.* at 343.

search of a cell phone. The more rigorous standards of *T.L.O.* apply to a decision by an educator to confiscate and search the contents of a student's cell phone incident to school discipline. The trip wire protecting these devices has been tightened; to say otherwise nullifies the expectation of privacy that is central to the rationale of the decision.

Meaningful policy choices that reflect the values of the school must be made. These values may be expressed in a variety of ways. Educators are by no means convinced that student possession and use of smart devices is an indivisible benefit to the education mission. Nevertheless, the common denominator going forward in policymaking is that smart devices in public school will increase as a pedagogical matter. Therefore, the dispositive assessment as to both student rights and the liability of educators will always focus on the school rule and the role the cell phone plays in an alleged violation of the rule. In many cases, when school policy allows cell-phone possession, searches of the contents of student smart devices will be beyond the authority of school officials unless there is an indication of danger or there is corroborated suspicion to believe that the phone is the hiding place of evidence.

At the same time, it does not necessarily follow that *Riley*'s heightened standard will control the resolution of all school-discipline lawsuits regarding smart devices. When suspicions of student misconduct involve cell-phone use, searches and seizures are valid without additional justification because all knowledge and suspicion focus on the use to which the device itself has been put. Nevertheless, the effects of *Riley* are present even here. *T.L.O.*'s "reasonable scope" inquiry erects a barrier to "search abuse" that occurs when the harvesting of the digital contents of student devices is unrelated to the violation of the school rule. In application, the most common charge brought against school officials will be ascribed to their having gone "too far." In this way, *Riley*'s legacy will be to create a much-needed script for articulating suspicions that illegitimate educational concerns are slipping in unnoticed under the guise of "campus safety." This framework is reliable. Its substantive rigor, when applied in the strip-search context, validates its power to protect the higher-order range of student privacy expectations. Additionally, the "reasonable scope" framework comes from a court committed to retaining the school-safety exception of *T.L.O.* when suspicions are specific to the property that is searched. The promise of clarity within this framework represents a bright line of accountability for school officials. Most importantly, it eases the longstanding lament by those who feel that the *T.L.O.* standard sets the bar for privacy protection too low.

To fully explain these final observations, it will help to confront and eliminate one of the most misleading falsehoods about the *T.L.O.* framework that, when allowed to persist, muddles thinking about school discipline under any standard of rigor. Here again, is the *T.L.O.* standard before *Riley*:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are *reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.* Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[92]

After *Riley*, here is the more rigorous end of *T.L.O.* for the higher-order student privacy interests that should apply to searches of cell phones:

> The *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or requires the support of reasonable suspicion of the student's resort to the cell phone for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from confiscation of a cell phone to the extreme intrusiveness of a search of its digital contents.

The most common mistake is the habit of creating artificial rigor in the "reasonable suspicion" assessment in an effort to upgrade student privacy protection.[93] This frequently occurs when the phrases "violations of law," "violations of the school rules," and "indications of danger" (as *Safford* adds it for the higher-order privacy interests) are treated as competitive elements. It is most clearly expressed in judicial second-guessing of the wisdom of a school policy when confronted with the assertion of the right to privacy. This temptation to ratchet up judicial rigor is powerful when the search involves a violation of school rules that is also a criminal offense, particularly in the proactive context where the search occurs randomly, prior to any campus disruption.[94] A judge is frequently driven to mumble, "there is no evidence in the record of special circumstances that would justify [the search]."[95]

The weight of authority on this subject resists the urge to use the categories of the *T.L.O.* formula competitively.[96] Such second-guessing has no place in the ordinary *T.L.O.* analysis. It brings to light a misunderstanding of judicial deference under the *T.L.O.* framework that the Court settled conclusively in a spate of cases involving the higher-order privacy interest of

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92. *Id.* at 341–42 (emphasis added) (footnotes omitted).

93. *See* Doe *ex rel.* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 355 (8th Cir. 2004); Dennis v. Bd. of Educ., 21 F. Supp. 3d 497, 504 (D. Md. 2014); Herrera v. Santa Fe Pub. Sch., 792 F. Supp. 2d 1174, 1184 (D.N.M. 2011); Hough v. Shakopee Pub. Sch., 608 F. Supp. 2d 1087, 1098 (D. Minn. 2009).

94. *See* cases cited *supra* note 53.

95. *Doe*, 380 F.3d at 352–53.

96. *See* Smook v. Minnehaha Cty., 457 F.3d 806, 811–12 (8th Cir. 2006); Doran v. Contoocook Valley Sch. Dist., 616 F. Supp. 2d 184, 191 (D.N.H. 2009); People v. Daniel A. (*In re* Daniel A.), No. B232404, 2012 WL 2126539, at *2 (Cal. Ct. App. June 13, 2012).

students as to drug testing.[97] Moreover, it indicated ideological hostility toward the judgment of educators on school safety policy. In reality, the discretion of educators on matters of school discipline trigger judicial deference precisely because they tend to be integrated and dynamic. Or, as the *T.L.O.* Court put it:

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.[98]

Indeed, when asked to justify school discipline, an educator will often be unable to provide a categorical explanation, all the while assuring the inquirer of the correctness of the decision to intervene. Of course, this deference is not a blank check; the judicial back stiffens, as it should, when school discipline is inconsistently and discriminatorily applied.[99]

The point here is to make a distinction that needs to be discussed in greater length than this Essay allows. After *Riley*, the elements of the rigorous end of *T.L.O. are* purposefully competitive in order to balance student's higher expectation of privacy against the compelling interest of educators to maintain a safe learning environment. In other words, the close judicial supervision that has no place in the ordinary *T.L.O.* analysis finds a comfortable seat in the unique context of higher-order privacy interests like smart devices. It represents a significant departure from the ordinary analysis and should not be confused with the typical school-discipline case lest it

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97. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995); *see also* Bd. of Educ. v. Earls, 536 U.S. 822, 853–54 (2002). The status of educators as custodial and tutelary guardians is, in fact, the catalyst for establishing the type of special relationship with their students that satisfies the special-need requirement. Nothing more is needed before they exercise their power to protect their students. *Earls*, 536 U.S. at 835–36 ("'[A] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime' . . . . We reject the Court of Appeals' novel test that 'any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.'" (second and third alterations in original) (quoting Chandler v. Miller, 520 U.S. 305, 319 (1997))).

98. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (citations omitted); *see also Earls*, 536 U.S. at 838 ("In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren."); *id.* at 842 (Breyer, J., concurring) ("I cannot know whether the school's drug testing program will work. But, in my view, the Constitution does not prohibit the effort.").

99. *See* cases cited *supra* note 96.

should fail to work as intended. When applied in *Safford*, the Court elevates judicial suspicions on the professional judgment of educators to its appropriate, but rare, status when it notes:

> [W]e mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students . . . . Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.
>
> We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.[100]

The hedge that separates judicial restraint in the typical case from the rigorous post-*Riley* analysis is a limited, device-specific exception. Indeed, its protection is necessary on both sides; in the absence of a higher-order privacy interest, it is equally important to heed the boundary to prevent a tiptoeing increase in judicial second-guessing of school discipline in all student-search cases going forward.

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