

Legal Update

***Riley v. California*: Guidance on School Safety, Cell Phones, and Student Privacy**

Bernard James*

Raija Churchill**

The law on search and seizure for school officials has been evolving independently of the rules that govern the Fourth Amendment for police and other law-enforcement personnel. As a result, when courts issue decisions on matters of civil rights in the police context, there is scant attention given to the case by school officials. Educators enjoy a generous deference from strict judicial review for search policies that are implemented in good faith and that further the compelling interest in maintaining a safe learning environment. School resource officers who act in collaboration with educators are considered “school officials.” As a result, the attention of the SRO is often focused on the court decisions that affect schools rather than law on the street.

However, educators cannot turn a blind eye to developments outside the campus context when a court ruling breaks new ground on constitutional rights. This is particularly true when the issues in the groundbreaking case involve incidents that are likely to occur on school campuses. And this is the situation in the 2014 term case of *Riley v. California*¹ and its implications for Fourth Amendment doctrine.² In *Riley*, the Supreme Court affirmed the longstanding authority of law-enforcement officials to seize and secure a suspect’s personal property, including a cell phone, after an arrest. The Justices then altered Fourth Amendment doctrine in part: they unanimously took away the power to search the digital contents of a cell phone under the search-incident-to-arrest exception to the Fourth Amendment.

Riley cannot be ignored in the school context. It raises a legitimate, persistent question about its downstream application to school policies regulating the possession and use of cell phones and other smart devices on campus. A study estimates that 77% of school-aged children take their phones with them to campus every school day.³ Using devices during the school day place students at risk of both seizures and searches; at least 65% of public schools have policies that allow them to inspect the contents of cell phones used in violation of school policy.⁴

This article’s purpose is to examine *Riley*’s prohibition on cell-phone searches in the public-school setting. The principal questions asked are:

- Does the higher-order privacy interest of ordinary citizens in the contents of cell phones and smart devices apply to students in the school setting?
- If so, what rules apply when school officials seek to search the contents of a cell phone of a student who violates school policy?

Riley v. California

Any predictions on whether *Riley* will affect education law must begin with a summary of the case itself. In *Riley*, two citizens experience the seizure and harvesting of their cell phones during separate arrests. Police officers arrested the first suspect for driving with expired registration tags and a suspended driving license, and for possessing two loaded handguns in the automobile. Files, photographs, and videos on his seized cell phone established that he was associated with a street gang. This evidence alone allowed the prosecutor to impose additional charges that would enhance any sentence handed down after conviction.

In a second case, a suspect was arrested for selling drugs. The police searched the two cell phones found in his possession and used the information obtained on a phone to locate his home. Police obtained a warrant to search the premises and found drugs, firearms, and cash in the home.

The lower courts disagreed on how to apply the law. In the first case, the state courts allowed the search under the usual search-incident-to-arrest exception to the Fourth Amendment because the cell phone was in Riley's possession during the arrest. In the second case, the federal courts decided against applying the exception; the appellate court granted Wurie's motion to suppress the contents of the cell-phone search. The court reasoned that cell phones were different from other physical possessions that are searched incident to arrest without a warrant.

The U.S. Supreme Court agreed with the federal courts in the second case. 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. However, the Justices also unanimously ruled that cell phones are unique devices and their digital contents cannot be harvested under the search-incident-to-arrest exception. The foundation of the Court's reasoning is twofold. First, the Justices believe cell phones and other smart devices are distinct because of the amount of personal data they contain.⁵ Second, the Justices believe police will not be at a disadvantage when the search-incident-to-arrest exception is taken away because (1) cell phones pose only a negligible threat to law-enforcement interests in the typical arrest and (2) other exceptions to the warrant requirement are still in play.

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 new applications of Fourth Amendment doctrine to accommodate the technology.⁶ 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 months or decades.⁷ In addition, the Justices said that smart devices, when linked to cloud computing, create a network of such

size that police searching a cell phone may be accessing information that is “well beyond [any] papers and effects [that might be] in the physical proximity of an arrestee.”⁸ In other words, the information contained by these devices exceeds what a citizen whose property is seized and searched during the typical arrest scenario could ever possess. The Court cited previous rulings as a reminder that a citizen does not forfeit all Fourth Amendment rights when arrested, especially when a search incident to arrest would constitute a “weighty enough” invasion of privacy, such as a “top-to-bottom search of a man’s house.”⁹ Placing the searches of cell phones in this category, the Court concluded that harvesting the digital contents of such a device would be unconstitutional unless police had additional justification.

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 data of a cell phone without additional justification.
3. As circumstances develop in an arrest, the other exceptions to the warrant requirement of the Fourth Amendment remain in play: plain view of cell-phone contents, consent to search the contents, and emergency.

New Jersey v. TLO

Riley sits uncomfortably alongside *New Jersey v. TLO*,¹⁰ which provides the structure for resolving student-privacy disputes in public schools. *TLO* creates the “school safety” exception to the warrant requirement of the Fourth Amendment that applies to educators who have a duty to keep kids safe. In *TLO*, the Supreme Court ruled in favor of a school administrator who turned drugs and drug paraphernalia over to police. The educator discovered them after searching the purse of a student on campus. The 14-year-old student was caught smoking in the bathroom, a violation of school rules. The school administrator first uncovered a pack of cigarettes and a container filled with tobacco-rolling papers. Further examination of the purse revealed drugs, along with evidence that the student was selling drugs to other students. The Justices upheld the school search, relaxing the application of the Fourth Amendment for on-campus searches under this 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.”¹¹

In addition, the *TLO* Court reasoned that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”¹² The following rules govern the school-safety search incident to school discipline:

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.¹³

TLO can be summed up with two rules:

1. A student has a reduced expectation of privacy in the school setting.¹⁴
2. Educators have a compelling interest in protecting the vulnerable children who assemble within the premises of a public school—one of the few compelling interests any government official can assert.¹⁵

The rules of *TLO*, after three decades, continue to reshape the landscape of education law for the benefit of children who are compelled to attend school. Primarily, this is through a series of carefully considered court opinions that balance the degree of the intrusion of the search against the interest of the student in privacy. The searches of lockers,¹⁶ purses,¹⁷ backpacks,¹⁸ cars,¹⁹ and clothing²⁰ have all been upheld as reasonable searches without the need for additional justification.

Two slogans emerge from these cases. The first refrain is that school-search policies are valid when educators have a reasonable suspicion that the student is violating either the law or school rules. The second precept is that courts presume the validity of school-search policies that are implemented in good faith to prevent misconduct by students that “materially disrupt[ed] classwork or involv[e] substantial disorder or invasion of the rights of others.”²¹

Cell Phones and the Courts: Which Side of the Line?

The first of the two principal questions asked above is the easiest to answer. The higher-order privacy interest in the contents of cell phones and “smart devices” does, indeed, apply in the school setting. Students now possess a unique and higher-order expectation of personal privacy in cell phones and other “smart” devices. The answer to the second question, on what rules apply when school officials seek to search a cell phone, will require courts to take a hard look at the Fourth Amendment. The courts must now choose on which side of the Fourth Amendment line to fall in deciding future student-search cases in public schools.

Under the express language of the Fourth Amendment, all searches and seizures—by any government official—must be reasonable. The options before the courts are

clear. The rules on the *TLO* side of the line represent a significant departure from the Constitution's ordinary application. For example, on the criminal-law side of the line, a reasonable search by police requires a search warrant based on probable cause that a legal violation has occurred. However, on the *TLO* side of the line, neither a warrant nor probable cause is required for searches incident to school discipline. Here, the standard has long been reasonable suspicion.²² The school-safety exception was purposefully handcrafted by the Supreme Court when it declared that "[t]he 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."²³ Unless the Justices have a change of mind on this matter, courts should not apply *Riley* literally by requiring educators to obtain warrants to search cell phones that are seized incident to school discipline.

The most concise statement of the Court's intention to permanently separate educators from other government officials to whom the Fourth Amendment's warrant requirement would apply is found in the student drug-testing cases, where the Justices upheld searches 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."²⁴ If any doubts should exist about the vitality of *TLO* after the *Riley* decision, they do not survive the 2009 decision of *Safford v. Redding*,²⁵ where the court applied *TLO* 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 strip searched her for over-the-counter ibuprofen. The ruling affirmed the authority of school officials to ban drugs, but imposed specific guidelines for strip searches because of the intrusive nature of the searches relative to students' privacy interests.²⁶ The search violated the rights of the student because school officials had no reasonable suspicion that the student was hiding drugs in her underwear.²⁷

In applying the Fourth Amendment to invalidate the strip search, the *Safford* Court rejected an obvious opportunity to redefine the student-educator relationship, and chose instead to leave *TLO* in place. Justice Stevens emphasized this point: "Nothing the Court decides today alters this basic framework. It simply applies *TLO* to declare unconstitutional a strip search of a 13-year-old honors student that was based on a groundless suspicion that she might be hiding medicine in her underwear."²⁸ Justice Souter, writing the majority opinion, simply applied *TLO* 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 *TLO*, 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.²⁹

After *Stafford*, any tension between *Riley* and *TLO* should resolve in favor of *TLO*. It is a straightforward task to import *TLO*'s framework and rigor (as applied in *Safford*) in resolving litigation over cell-phone searches. We must logically conclude that the higher-order privacy interest of students to resist a strip search is equal to (if not greater than) the heightened expectation of privacy students now possess in the digital contents of their cell phones. Hence, 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. Doing so would obscure the bright line between *TLO* and the warrant requirement of the Fourth Amendment, ignore *TLO*'s capacity to produce the necessary constitutional rigor in student searches, and impair the very foundation of educators' authority to maintain discipline while pursuing the education mission.

Consequently, it is not surprising that, prior to *Riley*, all the lower courts ruled in favor of school officials by placing seizures and searches of student cell phones on the *TLO* side of the line. When students violated policies that prohibited cell phones on school property during school hours, cell-phone seizures were upheld.³⁰ Searches of the contents of student phones were also upheld.³¹ Of course, these pre-*Riley* judges neither considered nor decided the question of whether cell phones increased students' privacy expectation enough to diminish *TLO* and the school-safety exception to the Fourth Amendment. All the same, now that courts must decide the issue, the answer is more straightforward than one might realize.³²

Cell Phones and School Officials: Model Policies

The law should leave educators on the *TLO* side of the line with one enormous additional obligation: Educators cannot be too careful not to forget that cell phones and other smart devices represent personal property that creates a unique expectation of privacy for students. However, students do not pick up an additional measure of protection against seizures and searches of their smart devices in most confrontations with educators. Only in the schools that have no policy on cell phones, or whose policies freely permit cell phone possession and use, will *Riley*'s impact greatly limit educator's discretion. And even this restraint has drawbacks; when the use of the cell phone is related to a violation of other provisions in the school code of conduct, *TLO* opens the door for searches when the "content of the suspicion . . . match[es] the degree of intrusion."³³

On this last point, it is important to remember the judicial presumption of school rules' validity. Although it may escape notice at a first glance over the *TLO* framework, it has always been true that when school searches are incident to violations of the code of conduct, the *TLO* promise of rigor will only apply to the "reasonable scope" feature of *TLO*'s two-pronged framework and not to the "justified at its inception" element. In other words, except for arbitrary and discriminatory abuses of the authority to search students and their property, *TLO* imposes liability on school officials only when the "content of the suspicion fail[s] to match the degree of intrusion."³⁴

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, particularly in the educational context. They choose instead to focus on whether the interest can withstand the rigor of the standard of judicial review in light of the right the citizen is asserting.³⁵ The typical Fourth Amendment case is no different; the government’s interest in conducting a search is competing with the citizen’s expectation of privacy. The ruling in *Riley*, based on this balancing test, just happens to favor the unique expectation of privacy in cell phones. In the words of the Court: “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.”³⁶ Essentially, when searching a cell phone incident to arrest, law-enforcement interests are not enough to support an exception to the warrant requirement.

Similarly, in the typical school search, educators’ interest in maintaining a safe campus by enforcing school rules competes 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 law-enforcement interests, judges vigilantly avoid second-guessing the educator’s interest in implementing and enforcing codes of conduct. The validity of the interest is accepted 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 *TLO* puts 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.³⁷

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. TLO* that standards of conduct 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.³⁸

Notice the effect this presumption creates when *TLO* is applied in the typical school search dispute. When the search is incident to school discipline, the satisfaction of the first prong of *TLO*—“justified at its inception”—is taken as a given. And so it will

be 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.*³⁹

This conclusion does not carry over to the reasonable-scope second prong of the *TLO* framework. The judicial review of whether or not the “content of the suspicion fails to match the degree of intrusion” is purposefully formidable and not to be trifled with, particularly in its more rigorous form. The elements of *Safford* are essential to understanding the rules on cell phone searches; they provide liability insurance for school officials because the privacy interest of students in avoiding 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.

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 *TLO* 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.*⁴⁰

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 *TLO* 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*. At first glance, this promises to limit the authority of educators to search a cell phone in all but a few dire circumstances. And as the progeny of the test used to condemn the strip search in *Safford*, that is what it expects to do. Educators who desire to avoid liability for searches conducted on cell phones cannot afford to forget the rigor of the *Safford* strip search case and the lessons it teaches. *Safford* will guide the implementation of school rules as the lower courts begin applying its rationale in cell phone search cases. Yet when the elements of danger, corroborated suspicion, and educators' authority to regulate devices in the school environment are properly accounted for, the test excludes far less than one might imagine.

1. The validity of the scope of all school searches is in direct relation to the reason "which justified the interference in the first place"⁴¹ and the student's expectation of privacy.
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."⁴² When searches are related to a 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.

In the case of lesson six above, there is room for much mischief and confusion if the 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 caused the arrest in the first place. But it is easy to see a different case and result when the illegality directly involves the device. The search of a cell phone by police creates no Fourth Amendment controversy of any kind when the arrest arises out of probable cause for a crime involving the uses to which the suspects put the cell phone itself.⁴³ 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.

This is the most important reason why school codes of conduct should closely regulate cell phone possession and use. It will be difficult for school officials to protect the campus climate from the growing range of the undesirable effects of technology on campus use when the code of conduct fails to diligently provide rules for possessing and using devices. Simply put, educators retain an additional measure of control and authority over technology when the school rules closely regulate student possession and use of smart devices. A general depiction of the policy options in light of the law appear this way:

| | 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. 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. 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. |

Cell Phones and School Discipline: Three Examples

Three simple scenarios of discipline involving cell phones illustrate the range of future policymaking by educators.

Scenario A: 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 involvement 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.⁴⁴ This justification is supplied if searching the cell phone is necessary to prevent imminent and serious harm, or the educator has actual knowledge or corroborated suspicion that evidence of theft is in the cell phone.

Scenario B: Use of Cell Phone in Actual Misconduct

Mortimer once again finds himself in the office of the principal. 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 digital contents of the cell phone 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 deed, the educator has actual knowledge that evidence of wrongdoing is in the cell phone or can easily corroborate this suspicion.

Scenario C: 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 wide 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 *TLO* 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.⁴⁵

The reasonable-scope issue is particularly troublesome in Scenario C because the nature of the infraction does not suggest any specific use to which the cell phone

has been put. *TLO* 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 *TLO* 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 phone, then they must be able to articulate a reason that is related to school safety. Here is how the *TLO* 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.*⁴⁶

Finally, 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. School policies that confiscate cell phones without searching the digital contents are exempt from the entire scope of this article. *Riley* has no effect on educators' authority to ban possession of the devices when the discipline is limited to confiscation. The student's privacy interest kicks in only when the cell phone is searched. Until the search occurs, the cell phone is just another item of personal property to which the educator can apply school discipline. Courts will presume the validity of the policy and focus instead on whether the school discipline implicates procedural due process protections.⁴⁷

*Professor of Law, Pepperdine University School of Law

** Judicial Clerk in the United States Courts.

¹ *Riley v. California*, 573 U.S. ___; 134 S. Ct. 2473 (2014).

² *The Fourth Amendment of the United States Constitution* states: "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 See Amanda Lenhart, Rich Ling, Scott Campbell Kristen Purcell, *Chapter 4: How Parents And Schools Regulate Teens' Mobile Phones*, PEW RESEARCH INTERNET PROJECT (April 20, 2010) available at <http://www.pewinternet.org/2010/04/20/chapter-four-how-parents-and-schools-regulate-teens-mobile-phones/>

⁴ Bernard James, *Safe Schools Policy Survey* (July 2014) (The Survey Results on this question were as follows: How often does Your Safe School Plan conduct CELL PHONE Searches? Answer Responses (Percent): Always (12.4.4%); Often 63 (23.2%) Little 101 (37.1%) Never 89 (32.7%) Not Applicable 7 (2.6%)).

⁵ *Riley*, 134 S. Ct. at 2489 (“[m]ost 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.”).

⁶ *Id.* at 2490–91 (quoting *United States v. Kirschenblatt*, 16 F. 2d 202, 203 (2d Cir. 1926) (“It is ‘a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.’ . . . If his pockets contain a cell phone, however, that is no longer true.”); see also *id.* at 2495 (“The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”)).

⁷ *Id.* at 2488.

⁸ *Id.* at 2491.

⁹ *Id.* at 2488 (quoting *Chimel v. California*, 395 U.S. 752, 766 n.12 (1969)).

¹⁰ *New Jersey v. TLO*, 469 U.S. 325 (1985).

¹¹ *Id.* at 341.

¹² *Id.*

¹³ *Id.* (emphasis added).

¹⁴ *Bd. of Educ. of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 829–30 (2002) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)) (“Fourth Amendment rights . . . are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”).

¹⁵ *Id.* at 829 (quoting *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989)) (citation omitted) ([the interest in keeping children safe] “is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.”).

¹⁶ *State v. Jones*, 666 N.W.2d 142 (Iowa 2003).

¹⁷ *TLO*, 469 U.S. 325. See *Cason v. Cook*, 810 F.2d 188 (8th Cir. Iowa 1987), cert. den., 482 U.S. 930 (1987).

¹⁸ *DesRoches v. Caprio*, 156 F.3d 571 (4th Cir. 1998)). See also *in re F. B. v. Pennsylvania*, 555 Pa. 661 (Pa. 1999). But see *Doe v. Little Rock Schools*, 380 F.3d 349 (8th Cir. 2004).

¹⁹ *Enterprise City Bd. of Educ. v. C.P. by & Through J.P.*, 698 So. 2d 131 (Ala. Civ. App. 1996)).

²⁰ *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996); *In re William V.*; 111 Cal. App. 4th 1464 (2003).

²¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). This quotation is often combined with *TLO* to complete the characterization of educators’ authority to keep children safe. See *Board of Education v. Earls*, where the Court lowers the *TLO* standard further to uphold schools’ drug-testing policies: “While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, see *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), 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.” *Earls*, 536 U.S. at 829–30.²² *TLO*, 469 U.S. at 346 (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)) (writing three decades ago that “the requirement of reasonable suspicion is not a requirement of absolute certainty: ‘sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment’”).

²³ *Earls*, 536 U.S. at 829–30.

²⁴ *Id.*

²⁵ *Safford Unified School District v. Redding*, 557 U.S. 364 (2009).

²⁶ In the words of the Court: “Nor could [school officials] have suspected that Savana was hiding common painkillers in her underwear. [Educators] 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.” *Safford*, 557 U.S. 364, 376 (2009).

²⁷ *Id.* at 378–79.

²⁸ *Id.* at 379–80 (Stevens, J., concurring in part and dissenting in part).

²⁹ *Id.* at 375 (citations omitted).

³⁰ Only five cases have been decided that involve cell phones in public education. Three cases uphold school enforcement of policies that prohibit phones and other devices on campus. *Price v. N.Y.C. Bd. of Educ.*, 51 A.D.3d 277 (N.Y. App. Div. 2008); *Laney v. Farley*, 501 F.3d 577 (6th Cir. 2007); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007).

³¹ *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009). In *Miller*, officials confiscated several students’ cell phones, examined them, and discovered that the students were engaged in sexting. In addition to school discipline, the phones were turned over to the over to the district attorney, who began a criminal investigation. The parents did not challenge the searches, but they sued to stop the district attorney from initiating criminal charges for the nude photographs. *Id.* at 637. In *Klump v. Nazareth Area School District*, the trial court agreed that the seizure of a student’s cell phone and the search of the phone-number directory and call log were valid. But the court declined to dismiss an unreasonable-search-and-seizure claim against the school, when school officials failed to identify themselves while sending an instant message to the student’s brother and called nine other students listed in the student’s phone. *See Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 627–30, 638 (E.D. Pa. 2006).

³² After *Safford*, a strip search of a student will be upheld if (1) there is any 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. *See Safford*, 557 U.S. at 376–77.

³³ *Id.* at 375.

³⁴ *Id.*

³⁵ *See Ferguson v. Skrupa*, 372 U.S. 726 (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’”); *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.”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“The 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.”).

³⁶ *Riley*, 134 S. Ct. at 2484–85.

³⁷ *TLO*, 469 U.S. at 341.

³⁸ *Safford*, 557 U.S. at 371 n.1.

³⁹ *Id.* at 362 (emphasis added).

⁴⁰ *Id.* at 365 (emphasis added).

⁴¹ *TLO*, 469 U.S. at 34.

⁴² *Id.*

⁴³ For example, all 50 states, the District of Columbia, and federal law criminalize transmitting harassing and fraudulent communications via the telephone. *See* ALA. CODE § 13A-11-8; ALASKA STAT. § 11.61.120; ARIZ. REV. STAT. § 13-2921; ARIZ. REV. STAT. § 13-2916; ARK. CODE ANN. § 5-71-209; CAL. PENAL CODE § 653m; COLO. REV. STAT. 18-9-111; CONN. GEN. STAT. § 53a-183; DEL. CODE ANN. tit. 11, § 1311; D.C. CODE § 22-404; FLA. STAT. § 365.16; GA. CODE ANN. § 46-5-21; HAW. REV. STAT. § 711-1106; IDAHO CODE ANN. § 18-6710; IDAHO CODE ANN. § 18-6711; 720 ILL. COMP. STAT. 135/1-1; IND. CODE § 35-45-2-2; IOWA CODE § 708.7; KAN. STAT. ANN. § 21-4113; KY. REV. STAT. ANN. § 525.080; LA. REV. STAT. ANN. § 14:285; ME. REV. STAT. ANN. tit. 17, § 506; MD. CODE ANN., CRIM. LAW § 3-804; MASS. GEN. LAWS ch. 265, § 43A; MICH. COMP. LAWS § 750.540e; MINN. STAT. § 609.749; MISS. CODE ANN. § 97-29-45; MO. REV. STAT. § 565.090; MONT. CODE ANN. § 45-8-213; NEB. REV. STAT. § 28-1310; NEV. REV. STAT. § 201.255; N.H. REV. STAT. ANN. § 644:4; N.J. STAT. ANN. § 2C:33-4; N.M. STAT. ANN. § 30-20-12; N.Y. PENAL LAW § 240.30; N.C. GEN. STAT. § 14-196; N.D. CENT. CODE § 12.1-17-07; OHIO REV. CODE ANN. § 2917.21; OKLA. STAT. tit. 21, § 1172; OR. REV. STAT. § 166.090; 18 PA. CONS. STAT. § 2709; R.I. GEN. LAWS § 11-35-17; S.C. CODE ANN. § 16-17-430; S.D. CODIFIED LAWS § 49-31-31; TENN. CODE ANN. § 39-17-308; TEX. PENAL CODE ANN. § 42.07; UTAH CODE ANN. § 76-9-201; VT. STAT. ANN. tit. 13, § 1027; VA. CODE ANN. § 18.2-427; VA. CODE ANN. § 18.2-428; VA. CODE ANN. § 18.2-429; WASH. REV. CODE § 9.61.230; W.VA. CODE R. § 61-8-16; WIS. STAT. § 947.012; WYO. STAT. ANN. § 6-6-103; 47 U.S.C. § 223.

⁴⁴ 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*, 134 S. Ct. at 2488 (quoting *Maryland v. King*, 569 U.S. ___, 133 S.Ct. 1958, 1979 (2013) (“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.’”).

⁴⁵ *See supra* note 39 and the accompanying main text; *see also Safford*, 57 U.S. 364 at 362.

⁴⁶ *TLO*, 469 U.S. at 342–43 (emphasis added).

⁴⁷ *See Laney v. Farley*, 501 F.3d 577 (6th Cir. 2007) (court upheld school policy against a procedural-due-process challenge where school policy required “[c]onfiscation of device and return to parent ONLY after 30 days and 1 day of In-school suspension.”). Some student-rights proponents will not concede these points and tend to unfurl the due-process

protections at this interpretation, advocating rigorous judicial review of the fit between the code and the method of enforcement. But opponents of this view should not forget the free-speech case of *Bethel v. Fraser*, 478 U.S. 675 (1986). There, the Court upholds both the policy and the validity of school discipline for violation of 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 687 (citations omitted).