

**REASONABLE SUSPICION, UNREASONABLE SEARCH:
DEFINING FOURTH AMENDMENT PROTECTIONS
AGAINST SEARCHES OF STUDENTS' PERSONAL
ELECTRONIC DEVICES BY PUBLIC SCHOOL OFFICIALS**
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I. INTRODUCTION

Recent technological developments in the field of personal electronic devices have outpaced Fourth Amendment jurisprudence as applied in the public school setting. The United States Supreme Court's recent decision in *Safford Unified School District No. 1 v. Redding*¹ provides an analytical framework for identifying and protecting student privacy interests excluded from the scope of the "reasonable suspicion" searches standard established in *New Jersey v. T.L.O.*² Ironically, *Redding*'s protection of public school officials under the doctrine of qualified immunity imperils student protection for unreasonable searches of their personal electronic devices. Nevertheless, by categorizing students' privacy interest in their personal electronic devices as worthy of the specialized protection given to their own bodies, courts can empower schools to respond nimbly and with nuance to disruption or danger without unconstitutionally invading students' privacy.

II. BACKGROUND

Jurisprudence dealing with the application of the Fourth Amendment of the U.S. Constitution to searches of students and their belongings by public school officials has undergone a steady, if ragged, evolution. Early jurisprudence split between two approaches.³ Some courts viewed schools as operating *in loco parentis* and held that the Fourth Amendment did not

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¹ 129 S. Ct. 2633 (2009).

² 469 U.S. 325, 343–48 (1985).

³ See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1084–89 (2008).

limit public school officials.⁴ Other courts recognized that the Fourth Amendment's umbrella of protection covered public school students, but struggled to define the contours of protection in the public school context.⁵ Eventually, the Supreme Court of the United States resolved the tension between these views, recognizing the applicability of the Fourth Amendment to public school officials' searches of students, but limiting the scope of protection by instituting a reasonableness standard.⁶ Subsequently, courts struggled to apply and refine this standard when addressing the myriad of circumstances surrounding searches in the public school context.⁷ Recently, the Supreme Court offered an especially significant refinement by recognizing that public school students' privacy interest in their own bodies merits protection in all but exceptional circumstances.⁸ The Court, however, simultaneously limited students' recourse for violations of their privacy by recognizing protections for school officials under the doctrine of qualified immunity.⁹ With their recourse thus limited, students now face a veritable Scylla and Charybdis: their First Amendment speech rights, including off-campus speech rights, continue to erode while school officials are now armed with the ability to conduct unconstitutional searches with what amounts to impunity. The following sections detail this evolution in Fourth Amendment jurisprudence as applied to public school officials' searches of students.

A. The Fourth Amendment as Applied in the Public Schools: Early Jurisprudence

As mentioned, early jurisprudence on the applicability of the Fourth Amendment to public school officials' searches of students split into two different strands.¹⁰ Some courts viewed public schools as acting *in loco*

⁴ See, e.g., *R.C.M. v. State*, 660 S.W.2d 552, 553–54 (Tex. App. 1983); *Mercer v. State*, 450 S.W.2d 715, 716–17 (Tex. App. 1970).

⁵ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *State v. Mora*, 307 So. 2d 317 (La. 1975).

⁶ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 340–44 (1985).

⁷ *Redding*, 129 S. Ct. at 2643. See also Diana R. Donahoe, *Strip Searches of Students: Addressing the Undressing of Children in Schools and Redressing the Fourth Amendment Violations*, 75 MO. L. REV. 1123, 1142–46 (2010).

⁸ *Redding*, 129 S. Ct. at 2642–43.

⁹ *Id.* at 2643.

¹⁰ Papandrea, *supra* note 3, at 1084–89.

parentis.¹¹ These courts concluded that Fourth Amendment protections against unreasonable searches and seizures did not extend to public school students.¹² Other courts recognized that the Fourth Amendment offered public school students some level of protection against unreasonable searches and seizures by school officials.¹³ However, these courts struggled to define the parameters of “reasonable” searches in the public school context.¹⁴

1. Public School Officials Acting In Loco Parentis: The Fourth Amendment Does Not Apply

The reasoning of some early courts reflected neither a concern for the scope of the Fourth Amendment’s protections in the public school context nor a recognition that minors’ Fourth Amendment protections extended beyond the schoolhouse door.¹⁵ Rather, these courts, reluctant to subject public school officials to a standard for searches that would be more stringent than that faced by the students’ own parents, held that school officials’ participation in the searches of students “cannot be construed as governmental action”¹⁶ Instead, these courts held that school officials acted *in loco parentis*, meaning that school officials “stand in the place or stead of the parent and [were] charged with the parent’s duties, rights, and responsibilities.”¹⁷ If school officials acted as parents rather than officials of the government, the courts reasoned, Fourth Amendment analysis need not proceed beyond the threshold established by the Supreme Court of the United States in *Burdeau v. McDowell*.¹⁸ There, the Court stated that “the search must be the result of state action by and through state agents acting under governmental authority, or under the color of authority.”¹⁹ Accordingly, the Court in *R.C.M. v. State*²⁰—despite reservations that the doctrine allowed public school officials “considerable discretion” to search

¹¹ See, e.g., *R.C.M. v. State*, 660 S.W.2d 552, 553–54 (Tex. App. 1983); *Mercer v. State*, 450 S.W.2d 715, 716–17 (Tex. App. 1970).

¹² *R.C.M.*, 660 S.W.2d at 554; *Mercer*, 450 S.W.2d at 717.

¹³ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *State v. Mora*, 307 So. 2d 317 (La. 1975).

¹⁴ *Redding*, 129 S. Ct. at 2643. See also *Donahoe*, *supra* note 7, at 1142–46.

¹⁵ See *R.C.M.*, 660 S.W.2d at 553.

¹⁶ *Id.* at 553 (citing *Mercer*, 450 S.W.2d at 717).

¹⁷ *Id.* at 554 (citing *Ranniger v. State*, 460 S.W.2d 181, 183 (Tex. App. 1970)).

¹⁸ 256 U.S. 465 (1921).

¹⁹ *R.C.M.*, 660 S.W.2d at 553 (Tex. App. 1983) (citing *Burdeau*, 256 U.S. at 475).

²⁰ *Id.* at 553–54.

students “without regard to . . . reasonableness”—refused to recognize Fourth Amendment protections for students.²¹ Other courts across the nation have followed similar reasoning.²²

The courts that applied the *in loco parentis* doctrine were not without their detractors. The Supreme Court of the United States, in fact, applied reasoning inconsistent with the *in loco parentis* doctrine in *Goss v. Lopez*,²³ when it held that students, who do not “shed their constitutional rights’ at the schoolhouse door,” can enforce their property rights against public schools via the Fourteenth Amendment.²⁴ The *Goss* Court relied in part on the Court’s reasoning in *Tinker v. Des Moines Independent Community School District*,²⁵ a case that extended some First Amendment protections to public school students.²⁶ Additionally, the *Goss* Court relied on *West Virginia Board of Education v. Barnette*,²⁷ a case where the Court established that “[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”²⁸ In fact, in *Ingraham v. Wright*,²⁹ the Court noted the clash between the *in loco parentis* doctrine and compulsory education laws.³⁰ This tension between the reasoning applied in *Goss* and *Barnette* and that applied in *R.C.M.* and cases like it helps explain the willingness of other contemporaneous courts to extend Fourth Amendment protections to public school students via application of the Fourteenth Amendment.³¹

²¹ *Id.* at 554.

²² See *D.R.C. v. State*, 646 P.2d 252, 257–58 (Alaska Ct. App. 1982); *In re G.*, 90 Cal. Rptr. 361, 364 (Cal. Ct. App. 1970); *In re Donaldson*, 75 Cal. Rptr. 220, 221–22 (Cal. Ct. App. 1969).

²³ 419 U.S. 565 (1975).

²⁴ *Id.* at 574 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

²⁵ 393 U.S. 503 (1969).

²⁶ *Id.* at 506.

²⁷ 319 U.S. 624 (1943).

²⁸ *Id.* at 637.

²⁹ 430 U.S. 651 (1977).

³⁰ *Id.* at 662.

³¹ Gerald S. Reamy, *New Jersey v. T.L.O.: The Supreme Court’s Lesson on School Searches*, 16 ST. MARY’S L.J. 933, 937–38 (1985).

2. *Public School Officials as Government Actors: The Fourth Amendment Applies*

In the seminal case of *New Jersey v. T.L.O.*,³² the Supreme Court of the United States formally abandoned the *in loco parentis* doctrine, holding that public school officials “act in furtherance of publicly mandated educational and disciplinary policies,” not just on delegated parental authority.³³ The Court’s willingness to extend Fourth Amendment protections to students in *T.L.O.* is best understood not as a reaction to the seeming illogic of the *in loco parentis* doctrine and a favoring of the courts that took the opposing view,³⁴ but rather as the natural result of developments in Fourth Amendment jurisprudence as applied in other contexts.

In deconstructing the argument that “the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers” and not public school officials, the *T.L.O.* Court undertook an examination of Fourth Amendment jurisprudence extending back to the pre-Revolution use of general warrants.³⁵ First, the Court emphasized that while the Fourth Amendment may have been “primarily directed” toward the use of general warrants, the Court has always applied “the Fourth Amendment’s strictures as restraints imposed upon ‘governmental action’—that is, ‘upon the activities of sovereign authority.’”³⁶ In other words, the Fourth Amendment applies to government actors as well as the police.³⁷ Next, the Court pointed to its application of the Fourth Amendment to “civil as well as criminal authorities.”³⁸ The Court reaffirmed that the Fourth Amendment’s purpose was “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”³⁹ Therefore, the Court concluded that “school officials act as representatives of the State, not merely as surrogates for the parents” and thus are subject

³² 469 U.S. 325 (1985).

³³ *Id.* at 336.

³⁴ *See, e.g.,* *State v. Mora*, 307 So. 2d 317 (La. 1975).

³⁵ *T.L.O.*, 469 U.S. at 334–35.

³⁶ *Id.* at 335 (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)).

³⁷ *Id.*

³⁸ *Id.* (citing *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312–13 (1978); *Michigan v. Tyler*, 436 U.S. 499, 506 (1978)).

³⁹ *Id.* (quoting *Camara*, 387 U.S. at 528).

to “the strictures of the Fourth Amendment.”⁴⁰ However, this was only the beginning of the Court’s analysis of the applicability of the Fourth Amendment to searches of public school students.⁴¹

As the *T.L.O.* Court recognized the Fourth Amendment demands “that searches and seizures be reasonable.”⁴² However, the Court also recognized that not all searches were the same, and thus the different “class[es] . . . require[d] ‘balancing the need to search against the invasion which the search entails.’”⁴³ This balancing weighs “the individual’s legitimate expectations of privacy and personal security” against “the government’s need for effective methods to deal with breaches of public order.”⁴⁴ The Court then cited to the substantial invasion of privacy that occurs when officials conduct “even a limited search of the person”⁴⁵ or when the search leads officials to open containers that shield items from plain view.⁴⁶ Whether such searches involve adults or children is immaterial, the Court held, noting that in either case officials commit a “severe [intrusion on] subjective expectations of privacy.”⁴⁷

Of course, unless society recognizes students’ subjective expectations of privacy as legitimate or reasonable, the Fourth Amendment provides no protection.⁴⁸ In *T.L.O.*, a school principal searched the purse of a fourteen-year-old freshman girl whom a teacher accused of smoking in the school bathroom.⁴⁹ The principal discovered cigarettes in the girl’s purse.⁵⁰ He also discovered cigarette rolling papers, which led him to a more thorough search that turned up marijuana, a pipe, letters that evidenced the girl’s involvement in drug dealing, and other incriminating evidence.⁵¹ The State argued that students have no legitimate expectation of privacy in most

⁴⁰ *Id.* at 336–37.

⁴¹ *Id.* at 337.

⁴² *Id.*

⁴³ *Id.* (citing *Camara*, 387 U.S. at 536–37).

⁴⁴ *Id.* at 337.

⁴⁵ *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 24–25 (1967)).

⁴⁶ *Id.* (citing *United States v. Ross*, 456 U.S. 798, 822–23 (1982)).

⁴⁷ *Id.* at 337–38.

⁴⁸ *Id.* at 338 (citing *Hudson v. Palmer*, 468 U.S. 517 (1984) and *Rawlings v. Kentucky*, 448 U.S. 98 (1980) for the proposition that for a privacy expectation to be protected, it must first be reasonable).

⁴⁹ *Id.* at 328–30.

⁵⁰ *Id.* at 328.

⁵¹ *Id.*

articles of their personal property brought onto school grounds.⁵² The Court found, however, that although many personal items are not technically necessary for students to carry, “the State’s suggestion that children have no legitimate need to bring personal property into the schools [does not] seem well anchored in reality.”⁵³ Aside from basic school supplies, students participating in school also carry “keys, money, and the necessities of personal hygiene and grooming.”⁵⁴ Moreover, students are likely to carry “nondisruptive yet highly personal items,” including “photographs, letters, and diaries,” along with items necessary for participation in “extracurricular or recreational activities.”⁵⁵ Noting that none of these items is contraband, the Court asserted that students do not “waive[] all rights to privacy in such items merely by bringing them onto school grounds.”⁵⁶

Despite this recognition of students’ subjective expectations of privacy in their personal effects, such subjective expectations comprise only one side of the balancing test.⁵⁷ Against the students’ legitimate expectations of privacy “must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”⁵⁸ Preserving the order necessary for a “proper educational environment” requires not only “close supervision of schoolchildren” but also the imposition and enforcement of rules that society does not impose on adults.⁵⁹ Accordingly, schools “require[] a certain degree of flexibility” when instituting discipline to maintain “security and order.”⁶⁰

The *T.L.O.* Court recognized both students’ legitimate subjective expectations of privacy in their personal effects and school officials’ need to maintain a secure and orderly learning environment. This recognition created a need to “strike [a] balance” between the two interests.⁶¹

⁵² *Id.* at 338.

⁵³ *Id.* at 339.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 339–40.

⁶¹ *Id.* at 340.

B. *T.L.O. v. New Jersey: A Standard of Reasonableness Governs*

One option for striking the delicate balance between students' legitimate expectations of privacy in their personal effects and school officials' need to maintain a secure and orderly learning environment is to institute a requirement that officials obtain a search warrant. The *T.L.O.* Court quickly dispensed with that idea, noting such a requirement would "interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."⁶² Citing the *Camara* holding that a warrant was not required where "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,"⁶³ the *T.L.O.* Court made clear that "school officials need not obtain a warrant before searching a student who is under their authority."⁶⁴

However, according to the Court, not even freedom from the warrant requirement provides sufficient flexibility for school officials to maintain a secure and orderly learning environment.⁶⁵ In addition, schools required "some modification of the level of suspicion of illicit activity needed to justify a search."⁶⁶ Therefore, the Court dispensed with the requirement that school officials base their searches upon probable cause, holding instead that, in the public school environment, the reasonableness of a search depends upon neither the securing of a warrant nor justification by probable cause, but rather the presence of some lesser level of suspicion.⁶⁷ In place of either a search warrant or suspicion based on probable cause, the Court established an inquiry of "reasonableness, under all the circumstances, of the search."⁶⁸

This inquiry is "twofold."⁶⁹ First, following the holding in *Terry v. Ohio*,⁷⁰ "one . . . consider[s] 'whether the . . . action was justified at its inception.'"⁷¹ Second, one "determine[s] whether the search as actually

⁶² *Id.*

⁶³ *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 533 (1967).

⁶⁴ *T.L.O.*, 469 U.S. at 340.

⁶⁵ *Id.* at 341–43.

⁶⁶ *Id.* at 340.

⁶⁷ *Id.* at 341.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 392 U.S. 1 (1967).

⁷¹ *T.L.O.*, 469 U.S. at 341 (citing *Terry*, 392 U.S. at 20).

conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’”⁷²

For a search of a public school student to be “justified at its inception,” a school official must have “reasonable grounds for suspecting that the search will turn up evidence” of a student’s violation of school rules or the law.⁷³ The “permissible” scope of a search includes measures that “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.”⁷⁴ The Court “trust[ed]” that this new rule governing searches of public school students would neither “unduly burden” school officials “nor authorize unrestrained intrusions upon the privacy of schoolchildren.”⁷⁵ Rather, the Court expected that its new rule would “permit” school officials to conduct searches of students “according to the dictates of reason and common sense.”⁷⁶

Next, the *T.L.O.* Court applied its newly-fashioned reasonable suspicion test to the facts at hand.⁷⁷ *T.L.O.* concerned a school administrator’s search of a student’s purse following her apprehension by a teacher while she and a friend smoked cigarettes in a school bathroom.⁷⁸ After the student denied that she was smoking, the administrator opened the student’s purse and discovered a package of cigarettes and a package of rolling papers.⁷⁹ Associating the rolling papers with use of marijuana, the administrator undertook a “closer examination of the purse” in search of “further evidence of drug use.”⁸⁰ The administrator’s search ultimately revealed marijuana, a pipe, and money and supplies that implicated the student in drug dealing.⁸¹ The Court found that the student’s denial that she had smoked cigarettes provided the “necessary ‘nexus’” to search her purse for evidence that tended to make her guilt more probable than without the evidence.⁸² Because the administrator based his search of the student’s purse on a “‘common-sense conclusio[n] about human

⁷² *Id.* (citing *Terry*, 392 U.S. at 20).

⁷³ *Id.* at 342.

⁷⁴ *Id.*

⁷⁵ *Id.* at 342–43.

⁷⁶ *Id.* at 343.

⁷⁷ *Id.* at 343–48.

⁷⁸ *Id.* at 328.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 345.

behavior”’—presumably that a student who smokes cigarettes would keep cigarettes in her purse—the search, at its inception, was based on reasonable suspicion.⁸³ The continued search for marijuana was based on reasonable suspicion and did not exceed its scope because of the association between rolling papers and marijuana use.⁸⁴ Accordingly, the administrator’s search of the student’s entire purse was permissible under the Court’s reasonable suspicion test.⁸⁵

Although the *T.L.O.* Court imagined that its reasonable suspicion rule would neither “unduly burden” school officials nor “authorize unrestrained intrusions” upon students’ privacy;⁸⁶ in practice, the rule has provided only marginal restraint to school officials’ searches.⁸⁷ For instance, courts have cited *T.L.O.* in finding constitutional suspicionless drug testing of student athletes,⁸⁸ a search of a student’s backpack for stolen tennis shoes,⁸⁹ searches of a group of students for a knife after a teacher saw a student with a knife and the knife had already been secured,⁹⁰ and even a general search for dangerous weapons of male students in grades six through twelve after a metal detector sounded.⁹¹ In short, although the reasonable suspicion rule did limit school officials in that they needed to support their searches with an amount of suspicion, even a small amount of suspicion usually sufficed to make extensive searches permissible.

III. RECENT DEVELOPMENTS IN FOURTH AMENDMENT JURISPRUDENCE AS APPLIED IN PUBLIC SCHOOLS

Despite the relatively broad swath of searches permissible under the reasonable suspicion test established in *T.L.O.*, courts have been willing to provide some limitations to public school officials’ searches of students.⁹²

⁸³ *Id.* at 346 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

⁸⁴ *Id.* at 347.

⁸⁵ *Id.*

⁸⁶ *Id.* at 343.

⁸⁷ See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Shade v. City of Farmington*, 309 F.3d 1054 (8th Cir. 2002); *DeRoches v. Caprio*, 156 F.3d 571 (4th Cir. 1998); *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996).

⁸⁸ *Vernonia*, 515 U.S. at 656–57.

⁸⁹ *DeRoches*, 156 F.3d at 577–78.

⁹⁰ *Shade*, 309 F.3d at 1059–62.

⁹¹ *Thompson*, 87 F.3d at 981–83.

⁹² See, e.g., *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 491 (6th Cir. 2008); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 887 (N.D. Ill. 2001); *State v. Tywayne H.*, 933 P.2d 251 (N.M. Ct. App. 1997).

However, with lower courts coming to divergent conclusions about how the reasonable suspicion test applies to particular fact patterns,⁹³ the Supreme Court recently returned to the topic of Fourth Amendment protections for public school students in *Safford Unified School District No. 1 v. Redding*.⁹⁴ At issue in *Redding* was not only the constitutionality of school officials' strip search of a thirteen-year-old female but also the level of reliability of knowledge required to justify a search at its inception.⁹⁵ Exploration of this concept—essential to a uniform application of the reasonable suspicion test by the lower courts—led the *Redding* Court to undertake a review of the various means of assessing the reliability of knowledge underpinning suspicion at a search's inception.⁹⁶

Next, the *Redding* Court applied its reasonable suspicion test to the facts of the case, providing a useful construct for analysis of novel search and seizure issues in the public schools.⁹⁷ The Court's ultimate conclusion that a "combination of . . . deficiencies [were] fatal to finding the search reasonable" was not entirely unexpected, given numerous lower courts' rulings against such searches.⁹⁸ Perhaps even more important to Fourth Amendment jurisprudence as applied to public school students was the Court's holding that, because lower courts had come to divergent, well-reasoned conclusions about the constitutionality of strip searches, the doctrine of qualified immunity protected the school officials in *Redding* from a claim for damages.⁹⁹ This holding about the applicability of qualified immunity to school officials, combined with refined guidance for application of the reasonable suspicion test, carved new contours for the constitutionality of searches of public school students.

A. *Bringing Further Definition to "Reasonable Suspicion"*

Noting its application in *T.L.O.* of "a standard of reasonable suspicion to determine the legality of a school administrator's search of a student," the *Redding* Court turned its attention to a series of probable cause cases.¹⁰⁰ These cases, according to the Court's reasoning, bear "implicit[ly] . . . on

⁹³ See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009).

⁹⁴ *Id.*

⁹⁵ *Id.* at 2639.

⁹⁶ *Id.*

⁹⁷ *Id.* at 2642–43.

⁹⁸ *Id.* at 2643.

⁹⁹ *Id.* at 2643–44.

¹⁰⁰ *Id.* at 2639.

the reliable knowledge element of reasonable suspicion.”¹⁰¹ In other words, the Court, reasoning by analogy, examined the various criteria used to assess the reliability of knowledge employed to support suspicion.¹⁰²

The “reliable knowledge component” of the “reliable knowledge element of reasonable suspicion” is assessed according to “the degree to which known facts imply prohibited conduct, . . . the specificity of the information received, . . . and the reliability of its source.”¹⁰³ Yet, these factors do not lend themselves to a “rigid[.]” application, and instead comprise “fluid concepts” that must be analyzed in the context of the facts of each case.¹⁰⁴ Therefore, the Court found that “the best that can be said” is that required knowledge must raise a “fair probability” or a “substantial chance” to support probable cause.¹⁰⁵ With no further analysis or discussion, the *Redding* Court held that “[t]he lesser standard for school searches could . . . be described as a moderate chance of finding evidence of wrongdoing.”¹⁰⁶

The *Redding* Court applied its updated version of the reasonable suspicion test to the facts before it, providing a construct for analysis of future searches of public school students by school officials.¹⁰⁷ In *Redding*, school officials, acting on the assistant principal’s direction, strip searched a thirteen year old female student.¹⁰⁸ The assistant principal suspected the girl of distributing prescription drugs to other students in violation of school policy. Applying its test, the Court first identified the subjective expectation of privacy at issue in the girl’s strip search.¹⁰⁹ Redding’s subjective expectation of privacy, the Court found, was “inherent in her account of [the strip search] as embarrassing, frightening, and humiliating.”¹¹⁰

The Court then examined the identified subjective expectation of privacy to determine whether that expectation met the Fourth Amendment’s reasonableness requirement.¹¹¹ Finding that Redding’s

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (internal citations and quotations omitted).

¹⁰⁴ *Id.* (internal citations omitted).

¹⁰⁵ *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13 (1983)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2642–43.

¹⁰⁸ *Id.* at 2637–38.

¹⁰⁹ *Id.* at 2641.

¹¹⁰ *Id.*

¹¹¹ *Id.*

“embarrass[ment], fright[], and humiliat[ion]” were “consistent” with the reactions of other “young people” who experienced invasive searches of their body, the Court determined that the nature of “adolescent vulnerability [amplifies] the patent intrusiveness of the exposure” of the search.¹¹² In evaluating the reasonableness of Redding’s subjective expectation of privacy, the Court cited to social science research.¹¹³ By pointing to the “common reaction” of adolescents to a strip search, as identified by social science studies, the Court implicitly indicated that commonality of subjective expectations among young people at least partially equates with reasonableness of expectations.¹¹⁴ The *Redding* Court also framed the reasonableness of Redding’s subjective expectation of privacy in the context of some school systems’ policies against strip searches, noting that to these school districts strip searches “are never reasonable.”¹¹⁵ It is, however, the Court’s reference to social science research that provides an important avenue for evaluating the reasonableness of students’ privacy expectations in the absence of school policies that, at least implicitly, support those expectations.¹¹⁶

The third step in the *Redding* Court’s reasonable suspicion test is rendered necessary only when, as in *Redding*, the first two steps establish that the student possessed a subjective expectation of privacy and the Court classifies that expectation of privacy as reasonable.¹¹⁷ This step draws directly from the reasonableness rule established in *T.L.O.*: “[T]he search as actually conducted [must be] reasonably related in scope to the circumstances which justified the interference in the first place.”¹¹⁸ The search’s scope is reasonably related “when it is ‘not excessively intrusive in light of the age and sex of the student and the nature of the

¹¹² *Id.* at 2641–42.

¹¹³ *Id.* (citing Brief for Nat’l Ass’n of Social Workers et al. as Amici Curiae at 6–14, *Redding*, 129 S. Ct. at 2641 (2009) (No. 08-479) [hereinafter Amici Brief]; Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998)).

¹¹⁴ *Id.* at 2642.

¹¹⁵ *Id.* at 2642 (citing N.Y.C. DEP’T OF EDUC., Reg. No. A-432 (2005), available at <http://docs.nycenet.edu/docushare/dsweb/Get/Document-21/A-432.pdf> (the New York City Department of Education’s published policy that prohibits strip searches of students in all circumstances)).

¹¹⁶ *Id.* at 2641–42.

¹¹⁷ *Id.* at 2642.

¹¹⁸ *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

infraction.”¹¹⁹ In Redding’s case, the Court held that “the content of the suspicion failed to match the degree of intrusion.”¹²⁰ Wilson, the school official in *Redding*, knew that the recovered pills that formed the basis of his suspicion were “common pain relievers” with over-the-counter equivalents, and thus their discovery provided only a “limited threat” or danger.¹²¹ Therefore, despite the newly minted “moderate chance of finding evidence of wrongdoing” standard¹²² that justified Wilson to engage in a search, Wilson could not justify the “extreme intrusiveness of a search” of Redding’s underwear.¹²³ The Court found the argument that students typically hide contraband in their underclothing unpersuasive, calling such a search “extensive.”¹²⁴ Rather, the Court held that “nondangerous school contraband does not raise the specter of stashes in intimate places,” and absent other facts in the surrounding circumstances that provide increased suspicion, mere “general background possibilities” stand insufficient to justify a strip search of a student.¹²⁵ Therefore, due to “the degradation its subject may reasonably feel,” a strip search is “in a category of its own[,] demanding its own specific suspicions.”¹²⁶

The Court’s willingness to treat strip searches categorically prefigures use of similar categorically-oriented constructs for other searches of public school students by school officials. However, the Court’s holding on the applicability of the doctrine of qualified immunity also weighs prominently into an understanding of the enforceability of students’ Fourth Amendment rights.

B. Public School Officials’ Protection Under the Doctrine of Qualified Immunity

In addition to finding unconstitutional the strip search of public school students by school officials absent facts indicating danger, the *Redding* Court also provided some clarity regarding the applicability of the doctrine

¹¹⁹ *Id.* (quoting *T.L.O.*, 469 U.S. at 342).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 2639.

¹²³ *Id.* at 2642.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 2643.

of qualified immunity.¹²⁷ This clarity assisted in determining school officials' liability for unconstitutional searches.¹²⁸

Citing to its decision in *Pearson v. Callahan*,¹²⁹ the Court began with the plain assertion that qualified immunity protects school officials who engage in student searches unless "clearly established law" indicates a Fourth Amendment violation.¹³⁰ Next, the Court reaffirmed that the exact action of the search in question need not be held unlawful in a precedential case,¹³¹ but rather "even in novel factual circumstances" school officials can be "on notice" that their conduct is unlawful.¹³² Finally, looking to its determination that the strip search of Redding violated Redding's Fourth Amendment rights, the Court noted that lower courts "reached divergent conclusions regarding" the application of the standard established in *T.L.O.* to searches similar to the search of Redding.¹³³ Both the minority in the Ninth Circuit's en banc hearing of *Redding* and the Sixth Circuit in a separate case¹³⁴ found strip searches of students for drugs permissible, even where the search was conducted "without any suspicion."¹³⁵ Although just "a single judge, or group of judges" with differing opinions would not suffice to establish the "disuniform[ity]" of law necessary to warrant the application of qualified immunity, the *Redding* Court held, qualified immunity would apply where there are "well-reasoned majority and dissenting opinions[] to counsel doubt" in the clarity of the law.¹³⁶

Sensing the lack of clarity implicit in this standard, Justices Stevens, joined by Justice Ginsburg, dissented in part, noting that "the clarity of a well-established right should not depend on whether jurists have misread our precedents."¹³⁷ Rather, in Justice Stevens' opinion, divergence in the views of lower courts bears weight only in cases where qualified immunity "spare[s] officials from having 'to predict the future course of

¹²⁷ *Id.* at 2643–44.

¹²⁸ *Id.*

¹²⁹ 555 U.S. 223 (2009).

¹³⁰ *Redding*, 129 S. Ct. at 2643 (quoting *Pearson*, 555 U.S. at 243).

¹³¹ *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

¹³² *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

¹³³ *Id.*

¹³⁴ 936 F.2d 881 (6th Cir. 1991).

¹³⁵ *Redding*, 129 S. Ct. at 2643 (citing *Williams v. Ellington*, 936 F.2d 881, 882–83, 887 (6th Cir. 1991)).

¹³⁶ *Id.* at 2644.

¹³⁷ *Id.* at 2645 (Stevens, J., dissenting).

constitutional law.”¹³⁸ Interestingly, Justice Stevens saw “no new constitutional path” in the Court’s decision in *Redding*;¹³⁹ to the contrary, he viewed the *Redding* opinion as doing nothing to alter the “basic framework” of analysis established in *T.L.O.*¹⁴⁰

Nevertheless, the *Redding* Court’s willingness to extend qualified immunity to the school officials who conducted the strip search of Redding indicates a potential peril for students who seek a remedy for violation of their Fourth Amendment rights. Where lower courts come to opposing conclusions—or even where dissenting opinions exhibit clear and detailed reasoning—qualified immunity might protect school officials.¹⁴¹ Therefore, when the issue at hand marks the frontier of Fourth Amendment jurisprudence, the prudence of litigation as a dispute resolution mechanism for students who seek a remedy for rights violations of rights is tenuous. Such a suit, like *Redding*, might establish a right but leave the plaintiff bereft of remedy. For students, the *Redding* Court’s application of qualified immunity only further cramps protection of their constitutional rights, which, as the next section details, have already been carved up and limited in the school setting.

C. *Relevant Developments in First Amendment Jurisprudence*

Courts have long recognized that the public school context subjects students’ First Amendment rights to special limitations.¹⁴² The Court’s recent decision in *Morse v. Frederick*¹⁴³ confirms and furthers these limitations, with important implications for public school students’ Fourth Amendment rights.¹⁴⁴ Moreover, schools responding to pressure to combat cyberbullying are restricting even off-campus speech.¹⁴⁵ The result is a “double-whammy” effect on student speech, for not only is more student

¹³⁸ *Id.* (citing *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2644.

¹⁴¹ *Id.* at 2643–44.

¹⁴² See James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000) (containing a fuller treatment of these issues). A full history of course of First Amendment jurisprudence in the public school context is beyond the scope of this comment.

¹⁴³ 551 U.S. 393 (2007).

¹⁴⁴ *Id.* at 403–10.

¹⁴⁵ See Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 139–44 (2003).

speech subject to restriction¹⁴⁶ but also, because cyberbullying is by its nature electronic speech,¹⁴⁷ schools face increased pressure to perform searches of students' personal electronic devices, where students often create and store such speech.

I. Morse v. Frederick: Further Restrictions on Public School Students' First Amendment Speech Rights

With its pronouncement that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des Moines Independent School Community District*¹⁴⁸ marked not only a foundation for heightened protection for student speech but also the starting palette for a series of increasing restrictions. Seventeen years after *Tinker*, the Court in *Bethel School District No. 403 v. Fraser*¹⁴⁹ justified differential treatment for public school students by distinguishing students in public schools and adults in “other settings.”¹⁵⁰ Two years later, the Court, relying on *Fraser* and hearkening back to the language of *Tinker*, asserted that students' rights must be analyzed through the lens of “the special characteristics of the school environment.”¹⁵¹ *Morse* marks the Court's confirmation that it views seizure and punishment as consequences for speech that school administrators deem to violate school policy as “consistent with [the] principles” established by *Morse's* predecessors, even where restricting the same speech by an adult in other settings would be unconstitutional.¹⁵²

Morse's importance, however, extends beyond its stamp of approval for enforcing school policy by seizure and punishment of offending student speech. *Morse's* reasoning resonates with four important implications for students' Fourth Amendment rights.

¹⁴⁶ *Id.* at 143–46.

¹⁴⁷ Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 9–10 (2010).

¹⁴⁸ 393 U.S. 503, 506 (1969).

¹⁴⁹ 478 U.S. 675 (1986).

¹⁵⁰ *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985)).

¹⁵¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

¹⁵² *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007).

a. *Morse's Broad Interpretation of "School Speech"*

The Court in *Morse* quickly dispensed with the plaintiff's argument that, because the plaintiff unfurled his infamous "BONG HITS 4 JESUS" banner across the street from the school, and not actually on school grounds, normal First Amendment speech analysis should apply.¹⁵³ Rather the Court determined the plaintiff was at school because "the event occurred during normal school hours," the principal "sanctioned" or approved the event, and school district's rules required that students attending approved events follow school rules.¹⁵⁴

Even though the Court noted, almost as an afterthought, "some uncertainty at the outer boundaries" of where school speech analysis no longer applies, the Court expressed little reservation for extending the school's reach off school property.¹⁵⁵ Given the Court's emphasis on the plaintiff's act of "direct[ing] his banner toward the school, making it plainly visible to most students[.]"¹⁵⁶ it is not difficult to imagine the Court reasoning that other student speech acts that technically occur off campus with students as the intended audience should be similarly restricted. The Court has not directly addressed whether student electronic speech—including posts on social media sites or blogs, e-mails, and text or a multimedia messaging service—is subject to school speech analysis even if its production and transmission technically occurs off campus. However, the reasoning in *Morse* appears to indicate that the Court is primed for such a conclusion, especially given the clear trend toward greater restriction demonstrated by *Fraser*, *Kuhlmeier*, and *Morse*.

b. *Morse's Interpretation of Ambiguous Student Speech*

The Court described the banner's "BONG HITS 4 JESUS" message as "cryptic" but not "meaningless and funny," as the plaintiff claimed.¹⁵⁷ Rather, the Court chose to agree with the school's principal and superintendent in determining that the message either "advocated" or "promoted" illegal drug use.¹⁵⁸ The Court's willingness to read the banner as "pro-drug," despite the plaintiff's stated motive ("appearing on

¹⁵³ *Id.* at 397, 400.

¹⁵⁴ *Id.* at 400–01.

¹⁵⁵ *Id.* at 401 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004)).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 401–02.

¹⁵⁸ *Id.*

television”) and interpretation (“meaningless”) demonstrated a lean toward accepting the conventions of school officials in framing the interpretive lens. Certainly, the Court did not take pains to color its interpretation in a light favorable to the plaintiff, nor did it give serious weight to the plaintiff’s own interpretation.¹⁵⁹

When the motives and context that give rise to student speech are even further removed from its interpretation by a viewer or listener, the speech’s ambiguity will only increase. Additionally, where such speech is electronic, unintended audiences might receive the message, furthering its ambiguity.¹⁶⁰ The Court’s reasoning in *Morse* provides little protection against this ambiguity; rather, appears to favor interpretations that fit rationally under the proscriptions of school rules. The end result may be that more student speech is restricted under the justification that, even though the speech could be intended as meaningless or simply silly, if others interpret it as offensive, then it is not speech which the Constitution protects.

c. Morse’s Confirmation of the Link Between First and Fourth Amendment Public School Jurisprudence

Morse laid out a crystal clear confirmation of the Court’s previous holdings in *Vernonia School District 47J v. Acton*,¹⁶¹ and *Board of Education of Independent School District Number 92 of Pottawatomie City v. Earls*.¹⁶² Specifically, the Court in *Morse* held that “‘special needs’ inhere in the public school context.”¹⁶³ Further relying on *T.L.O.*,¹⁶⁴ the *Morse* Court also confirmed that these three Fourth Amendment cases correctly relied on the “principles applied in [the Court’s] student speech cases.”¹⁶⁵ *Morse* also confirmed the holding in *Vernonia* that the “reasonableness inquiry” first established in *T.L.O.* must be conducted in light of schools’ “custodial and tutelary responsibility for children.”¹⁶⁶ The extent that such “special needs” justify limitation of students’ Fourth Amendment rights against unreasonable search and seizure remains

¹⁵⁹ *Id.* at 402.

¹⁶⁰ Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, B.U. J. SCI. & TECH. L. 243, 283 (2001).

¹⁶¹ 515 U.S. 646, 656 (1995).

¹⁶² 536 U.S. 822, 829–30 (2002).

¹⁶³ *Id.* at 829 (quoting *Vernonia*, 515 U.S. at 653).

¹⁶⁴ 469 U.S. 325, 340 (1985).

¹⁶⁵ *Morse*, 551 U.S. at 406.

¹⁶⁶ *Id.* (internal citations omitted).

undefined.¹⁶⁷ If *Morse* is meant to support limitations on students' First and Fourth Amendment rights, as the opinion's direct confirmation of the link between student speech and student search and seizure cases appears to indicate, then the ability of schools to employ underlying policy goals as justification for otherwise unconstitutional searches has been substantially expanded. The next subsection explores the implications of the Court's willingness to rely on social science research and congressional intent to define schools' interests in terms of underlying policy goals.

d. Public Schools' Compelling Interest: A Safe, Disruption-free Learning Environment or Supporting Broad Administrative Policies?

The *Morse* majority's treatment of the subject matter of the student speech extends the Court's holding from *Vernonia*. There, school officials instituted a random urinalysis drug testing program for all student athletes and the Court held that "detering drug use by schoolchildren is an 'important—indeed perhaps compelling' interest."¹⁶⁸ Citing to *Vernonia*'s pronouncements that drug use particularly imperils children's maturing nervous systems and that "drug-infested" schools' entire educational process suffers,¹⁶⁹ *Morse* amplifies the issue's importance by recognizing that the problem continues to worsen.¹⁷⁰ Especially interesting is *Morse*'s delineation of additional evidence of drugs' adverse influence on children.¹⁷¹

Citing to studies by the National Institute on Drug Abuse¹⁷² and the Department of Health and Human Services,¹⁷³ the Court in *Morse* noted that "[a]bout half of American [twelfth] graders have used an illicit drug"

¹⁶⁷ *Morse*, 551 U.S. at 406–07 (displaying an abrupt end to the Court's discussion of the nexus between student speech cases and student Fourth Amendment cases following the Court's transition that schools' interest in "detering drug use" is "[e]ven more to the point").

¹⁶⁸ *Id.* at 407 (quoting *Vernonia*, 515 U.S. at 661).

¹⁶⁹ *Vernonia*, 515 U.S. at 661–62.

¹⁷⁰ *Morse*, 551 U.S. at 407.

¹⁷¹ *Id.* at 407.

¹⁷² Lloyd D. Johnston et al., *Monitoring the Future: National Survey Results on Drug Use, 1975–2005: Secondary School Students*, NAT'L INST. ON DRUG ABUSE 1 (2006), http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf.

¹⁷³ Danice K. Eaton et al., *Morbidity & Mortality Weekly Report: Surveillance Summaries*, 55/SS-5 DEP'T OF HEALTH & HUM. SVCS. CENTERS FOR DISEASE CONTROL & PREVENTION 1 (2006), <http://www.cdc.gov/mmwr/pdf/ss/ss5505.pdf>.

and that 25% of high school students report “they have been offered, sold, or given an illegal drug on school property within the past year.”¹⁷⁴ The Court then noted Congress’s various acts that indicated “part of a school’s job is educating students about the dangers of illegal drug use.”¹⁷⁵

Next, the *Morse* Court connected *Tinker*’s recognition of “the special characteristics of the school environment” with the “governmental interest in stopping student drug abuse” to describe the danger of the speech in *Morse* (“BONG HiTS 4 JESUS”) as “serious and palpable.”¹⁷⁶ The similarity of the *Morse* majority’s approach and plain viewpoint discrimination formed part of the basis of Justice Stevens’ dissent, but even Justice Stevens saw some viewpoint discrimination in the special public school context as “tolerable.”¹⁷⁷

Following *Morse*’s reasoning schools may specially restrict student First and Fourth Amendment rights when student conduct runs afoul of public school policies founded on quality research and congressional and other governmental action.¹⁷⁸ The severity of drug use’s impact on public schools provides a noble intention for the Court’s treatment of students’ constitutional rights, as schools must be able to respond nimbly and confidently to combat such an intractable problem. Nevertheless, the ruling in *Morse* appears to justify a dangerously broad swath of school official conduct, especially if the ruling applies equally to students’ Fourth Amendment rights, as its language seems to indicate.¹⁷⁹ The heavy and growing pressure on public schools to combat bullying, and cyberbullying in particular,¹⁸⁰ demonstrates the potential extent of such danger.

D. The Effect of Public School Officials’ Efforts to Combat Cyberbullying on Students’ Constitutional Rights

Cyberbullying occurs when students engage in “[t]hreats, harassment, or intimidation made by way of postings on . . . [w]eb sites, . . . e-mails” or via other electronic modes of communication.¹⁸¹ Recent cases of the

¹⁷⁴ *Morse*, 551 U.S. at 407.

¹⁷⁵ *Id.* at 408.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 439 (Stevens, J., dissenting).

¹⁷⁸ *Id.* at 409–10 (majority opinion).

¹⁷⁹ *Id.* at 406.

¹⁸⁰ Kevin Turbert, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 657 (2009).

¹⁸¹ Ronna Greff Schneider, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS, AND DISCRIMINATION LITIGATION, § 2:27 (2010).

severe adverse consequences of cyberbullying are well-documented¹⁸² and have sparked public outrage and cries for schools to intervene.¹⁸³ Significantly, Secretary of Education Arne Duncan, noting its adverse affect on student health and safety, has called for schools to “eliminate” school bullying “as fast as we can.”¹⁸⁴ In the face of such pressures, some schools have stretched their disciplinary codes to apply to student electronic speech that is created and transmitted off campus, outside of school hours, via privately owned equipment.¹⁸⁵ Disciplining students for conduct that occurs off campus but still causes or threatens to cause disruption to school activities marks the zenith of school officials’ disciplinary powers.¹⁸⁶ Although the extent of school officials’ powers to discipline students for such speech remains unclear,¹⁸⁷ even a modest extension of school officials’ reach, combined with strong governmental action encouraging schools to combat cyberbullying, will almost certainly lead more school officials to conduct searches designed to uncover cyberbullying. Students’ personal electronic devices, which often act as repositories for students’ personal speech and the speech of others, will become the natural target for such searches. What limits, however, should apply to the scope of such searches? More specifically, should courts view searches of students’ personal electronic devices as no more invasive as those of other personal effects (such as those in *T.L.O.*¹⁸⁸)? Or does the breadth of personal data contained in such devices paired with their near ubiquity command a narrowing of the scope of a reasonable search unless accompanied by threat of danger?

¹⁸² See, e.g., Kathleen Conn, *Sexting and Teen Suicides: Will School Administrators Be Held Responsible?*, 261 EDUC. L. REP. 1, 1 (2010); Turbert, *supra* note 180, at 655–56.

¹⁸³ *Take a Stand Against Cyberbullying*, STOP CYBERBULLYING, http://www.stopcyberbullying.org/take_action/take_a_stand_against_cyberbullying.html (last visited Sept. 21, 2011); *Cyberbullying Campaign*, NATIONAL CRIME PREVENTION COUNCIL (2011), <http://www.ncpc.org/cyberbullying>.

¹⁸⁴ Liz Goodwin, *Can Schools ‘Eliminate’ Bullying, as Education Secretary Says They Must?*, YAHOO! NEWS (Oct. 27, 2010), http://news.yahoo.com/s/yblog_upshot/20101027/us_yblog_upshot/duncan-says-schools-should-eliminate-bullying-is-that-possible.

¹⁸⁵ Turbert, *supra* note 180, at 671.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 671–76.

¹⁸⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (applying the Court’s two-part “reasonableness” test to justify a search of the student’s purse).

IV. ANALYSIS

Schools struggling to combat cyberbullying, drug use, and other ills find themselves caught between two competing interests: the school's interest in a productive, healthy, and safe learning environment, and students' interest in personal privacy.¹⁸⁹ As the Court recognized in *Redding*, a student's privacy interest, such as her interest in her own body, may be so compelling that the scope of a search reasonable at its inception requires special circumstances, such as threat of danger, to intrude upon that interest.¹⁹⁰ The reasoning that the Court applied in *Redding* to protect students' privacy interest in their own bodies—surely the privacy interest worthy of the strictest protection—is now, due to technological and societal developments, consistent with students' privacy interest in their personal electronic devices.¹⁹¹ Students' privacy interest in their personal electronic devices carries the same import as their privacy interest in their body.¹⁹² Yet, the Court's sensitivity to the embarrassment and humiliation attendant upon the search in *Redding*¹⁹³ supports a narrow scope for all invasive searches. Accordingly, school officials' searches of student personal electronic devices should be constitutional only when reasonable suspicion supports the search and a real threat of danger extends the permissible scope of the search.

A. The Nature and Capability of Students' Personal Electronic Devices

Today's personal electronic devices no longer derive their sole or even their primary utility from their ability to receive and transmit mobile phone

¹⁸⁹ Turbert, *supra* note 180, at 671.

¹⁹⁰ *Safford Unified Sch. Dist. No.1 v. Redding*, 129 S. Ct. 2633, 2642 (2009).

¹⁹¹ See *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”); Mary Graw Leary, *Reasonable Expectations of Privacy for Youth in a Digital Age*, 80 MISS. L.J. 1035, 1066 (2011) (discussing possible extension of *Redding* beyond students' interest in their bodies to the students' personal possessions).

¹⁹² See Sara M. Smyth, *Searches of Computers and Computer Data at the United States Border: The Need for a New Framework Following United States v. Arnold*, 2009 U. ILL. J.L. TECH. & POL'Y 69, 81–85 (2009) (analyzing the decision in *United States v. Arnold (Arnold I)*, 454 F. Supp. 2d 999 (C.D. Cal. 2006), where the district court equated a laptop search to a body cavity search due to the highly personal nature of electronic devices, and the Ninth Circuit's subsequent reversal in *United States v. Arnold (Arnold II)*, 523 F.3d 941, 946 (9th Cir. 2008)).

¹⁹³ *Redding*, 129 S. Ct. at 2641–42.

calls. Rather, personal electronic devices have a combination of capabilities, usually including text messaging, multi-media messaging, photograph and video capture, Bluetooth file transfer, WiFi connection, voicemail storage, instant messaging, and more.¹⁹⁴ Much of the data created or received by the personal electronic device is archived in the device's internal storage in conversation format for easy reference.¹⁹⁵ Thus, personal electronic devices now serve not just as a camera for photography and video but also as a photo album and video viewer (replete with "geotags" for each file that indicate the geographical location of the photograph's origin).¹⁹⁶ Moreover, personal electronic devices now function as the hub for user access to social networking sites, cloud storage sites, and Internet browsing.¹⁹⁷ With the installation of downloadable applications, these devices further serve as access points for banking and investment information and even device location. Evernote, an application for personal electronic devices, endeavors to help users to "remember anything and everything that happens in their lives."¹⁹⁸ These advanced capabilities make personal electronic devices repositories for a wealth of highly personal data.¹⁹⁹ What level of care and caution should be required before public school officials may access and search this information for disciplinary code violations? The answer hinges on the expectation of privacy that students have in their personal electronic devices.

¹⁹⁴ See, e.g., *iPhone*, APPLE, <http://www.apple.com/iphone/features> (last visited Sept. 2, 2011) (describing iPhone's ability to facilitate video calling, e-mail, application purchases, capturing and storing of photographs and video, send and receive text and multi-media messages, browse the Internet, utilize global positioning system technology, and function as personal library); *Smartphones Blackberry Torch*, BLACKBERRY, <http://us.blackberry.com/smartphones/blackberry-torch-9850-9860> (last visited Sept. 2, 2011) (describing smartphone features similar to those of Apple's iPhone).

¹⁹⁵ See *id.*

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ *Evernote*, MAC APP STORE, <http://itunes.apple.com/us/app/evernote/id406056744?mt=12> (last updated Sept. 7, 2011).

¹⁹⁹ *App Watchdog Findings: Sensitive User Data Stored on Android and iPhone Devices*, VIAFORENSICS (July 2011), <http://viaforensics.com/mobile-news/survey-finds-smartphone-apps-store-personal-data-wiredcom.html>. See also, Mike Isaac, *Survey Finds Smartphone Apps Store Too Much Personal Data*, WIRED (Aug. 8, 2011, 4:45 PM), <http://www.wired.com/threatlevel/2011/08/smartphone-local-data-storage/> (utilizing viaForensics study to comment on the large amount of personal data stored in smartphones).

B. Students' Expectation of Privacy in Their Personal Electronic Devices

One obvious way for schools to insulate themselves from the potential distractions and disruptions caused by student use of cellular phones and other personal electronic devices²⁰⁰ is to exercise an outright ban.²⁰¹ Yet, increasingly, schools strive to be sensitive to parent and student expectations that students will have access to personal electronic devices²⁰² and even capitalize on the technology to engage students and facilitate learning in the classroom.²⁰³ Therefore, an outright ban on student personal electronic devices is neither workable nor desirable for many schools. Once schools sanction possession and even use of personal electronic devices on school property during the school day, they must then determine under what circumstances the devices are subject to search and seizure.

The Court in *T.L.O.* rejected the argument that students have no legitimate expectation of privacy in any personal property brought to school.²⁰⁴ Instead, the Court instituted a test that balances the legitimate expectation of privacy that students have in personal items such as “photographs, letters, and diaries” with the strong interest of the school in preventing disruption and maintaining safety.²⁰⁵ The Court’s refinement of this test in *Redding*²⁰⁶ for application to searches of the body provides the

²⁰⁰ See, e.g., Steven Campbell, *Huntsville Has Firm Policy on Cell Phone Use*, HUNTSVILLE TIMES, July 31, 2008, at 10S; Chris Segal, *Bay Schools Tussling With Texting*, NEWSHERALD.COM (Nov. 1, 2009, 7:03:21 PM), <http://www.newsherald.com/common/printer/view.php?db=newsherald&id=78729>. These distractions and disruptions include students sending or receiving text messages in class and using camera functionality and multi-media messaging to cheat on tests. *Id.*

²⁰¹ See Editorial, *How Should Schools Handle Student Cell Phones? Use Common Sense Policies*, TENNESSEAN, May 17, 2007, at A14 (describing the case for such a ban as “strong”).

²⁰² See *id.* (recognizing the “strong” case for allowing student use of cellular phones and pointing to “vital” scenarios for such use).

²⁰³ See Stacy Wolford, *Spanish Students Use Cell Phones in Monessen Class*, TRIBLIVE (Mar. 21, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/westmorelands/s_672579.html (explaining how a teacher employed mobile phones in the classroom after attending a professional development seminar that taught teachers how to use such technology to motivate students).

²⁰⁴ *New Jersey v. T.L.O.*, 469 U.S. 326, 339 (1985).

²⁰⁵ *Id.* at 326, 339.

²⁰⁶ See *supra* Part III.A (discussing the further definition of the *T.L.O.* reasonable suspicion test).

appropriate framework for determining the circumstances under which school officials can conduct another especially invasive search: that of students' personal electronic devices.

The first step in the *Redding* analysis is to define the student's subjective expectation of privacy.²⁰⁷ Here, the student's subjective expectation of privacy must be viewed as closer to the "embarrass[ment], fright[, and humiliati[on]]"²⁰⁸ Redding experienced during her strip search than the more mild privacy expectation in "photographs, letters, and diaries" to which the Court pointed in *T.L.O.*²⁰⁹ Students' personal electronic devices likely contain pictures, messages, and diary-like blog entries.²¹⁰ Unlike the students of the early 1980s though, who would have needed a shopping cart or wagon to carry the family stock of photo albums and archive of communications, today's students can carry literally gigabytes and soon terabytes of information in a device roughly the size of a deck of cards.²¹¹ It is one thing to bring a couple of Polaroid photographs to school for an assignment or to show to friends; a student might expect a level of privacy, but foresee its breach. Bringing to school a library that documents most of life's sensitive information²¹² provides an entirely different and greater expectation of privacy.²¹³ What student carries a mobile phone to school without an expectation that others will only examine its contents with express permission?

In *Redding*, the Court gave special emphasis to the highly personal nature of the strip search, with its attendant embarrassment and humiliation.²¹⁴ Redding herself testified to the extent of this embarrassment and humiliation,²¹⁵ but the Court also took pains to confirm the legitimacy of Redding's personal expectation of privacy by pointing to the similarity of attitudes among her peer group and the findings of social

²⁰⁷ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2638 (2008).

²⁰⁸ *Id.* at 2641.

²⁰⁹ *T.L.O.*, 469 U.S. at 339.

²¹⁰ *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2010).

²¹¹ Kelly Hodgins, *SD Association Pushes SD Storage into Realm of Terabyte Capacities*, BGR (Jan. 9, 2009, 4:05 PM), <http://www.bgr.com/2009/01/09/sd-association-pushes-sd-storage-into-realm-of-terabyte-capacities/>.

²¹² Bryan Andrew Stillwagon, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1175 (2008).

²¹³ *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001).

²¹⁴ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2641–42 (2009).

²¹⁵ *Id.* at 2641.

science research.²¹⁶ Significantly, the Court cited to examples of social science research to assert that the nature of adolescent “vulnerability” amplifies the “patent intrusiveness of the exposure” of the search.²¹⁷ Although the Court in *Redding* implicitly had in mind adolescents’ special vulnerability to embarrassment due to their stage in both physical and psychological maturation, the same principal applies to the invasiveness of a search of a personal electronic device, the warehouse for many of an adolescent’s most intimate life details. The Court’s acceptance of social science as an avenue for confirming and explaining the legitimacy of adolescents’ privacy expectations seems to reflect a willingness to consider not only the special nature of adolescence but also the dramatic impact of privacy on adolescents’ psychological development.²¹⁸

Social scientists—including adolescent psychologists, cultural anthropologists, and sociologists—document American adolescents’ haste to bear adult responsibilities and stressors.²¹⁹ Because of this haste, the suitability of instituting more adult-like privacy protections for the electronic devices that are the vehicles for tracking and executing those responsibilities becomes more sensible. Adolescents’ psychological struggle to establish boundaries—a key to their healthy formation of identity²²⁰—speaks directly to the need to give special credence to adolescents’ subjective expectation that the mountain of intimate personal data contained in their electronic devices will remain private from school officials. At the very least, adolescent students deserve a clear, reliable standard on which to base their expectations of privacy. Lack of clarity, however, undercuts the utility of the test developed in *T.L.O.* and *Redding* for this purpose.

C. A Critique of “Reasonable Suspicion”

Professor LaFave has described in depth the primary weakness of the “reasonable suspicion” standard established in *T.L.O.*²²¹ Although the

²¹⁶ *Id.*

²¹⁷ *Id.* at 2641–42.

²¹⁸ *Id.* (citing Amici Brief, *supra* note 113, at 6–14; Hyman & Perone, *supra* note 113, at 13).

²¹⁹ See, e.g., PETER DEMERATH, PRODUCING SUCCESS: THE CULTURE OF PERSONAL ADVANCEMENT IN AN AMERICAN HIGH SCHOOL (1990).

²²⁰ See DAVID ELKIND, A SYMPATHETIC UNDERSTANDING OF THE CHILD: BIRTH TO SIXTEEN 112–14 (3rd ed. 1994).

²²¹ See WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(b) (4th ed. 2004).

“reasonable suspicion” standard’s justification is at its strongest when searches intend to combat dangers such as drug use or violence,²²² nothing in *T.L.O.* prevents use of a similar standard for what Justice Stevens in his dissenting opinion in *T.L.O.* termed “trivial” violations of school regulations, such as minor dress code infractions.²²³ Justice Stevens would have held that the “reasonable suspicion” standard applies only when the suspicion is connected to criminal behavior.²²⁴ Professor LaFave points out that Justice Stevens’ concerns about school officials’ potential use of watered down cause for search have come at least occasionally to fruition.²²⁵ In one instance, a school official justified a search of a student’s flashlight because, as a potential dangerous weapon, the flashlight was contraband.²²⁶

Undercutting the assumption that without the lesser “reasonable suspicion” standard schools would have insufficient cause to conduct needed searches is Professor LaFave’s assertion that most cases of school officials’ drug-related searches would have been justified even under a full probable cause standard.²²⁷ In the face of this, Professor LaFave notes that it is “difficult to accept a watered-down probable cause test . . . if the result is that a student may be searched merely because he is found in a hallway rather than an assigned class or merely because he put his hand into his clothing upon approach of the principal.”²²⁸ Where the search is minimally intrusive, the lesser “reasonable suspicion” standard is less objectionable. The more intrusive the search, the less the departure from the probable cause standard makes sense.²²⁹

It is no surprise, then, that the *Redding* Court found it too difficult to stomach a strip search on the lesser “reasonable suspicion” standard alone.²³⁰ Whether school officials’ searches of students’ personal electronic devices based solely upon “reasonable suspicion” of a low-level infraction unconstitutionally invade those students’ privacy interests

²²² *Id.*

²²³ *New Jersey v. T.L.O.*, 469 U.S. 325, 371, 377 (1985).

²²⁴ *Id.* at 372, 384–85.

²²⁵ LAFAVE, *supra* note 221, at 494.

²²⁶ *Id.* (quoting *People v. Dilworth*, 661 N.E.2d 310, 316 (1996)).

²²⁷ *Id.* at 495.

²²⁸ *Id.* at 498 (citing *State v. Baccino*, 282 A.2d 869, 870 (Del. Super. Ct. 1971); *State v. Young*, 216 S.E.2d 586, 588 (Ga. 1975)).

²²⁹ *Id.* at 501.

²³⁰ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009).

remains unclear, especially given parties' decisions to settle rather than litigate cases.²³¹

The lack of clarity about the appropriate standard for searches of students' personal electronic devices,²³² combined with billowing pressure on schools to combat cyberbullying, drugs, and violence,²³³ leaves schools stretching to police their students without clear guidelines. As the Court determined in *Redding*, the doctrine of qualified immunity insulates school officials from damages claims when such a lack of clarity clouds their conduct.²³⁴ Therefore, school officials have an incentive to make even highly intrusive searches of students' personal electronic devices, secure in the knowledge that, at worst, their actions will result in an injunction against similar future searches.

The best solution to this lack of clarity is for courts to apply the heightened "reasonable suspicion plus danger" standard established in *Redding* to searches of students' personal electronic devices.

D. Reasonable Suspicion Plus Danger: The Appropriate Standard for School Officials' Searches of Students' Personal Electronic Devices

To prevent further chilling of First Amendment free speech protections in public schools and to foster the innovative use of personal electronic devices in education, courts should follow the framework laid out in *Redding* to identify students' expectation of privacy in their personal electronic devices as worthy of heightened protection. By applying the narrowed scope used for one category of searches (strip searches) to searches of students' personal electronic devices, courts can free schools to respond nimbly to justified concerns about student safety. This would permit schools to respond to concerns including drug use, gang violence,

²³¹ See, e.g., *ACLU Settles Student Cell-Phone-Search Lawsuit With Northeast Pennsylvania School District*, ACLU (Sept. 1, 2009), [http://www.aclu.org/racial-justice-technology-and-liberty/aclu-lawsuit-challenges-expulsion-middle-school-student-after-; Angelica Bonus, Pennsylvania School District Settles Laptop Privacy Suit](http://www.aclu.org/racial-justice-technology-and-liberty/aclu-lawsuit-challenges-expulsion-middle-school-student-after-;Angelica Bonus, Pennsylvania School District Settles Laptop Privacy Suit), CNN (Oct. 12, 2010), http://articles.cnn.com/2010-10-12/justice/pennsylvania.school.webcams.settlement_1_blake-robbins-lower-merion-school-district-mark-haltzman?_s=PM:CRIME; Mark Zaretsky, *East Haven Student Privacy Suit Settles: Officials Allegedly Sought Access to Confidential Records*, NEW HAVEN REGISTER (Mar. 30, 2011), <http://www.nhregister.com/articles/2011/03/30/news/shoreline/doc4d928744809c5170154782.txt>.

²³² See *supra* Part IV.A–IV.B.

²³³ Turbert, *supra* note 180, at 671.

²³⁴ *Redding*, 129 S. Ct. at 2643.

and cyberbullying,²³⁵ while still protecting students from highly invasive searches justified only by small infractions of school rules or unreliable student rumors. Given the exceptionally sensitive nature of the data contained in students' personal electronic devices,²³⁶ the scope of reasonable searches by school officials should either exclude such devices or be extended to include such devices because of a threat of danger. Otherwise, in instances in which school officials search student cellular phones for trivial or routine violations of the school's disciplinary policy, "the content of the suspicion" will "fail[] to match the degree of intrusion" of the search (to use *Redding's* language).²³⁷

Under this construct, schools that have legitimate safety concerns that give rise to a desire to search students' personal electronic devices might still conduct searches of students' personal electronic devices if school officials have a moderate chance of finding evidence of wrongdoing and if a threat of real danger exists, such as reports of death threats or severe bullying.²³⁸ Schools could search phones upon reasonable suspicion for evidence of cyberbullying in those instances where reported behavior threatens the physical or psychological safety of students. Moreover, when non-immediate danger gives rise to the desire to search, schools could still search if suspicion rises to the level of probable cause or, acting in concert with law enforcement, the search is conducted pursuant to a search warrant. In a multitude of instances—that is to say, for searches founded upon reasonable suspicion that a student upset about a grade bad-mouthed a teacher via text message or on a social network, or other such routine and non-dangerous disciplinary code issues—school officials will not be emboldened to sacrifice students' privacy in the name of expediency.

The narrowed scope for searches of the body established by the Court in *Redding*, when applied to invasions of the wealth of data contained in students' personal electronic devices, sensibly balances the special circumstances of the public school setting with students' legitimate privacy interests in their personal electronic devices. As the technology of personal electronic devices advances, the degree of invasiveness of school officials' searches of those devices also increases. Allowing highly

²³⁵ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. at 325; *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997); *T.K. v. N.Y.C. Dep't of Educ.*, No. 10-CV-00752, 2011 WL 1549243 (E.D. N.Y. April 25, 2011).

²³⁶ *Stillwagon*, *supra* note 212, at 1174–75.

²³⁷ *Redding*, 129 S. Ct. at 2643.

²³⁸ Diane Heckman, *Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech Protection*, 259 ED. L. REP. 381, 406 n.203 (2010).

invasive searches of students' personal electronic devices based solely on suspicion of minor disciplinary infractions (such as text messaging in class) or unsubstantiated student rumors sounds more like a demand that students check their rights at the schoolhouse gate and less like a balanced approach to respecting students' privacy interests and schools' need for effective discipline. The *Redding* Court opened the door for treating highly invasive searches with greater care than less invasive searches, and searches of students' personal electronic devices—with the wealth of sensitive personal data they contain—rise almost to the level of searches of students' bodies. Given schools' option of exercising an outright ban on personal electronic devices, schools that allow use or possession of these devices on school grounds should not then be able to search these devices on little more than a hunch or a passing whim. The Court struck the most appropriate balance for such invasive searches in *Redding* by narrowing the scope of reasonable searches to exclude strip searches, and lower courts should apply the same narrow scope other highly invasive student searches, including those of students' personal electronic devices.

V. CONCLUSION

The analytical framework that led the *Redding* Court to narrow the scope of reasonable searches by school officials to exclude strip searches unless accompanied by special circumstances provides the construct that should apply to school officials' searches of students' personal electronic devices. Undoubtedly, there can be no privacy interest stronger than students' privacy interest in their own bodies. Society and technology, however, have outpaced the old Fourth Amendment jurisprudence that sees personal electronic devices as just another personal effect. Students' personal electronic devices are complex, multi-functional containers for student expression and personal information. Student speech rights, already significantly curtailed by prevailing First Amendment jurisprudence, provide little protection for student expression. By applying the Court's Fourth Amendment jurisprudence as detailed by *T.L.O.* and *Redding*,²³⁹ courts can avoid both the unacceptable chilling of student speech and highly intrusive invasions of students' personal information.

The scope of a reasonable search by a school official of a student should not include the student's personal electronic device unless a threat of danger specially expands the scope of the search. Failure to provide additional clarity to the scope of reasonable searches by school officials of

²³⁹ See *supra* Part III.

students' personal electronic devices would leave school officials emboldened to stretch the scope of searches secure in the knowledge that the doctrine of qualified immunity will offer protection. Instead, courts should employ the analytical framework established in *T.L.O.* and refined in *Redding* to give credence to the societal and technological developments—and strong privacy interest—that ensconce students' personal electronic devices in a category that, like strip searches, falls outside the scope of reasonable searches without special circumstances.