CELL PHONE SEARCHES IN SCHOOLS:
THE NEW FRONTIER
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I. Introduction

In the age of smart phones, what once was a simple device to make phone calls has become a personal computer that stores a wealth of sensitive, personal information. Despite the fact that most people carry a cell phone, there has been relatively little litigation deciding whether these cell phones are entitled to the protections provided by the Fourth Amendment. While this issue is currently under view by the United States Supreme Court, the Court is only examining it to the searches of cell phones incident to lawful arrests, not in schools. This paper will argue that students do not have a reasonable expectation of privacy in their cell phones that prevents the search of their cell phones while in school, provided the school has a policy which prohibits the use of cell phones.

II. Fourth Amendment Generally

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures by government authorities.\(^1\) Adopted in response to the abuse of general search warrants that were issued by the British government in pre-Revolutionary America, it was officially adopted on March 1, 1792 as part of the Bill of Rights.\(^2\) Although it did not initially apply to the states, in *Mapp v. Ohio*, the Supreme Court held that the Fourth Amendment was applicable to the states through the Fourteenth Amendment.\(^3\)

\(^1\) U.S. Const. Amend. IV.
The Fourth Amendment 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.⁴

In addition to prohibiting unreasonable searches and seizures by the government, it requires that any search warrant be both judicially sanctioned as well as supported by probable cause. Furthermore, these searches are required to be limited in scope to the particular places and items sworn to by the law enforcement officer in his or her application for the search warrant.⁵

While law enforcement officers are required to have a search warrant for most searches, the Court has defined a series of exceptions for consent searches, automobile searches, evidence in plain view, exigent circumstances, border searches, and other specific situations. If, however, law enforcement officers conducting a search do not have a valid warrant or an exception to the warrant requirement, any evidence obtained may be suppressed in subsequent criminal trials.⁶

This mechanism for enforcing the Fourth Amendment, known as the exclusionary rule, was established by the Supreme Court in *Weeks v. United States*.⁷ The exclusionary rule applies not only to evidence obtained in direct violation of the Fourth Amendment, but also to evidence subsequently discovered as a result of such violations, often referred to as the “fruit of the poisonous tree” doctrine. Further, illegally obtained evidence is generally inadmissible unless it: a) would have been inevitably discovered by legal means or b) if the government infringement upon the individuals Fourth Amendment rights was sufficiently removed from the discovery of

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⁴ U.S. Const. amend. IV.
⁵ Id.
⁶ CRS Annotated Constitution
the evidence that it has cleansed itself of the taint caused by the initial Fourth Amendment violation.  

Although there is no shortage of Fourth Amendment case law, it is generally focused on three specific questions: first, what government activities constitute “searches” and “seizures”; second, what constitutes probable cause for these government actions; and third, how violations of the Fourth Amendment should be addressed. While early court decisions limited the scope of the Fourth Amendment simply to law enforcement officer’s physical intrusions on private property, in Katz v. United States the Supreme Court held that the protections of the Fourth Amendment also extend to the privacy of individuals.

In order for the Fourth Amendment to apply in any given situation, the individual that asserts its protections must claim that the government intruded into an area in which he had a reasonable expectation of privacy. The idea of reasonable expectation of privacy is generally broken down into a two-part test, set forth in Katz. First, the person asserting Fourth Amendment protections must show that he had an actual belief that he had an expectation of privacy in the area that was searched or the property that was seized. Second, the individual must demonstrate that society would view this belief as reasonable. This test, sometimes referred to as the subjective-objective test, is the starting point for most Fourth Amendment analysis. As a result, if the individual cannot show that he or she had both a subjective and objective expectation of privacy, the question of whether law enforcement officials properly conducted a search is moot. In such situations, there has been no search and therefore the Fourth Amendment is not implicated.

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8 Mapp, 367 U.S. at 648-650.
11 Id.
III. Fourth Amendment in Schools

In *New Jersey v. T.L.O.*, the Supreme Court affirmatively answered the debate as to whether the Fourth Amendment’s protections extended to students.\(^{12}\) In holding that the Fourth Amendment applies to searches of students conducted by public school officials, the Court found that school officials act as representatives of the State, not merely as surrogates for the parents, and cannot claim parental immunity from the parameters of the Fourth Amendment.\(^{13}\) While the underlying requirement of the Fourth Amendment is that all searches and seizures must be reasonable, what is reasonable depends on the context in which the search takes place.\(^{14}\)

In the context of schools, however, this notion is relaxed in order to balance the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in schools.\(^{15}\) While under normal Fourth Amendment circumstances a valid warrant or exception to the warrant requirement is necessary for a valid search, in the context of school searches, school officials are not required to obtain a warrant before searching a student who is under their authority.\(^{16}\) Consequently, for a search of a student by a school official to be legal, it depends only on the reasonableness of the search under the circumstances.\(^{17}\)

In order for a search to be reasonable under all the circumstances, it must satisfy a two-part test, set forth by the Supreme Court in *T.L.O.*: first, the search must be justified at its inception; and second, the search must be reasonably related in scope to the circumstances which justified the search in the first place. Under ordinary circumstances, a search of a student by a teacher or other school official is justified at its inception when there are reasonable grounds for

\(^{13}\) *Id.* at 336-37.
\(^{14}\) *Id.* at 337.
\(^{15}\) *Id.* at 341.
\(^{17}\) *Id.* at 341.
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. Further, such searches are permissible in scope when the measures that are adopted are reasonable related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.\textsuperscript{18}

While the \textit{New Jersey v. T.L.O.} Supreme Court did not decide whether individualized suspicion is an essential element of the reasonableness test it adopted for searches by school authorities, the majority view is that the Fourth Amendment, even as applied to schools, requires more than generalized probability.\textsuperscript{19} Here, it requires that the suspicion be particularized with respect to each individual searched. Because of the nature of the school setting, however, the extent to which suspicion must be particularized generally does not rise to the standard as would apply in criminal law cases. Furthermore, exceptions to the general requirement of individualized suspicion exist in cases where privacy interest implicated by the search are minimal and other safeguards are available to assure that the individual’s reasonable expectation of privacy is not subject to the discretion of the school official in the field.\textsuperscript{20}

\textbf{IV. Fourth Amendment Protections of Cell Phones}

\textbf{A. Generally}

Despite the fact that cell phones are a certainty of everyday life for most people, the law on searches of cell phones is anything but certain. In fact, there is very little guidance as to whether cell phones can be lawfully seized and searched without a warrant. Despite this, police have begun to search cell phones incident to arrests. Consequently, the Supreme Court is now

\textsuperscript{18} \textit{Id.} at 341-42.
\textsuperscript{19} James Rapp, Education Law, Ch. 9, § 9.08, pg. 31 (Matthew Bender & Co. 2014).
\textsuperscript{20} James Rapp, Education Law, Ch. 9, § 9.08, pp. 32-33 (Matthew Bender & Co. 2014).
left attempting to balance the unique capabilities of modern technology with the traditional rules of the Fourth Amendment.

On April 29, 2014, the Supreme Court heard oral arguments in two cases involving searches of cell phones incident to arrest—Riley v. California and United States v. Wurie.\(^\text{21}\) In Riley, police seized Riley’s smart phone during a traffic stop for an expired license plate. Using photos, videos and call logs obtained from his cell phone, along with two hand guns found during a search of his car, police identified Riley as a member of a gang and placed him near the scene of a gang-related shooting that occurred several weeks before his arrest. Despite the fact that no witnesses positively identified Riley as being involved in the shooting at trial, the evidence from the cell phone allowed jury to convict him of shooting at an occupied vehicle, attempted murder, and assault with a semi-automatic weapon.\(^\text{22}\)

In Wurie, police arrested Wurie near the scene of a drug transaction and took him to a police station. While at the police station, the police seized two cell phones and observed that one of the cell phones was receiving repeated calls from “my house.” Without a warrant, police officers opened the phone, reviewed the call log and traced the number to Wurie’s apartment. After obtaining a warrant for Wurie’s apartment, the police searched it and found crack, marijuana and other evidence of drug crimes. Wurie was later convicted of distribution and possession with intent to distribute crack, and being a felon in possession of a firearm and ammunition.\(^\text{23}\)


\(^{22}\) Id.

\(^{23}\) Id.
During oral arguments on the cases, the Justices discussed at length the effect of cell phones on the traditional rationales of searches incident to arrests.\textsuperscript{24} While traditionally police officers are permitted to search an individual once he has been lawfully arrested, the rationale for this twofold: first, for officer safety; and second, to prevent the destruction of evidence that the individual may have in his possession at the time of his arrest. Although this rationale still holds true, at the time this came into practice, were limited by the amount of information an individual kept on his person at the time of his arrest. Now, smart phones hold the key to unlocking an incredible amount of personal information. Allowing police to search a cell phone without a warrant would give access to personal mementos—such as pictures and videos—medical information, GPS tracking information and financial data. This type of search—as acknowledged by the Supreme Court during oral arguments—is much broader than the search originally envisioned under the search incident to arrest exception to the warrant requirement.\textsuperscript{25}

B. In Schools

Despite the fact that this issue has not been litigated in many circuits, the current trend of decisions indicates that students have a reasonable expectation of privacy in their cell phone—to a certain extent. In \textit{G. C. v. Owensboro Pub. Sch.}, the Appellate Court for the Sixth Circuit held that a search of a student’s cell phone was unreasonable in light of all the circumstances.\textsuperscript{26} In \textit{G.C.}, the student had a history of disciplinary and mental health issues. The student was sitting in class when his teacher caught him sending two text messages on his phone in violation of school policy.\textsuperscript{27} After the teacher confiscated the student’s phone, she gave it to the principal who read

\textsuperscript{25} Id.
\textsuperscript{26} \textit{G.C. v. Owensboro Pub. Sch.}, 711 F.3d 623 (6\textsuperscript{th} Cir. Ky. 2013).
\textsuperscript{27} Id. at 634.
several text messages on the phone “to see if there was an issue with which she could help him so that he would not do something harmful to himself or someone else.” Here, nothing in the sequence of events indicated that a search of the phone would reveal evidence of criminal activity, further violations or school rules or potential harm to anyone in the school. As a result, the court held that there was no reasonable suspicion to justify the search at its inception.29

Another case which exemplifies the reasonableness of cell phone searches in schools is Klump v. Nazareth Area Sch. Dist.30 In Klump, the student’s cell phone was confiscated because it was displayed during school hours, in violation of a school rule.31 After confiscating the phone, the student’s teacher and Assistant principal called nine other students from the phone’s call log in order to determine whether those students had also been violating the school’s cell phone use policy.32 The Assistance Principal and teacher also accessed the student’s text messages, voice mail and held a conversation with the student’s younger brother by using an instant messaging feature on the cell phone.33 The court held that the school officials were justified in seizing the cell phone because the student had violated a school policy banning cell phones during school hours.34 On the second prong of the reasonableness test, however, the court held that the school officials were not justified in calling other students because they did not have a reason to suspect at the outset of the search that it would reveal evidence of violations of other school polices.35 Despite the fact that the school officials eventually found evidence of drug activity on the phone, the court noted this was irrelevant because school officials did not see the evidence of the drug

28 Id. at 628.
29 Id. at 634.
31 Id. at 627.
32 Klump, 425 F. Sup. 2d at 627.
33 Id.
34 Id. at 640.
35 Id.
related activity until after they had searched the phone.\textsuperscript{36} As a result, the court held that the search of the student’s cell phone was not reasonable under all the circumstances.\textsuperscript{37}

From this line of cases, it is evident that courts are having a difficulties determining what role the Fourth Amendment plays in the context of cell phone searches. While it is certain that cell phones are entitled to Fourth Amendment protections, it is still unclear the extent to which these devices are protected. Even in school settings, in which Fourth Amendment protections are relaxed, courts tend impose restrictions on the scope of cell phone searches.

In analyzing cell phone searches in schools, courts still follow the traditional two-prong \textit{T.L.O.} test, but also take into account the unique characteristics of cell phones. Despite these considerations, courts still allow school officials to search cell phones. Consequently, the issue becomes not the actual search of a cell phone by school officials, but the scope of the search. The implications of this is that, despite the fact courts recognize the far reaching capabilities of cell phones, they do not extend Fourth Amendment protections to all searches of cell phones. This is illustrated by the fact that, while both searches in \textit{G.C.} and \textit{Kulp}, were ultimately held to be unreasonable, it was not because a \textit{search} took place, but rather that the search that took place was \textit{too intrusive}. It follows that students, as long as they possess their cell phones in schools in violation of school policy, do not have a reasonable expectation of privacy in their cell phones and those cell phones can be subject to search.

\textbf{V. Conclusion}

Although it is reasonably clear that cell phones are entitled to Fourth Amendment protections, the scope of that protection has yet to be determined. While the Supreme Court is wrestling with the issue of searches of cell phones incident to lawful arrests in order to prevent

\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.}
the destruction of evidence, the inquiry into cell phone searches in schools stems from a different area altogether—reasonableness. Analyzing cell phone searches according to the standard set forth by the court in *T.L.O.*, courts have held that it was not the inception of the search, but the scope of the search that was unreasonable in light of the circumstances involved. As a result, it is not the actual search of a cell phone that becomes problematic, but rather the extent to which school officials search the phone. Consequently, students do not have a reasonable expectation of privacy in their cell phone that prevents the search of their cell phones while in school, provided the school has a policy which prohibits the use of cell phones.