The Times They Are A-Changin’: The “Sexting” Problem and How the Intrusiveness of a Cell Phone Search Determines the (Un)Constitutionality of Suspicion-based and Suspicionless Searches in the Public School Setting

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It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.¹

~Justice Joseph P. Bradley, 1886

INTRODUCTION

Gone are the days depicted in the TV show “Saved by the Bell” where one extremely rich and extremely popular student had an extremely huge cell phone at school.² In the past twenty years, cell phones have gone from relative obscurity to being perceived as a near necessity.³

While cell phones provide a great convenience for students, their technological capabilities provide a very easy way to conduct activities that are against school policy or even illegal while at school.⁴ “Sexting⁵” is one, possibly illegal,⁶ cell phone activity that violates policy that is making waves in school districts.⁷ This “sexting” activity is typically entered into by minors who do not know the potential harm it could cause them. The students who are engaging in “sexting” behavior are not the only individuals acting with naïveté; on the other side of the coin, school districts are blindly enacting cell phone search policies that leave administrators potentially liable for civil, or even criminal, penalties and are an unconstitutional under the

¹ *Boyd v. United States*, 116 U.S. 616, 630 (1886).
² *Saved by the Bell: Day of Detention* (NBC television broadcast Oct. 3, 1992) (portraying show star Zack Morris ordering Chinese take-out on an extremely large cell phone and his fellow students being in awe of his ownership of the phone).
⁴ Because this paper analyzes Fourth Amendment issues, only public schools are considered. Any reference to schools, school boards, or school officials can be assumed to refer to those affiliated with a public school system; see Lisa E. Soronen, *Sexting at School: Lessons Learned the Hard Way*, INQUIRY & ANALYSIS (Feb. 2010) http://www.nsba.org/SecondaryMenu/COSA/Resources/InquiryAnalysis/2010/IA-Feb-10.pdf [hereinafter *Soronen*] (analyzes the legality of “sexting” and displays various legislation that states have enacted to address “sexting” issues).
⁵ The term “sexting” is a combination of the words “sex” and “text.” It is “the sending of sexually explicit photographs or messages via mobile phone.” *Sexting Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/sexting (last visited July 28, 2011); see also *US v. Broxmeyer*, 616 F.3d 120 (2d Cir. 2010).
⁶ See *Soronen*, supra note 4.
⁷ See *Miller v. Mitchell*, 598 F.3d 139 (3rd Cir. 2010) (deciding the legality of prosecuting fourteen students that had been found to be “sexting”); See *Teen Mobile Report*, supra note 3.
Fourth Amendment. School districts around the country are setting up suspicion-based and suspicionless cell phone search policies, with little guidance, in an attempt to quell the perceived influx of “sexting” activity by middle and high school aged students.⁸

There are two types of policies that have been enacted by various school districts around the country. One is a suspicion-based search policy, where the school officials will only search a student’s phone in response to information received by school officials, leading them to believe a particular student is engaging in “sexting” activities or has explicit images stored on a cell phone while on school grounds. The other type of search policy is a suspicionless search, where school officials will search any and all phones that are confiscated by school officials for any reason.

The suspicion-based search policies typically equate a cell phone search to the search of a student’s person or any containers in control of the student.⁹ These policies do not take into account the increased intrusiveness of a cell phone as compared to the search of a handbag. These factors should call for a heightened suspicion, in comparison to the suspicion needed to justify a simple search of a backpack, in order to justify the search of a cell phone. Even if the policy states that only text messages and pictures will be searched, entering a modern cell phone, especially true in “smart phones,” leads to almost a seamless separation between email accounts, social networking accounts, access to all sorts of Internet accounts, and an extraordinary storage capacity, and an unprecedented access into the personal communications of today’s teenager. In Section II, I will apply the existing Fourth Amendment jurisprudence, the T.L.O./Redding sliding scale analysis, to suspicion-based searches by using a hypothetical fact set posited in Sext Ed:

⁸ “Sexting” typically takes the following forms: 1) two students sending images to each other on a mutually consensual basis, 2) a student sending an image in a flirtatious manner, 3) an image that sent to an individual is then sent to one or more unintended third party recipients, or 3) a message sent due to coercion from the recipient to the sender.

⁹ See Miller v. Mitchell, 598 F.3d 139 (3rd Cir. 2010).
Students’ Fourth Amendment Rights in a Technological Age and conclude that, because of the highly intrusive nature of the search, a suspicion-based search of a student’s cell phone will be held unconstitutional under Safford v. Redding unless it is in response to a serious immediate threat to school safety and the school has strong individualized suspicion regarding the suspected behavior.

The justification for suspicionless searches diminishes the student’s Fourth Amendment rights even more than suspicion-based searches. Schools that enact suspicionless searches reason if a student uses a cell phone in violation of school policy, all privacy rights are effectively waived because the student’s expectation is effectively nil. In Section III, I will conclude suspicionless cell phone searches, such as those conducted by the Tunkhannock Area School District, located in Wyoming County PA, while theoretically constitutional, will never be justified under the analysis mandated in Vernonia School District v. Acton because of the highly intrusive nature of a cell phone search.

In the end, I will recommend an ideal solution, a statewide school code limiting school searches of cell phones to only those cases where there is an immediate threat that cannot be extinguished without a search. I will also recommend a comprehensive and constitutionally sound cell phone control and “sexting” policy for schools to follow that will reduce the prominence of “sexting” on school grounds, protect administrators from potential criminal and civil liability, and protect students’ constitutional rights.

10 This note is used primarily because the analysis offered is a typical flawed view on school search jurisprudence, but also because, as of this writing, it is the only other published legal article about the Fourth Amendment issues surrounding suspicion-based searches of students’ cell phones for evidence of “sexting.” Richard Hartsock, Comment, Sext Ed.: Students’ Fourth Amendment Rights in a Technological Age, 37:1 N. Ky. L. Rev. 191 (2010) [hereinafter Hartsock].
I. THE PROMINENCE OF, AND THE ISSUES THAT SURROUND, “SEXTING” IN THE PUBLIC SCHOOL CONTEXT

As the previous decade’s generation of teens was driven by MTV, this generation’s teens are driven by the cell phone. According to Nielsen Wire, 13 to 17 year-olds send an average of 3,339 SMS data messages (“text messages”) per month, which is about 110 messages per day. Another poll taken in 2008 surveyed 1,280 cell phone users, 653 of them teenagers, and 19% admitted to sending at least one semi-nude or fully nude image or video to someone else using a phone message or email service. The following discussion will show the possession of these explicit images of minors poses the possibility of serious criminal penalties to the minor sender or possessor; as districts have found out, school officials possessing these images during an investigation of student “sexting” can face criminal charges; and the minors who are sending these messages likely are not fully aware of the emotional damage that can occur if the explicit messages they are sending are distributed to unintended recipients. While this is not directly relevant to a Fourth Amendment analysis, it is important for schools to have an understanding of the “sexting” problems, as they are as confusing as they are dynamic.

A. Minors Engaging in “Sexting,” Regardless of the Severity of Their Conduct, Are Subject to Criminal Penalties

14 Music Television Network.
15 See Teen Mobile Report, supra note 3.
16 Id.
18 Statutes that criminalize the possession of child pornography were written well before the issue of “sexting” arose. These statutes were put in place to protect children from adults that sought to exploit them. See Robert H. Wood, The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint, 16 Mich. Telecom. & Tech. L. Rev. 151 (2009); See Sarah Wastler, The Harm in “Sexting”? Analyzing the Constitutionality of Child Pornography Statutes that Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers, 33 Harv. J. L. & Gender 687 (2010).
One major concern for schools to take into account regarding students’ “sexting” behavior is the fact that the students may be committing high-level felonies depending on the jurisdiction in which the message was sent or received because child pornography statutes were written before “sexting” was even possible. “Sexting” behavior ranges from extremely disturbing cases, where minors are coerced to send adults images, to seemingly innocuous cases, where two minors who are in a loving relationship send images only to each other. However severe, typically, when a prosecutor is given a case involving “sexting” allegations he or she can either choose to drop the case; charge the accused with felony child pornography charges, which would subject the charged individual with a prison term and force him or her to register as a sex offender; or attempt to fit the circumstances of the case into a different, lower, charge (given most state laws, there are not really any charges that fit the facts of the case). The following real life examples are given to show the range of “sexting” behavior. While not all of them involved a school search, they are relevant because they show the potential ramifications that come with “sexting” as the law stands today.

Because “sexting” is merely defined as sending nude or explicit images by way of a cell phone, “sexting” cases should be analyzed on a case-by-case basis because this encompasses a wide range of activity. It should not have to be argued that the most severe “sexting” cases would involve an adult coercing a young minor to send him or her sexually explicit messages. This situation has come up in schools where school employees engage in “sexting” behavior with students. Obviously, this behavior should be a large concern for school boards. Students are

21 See A.H. v. State of FL, 949 So.2d 234 (Fla.App. 2007), aff’d 44 So.3d 593 (Fla. App 2010).
22 See supra note 5.
23 This is the type of predation behavior that child pornography statutes were aimed at controlling. See supra note 18 and accompanying text.
24 In this case, a 33 year-old teacher admitted to having sent explicit pictures to a 12 year-old student for over a year. Teacher Accused of Sexting 6th Grader, KRQE.COM (May 17, 2010, 10:29 PM), http://www.krqe.com/dpp/news/crime/teacher-accused-
particularly vulnerable to coercion by authority figures because school officials have a particularity persuasive influence over the student.25

An arguably less serious example of “sexting,” still involving predatory behavior school boards must take into account is when an eighteen year-old (or slightly older) student is sending images to a slightly younger minor student. This is a particularly troublesome scenario because, while the eighteen year-old is technically an adult in the eyes of the law, he or she is still in high school where many or even most of his or her peers are still minors. This tricky situation is very familiar to Phillip Alpert. In 2009, very soon after Phillip turned eighteen, then still a high school student, he sent a sexually explicit image of his then sixteen year-old girlfriend to her friend and some members of her family after they had an argument.26 Philip was charged with the distribution of child pornography to which he pled no contest.27 He was kicked out of college, sentenced to five years probation, and must now register as a sex offender, which he will remain until he is 43 years old.28 If this type of behavior were to occur on school grounds, meaning the sending or receipt of the image(s), schools should do whatever they can to protect the safety of the student victim and the student body at large. Philip, without consent, distributed an explicit image of his girlfriend to students and adults of which were not intended recipients. This leaves the depicted individual in a very precarious situation that can lead to severe collateral consequences, which will be discussed.29

Even though the following facts suggest a much less severe situation, serious charges

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25 See Krogman, supra note 24.
27 Id.
28 Id.
29 See discussion infra section I.C.
were brought against the teens, both of whom were under age, who took pictures of themselves while engaged in a private sexually intimate behavior. In this case, *A.H. v. Florida*, a seventeen year-old male and a sixteen year-old female were charged and convicted of felony distribution of child pornography. The images in question were never distributed to any third party and were for their own enjoyment. These images somehow ended up in the hands of police and charges were brought. A.H. and her boyfriend were both charged and convict with felonies and currently face the possibility of having to register as sex offenders. Schools need to think about cases such as this when enacting “sexting” policy and when assessing the potential harm of suspected behavior. As will be discussed, school officials should not treat this type of situation the same as that seen in the case of Philip Alpert and the minimal threat posed by this type of “sexting” activity does not raise any immediate concerns regarding the safety of the school.

B. School Districts and School Officials, Regardless of Good Faith on Their Part, May Be Liable For Civil Penalties or Even Criminal Charges

School districts have been sued after searching a student’s cell phone during “sexting” investigations. School districts have been sued for not only violating the searched student’s Fourth Amendment rights by searching his or her cell phone, but also for failing to punish students who distribute the images and sharing found images with other school officials.

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30 *A.H.*, 949 So.2d 234.
31 *Id.*
32 *Id.*
33 There is no information as to how the police ended up with these messages nor is there information suggesting the images were distributed to any other individuals. The case says on more than one occasion that the images were not distributed. *Id.*
34 *Id.*
35 See discussion infra Part II.C.3.
36 See *Miller*, 598 F.3d 129.
37 After learning of nude images of high school cheerleaders circulating amongst the football team, the school board started an investigation. Eventually an anonymous individual gave the principal printed copies of the pictures and the depicted cheerleaders were kicked off the squad. There was no investigation into who disseminated the images. The lawsuit alleges that school officials needlessly showed the images to several members of the school staff that did not need to see the image, the school failed
Unfortunate school officials have found that “sexting” investigations are a veritable minefield. The correct process of investigating “sexting” suspicions or allegations is unclear at the moment and a wrong turn will open the potential for legal liability. Though it may seem nonsensical, school administrators have been personally sued and may be held liable for civil and even criminal violations related to efforts, albeit in poor judgment, to investigate “sexting.” Administrators have been sued or charged with possession of child pornography, dissemination of child pornography, and failure to report child abuse. These charges will vary based upon the controlling state statute so it is extremely important school officials to be well versed in state policy and law, but also to understand the constitutional issues surrounding cell phone searches.

One (perhaps) unfortunate school official found out the consequences that can stem from a well-meaning investigation into “sexting” when criminal charges were brought against him personally. In 2008 Ting-Yi Oie, a Virginia assistant principal, was informed of rumors around the school that there were explicit images circulating around the school. After a minimal investigation he called a student whom he believed to have an image into his office. In the presence of other school officials he questioned the seventeen year-old male student about the rumors and the student almost immediately admitted to having an image and showed it to Mr.

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38 Soronen, supra note 4, at 3.
39 Id.; See infra text accompanying note 42-49.
40 Soronen, supra note 4, at 3.
41 See Krogman supra note 24.
43 Id.
44 Id. The picture depicted the torso of a topless female in underpants with her arms crossed over her breasts. Her breasts and pubic area were totally covered.
Oie by accessing it on his phone. Mr. Oie informed his supervisor about the image who said it would be best to preserve the image on a school computer for a future investigation. Mr. Oie did not know how to transfer an image to his computer, so the student told him he would text the image to Mr. Oie and give him instructions as to how to forward it to an email account. A month later he was charged with failure to report suspected child abuse and later, after refusing to resign, possession of child pornography. Though the charges were later dropped, Mr. Oie was arrested, lost his entire life savings paying for his defense, and had his reputation badly damaged.

As of this writing, all of these cases have been either settled or are still pending, but it can be seen by the range of these lawsuits that school districts can fail on more levels than just the search of the phone. This is by no means an exhaustive list of legal issues school administrators have been party to, but rather a display of the wide range of potential liability school districts and school administrators face.

C. Minors Enter Into “Sexting” Behavior Naïve of the Long-Term Consequences of Their Actions

“Sexting” can also have serious social consequences for the depicted individual if the images get into the wrong hands, as is all too familiar to Beth Shields Middle School in Ruskin, Florida. In late November 2009, Hope Witsell, a 13 year-old female student took her own life after being socially ostracized by her peers when a nude picture of her was sent throughout the

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45 Id.
46 Id.
47 This suggestion may seem silly to some, but to those unfamiliar with technology and the law, it may seem like totally appropriate behavior. Id.
48 The mother of the informing student actually reported him to the authorities. He informed her of the sexting investigation her son aided in after the informer was suspended for pulling a female student’s pants down in class. The mother was outraged that she had not been informed of her son been involved in “sexting.” Id.
49 Id.
entire school district.\textsuperscript{50} Hope sent the image to a boy who she liked in hopes of getting him to like her.\textsuperscript{51} Another girl who also liked this particular boy was looking through his phone and found the image, became jealous, and decided to send it to everyone on the boy’s contact list.\textsuperscript{52} Within a few days the message was sent to dozens of phones throughout the community.\textsuperscript{53} Hope was suspended for seven days from school for the image.\textsuperscript{54} When she returned to school she was subjected to constant verbal and physical abuse.\textsuperscript{55} Two weeks after returning, she took her own life.\textsuperscript{56} There is nothing to suggest any other student was punished in this case.\textsuperscript{57} Schools need to learn it is likely the naïve student in the picture who ends up the victim and it is the predatory behavior of sending the image to the masses that causes the greater harm.

II. THE FOURTH AMENDMENT AS APPLIED TO SUSPICION-BASED STUDENT CELL PHONE SEARCHES BY SCHOOL OFFICIALS IN THE PUBLIC SCHOOL CONTEXT

The issues described in the previous section frame the issues surrounding the “sexting” problem. They are relevant to a decision whether or not to search for two reasons. The main reason is because the potential harm to students, as will be discussed, is a factor to consider in an analysis of whether a search was constitutional under Fourth Amendment jurisprudence. A corollary reason is that it is important to keep in mind the varying scenarios, because even if a search is, without a doubt, fully justified,\textsuperscript{58} the school official must determine if the search is worth the risks that are not associated with potential Fourth Amendment violations. Both of

\textsuperscript{50} Andrew Meacham, Sexting-Related Bullying Cited in Hillsborough Teen's Suicide, ST. PETERSBURG TIMES (Nov. 29, 2009), available at http://www.tampabay.com/news/humaninterest/sexting-related-bullying-cited-in-hillsborough-teens-suicide/1054895 [hereinafter Meacham]; See also Mike Celizic, Her Teen Committed Suicide over Sexting, MSNBC (Mar. 6, 2009), http://today.msnbc.msn.com/id/29546030/ns/today-parenting/, (describing another case of “sexting” related bullying leading to suicide) [hereinafter Celizic].
\textsuperscript{51} Meacham, supra note 50.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} See Id.
\textsuperscript{58} As will be shown, it will be extremely rare for a search to be without a doubt justified. See discussion infra Part II.
these considerations are relevant in the conclusion that almost all cell phone searches are constitutional should only be entertained if there is no other way to extinguish the immediate and substantial threat.

The Fourth Amendment provides people “[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause.” The Fourth Amendment protects people, not places. The Supreme Court has defined a search of an intrusion into an area where (1) the individual has exhibited a reasonable expectation of privacy and (2) this expectation is one that is recognized by society. Typical Fourth Amendment jurisprudence has dictated that a search of one’s property by a state official must be supported by a warrant or probable cause; however, the Supreme Court has carved out several exceptions to this requirement. The justification for creating these exceptions is there are certain situations that arise where the acquisition of a warrant and/or probable cause is impractical, like when an officer fears evidence will be destroyed if he or she takes the time to get a warrant. Another exception to the warrant requirement is school officials are not required to have a warrant or probable cause when searching students because of the special needs of the school environment, the main one of which is student safety. Although, there are certain requirements that must be met to qualify for this “special needs” exception and the type of search conducted will dictate those requirements.

59 U.S. CONST. amend. IV.
61 Id. at 361 (Harlan, J., concurring).
64 T.L.O., 469 U.S. at 339-42.
65 Id.
As the following discussion will demonstrate, a search of data stored within the memory of a cell phone by a public school official is a search that is governed by the Fourth Amendment. When looking at school search precedent as it applies to the topic at hand, it is helpful to separate suspicion-based searches and suspicionless searches. The reason it is particularly important to keep suspicion-based and suspicionless searches conceptually separate is because what type of search a school official is contemplating will dictate what standard must be met to satisfy the “special needs” exception to the Fourth Amendment warrant/probable cause requirement. This section will provide a brief history and then analyze suspicion-based cell phone searches under New Jersey v. T.L.O. and Safford Unified School District #1 v. Redding and then suspicionless searches under Vernonia School District v. Acton and Board of Education v. Earls.

A. “Special Needs” Exception in the Public School Setting According to New Jersey v. T.L.O. and Safford Unified School District #1 v. Redding

Even though the public school setting presents a “special needs” exception to the Fourth Amendment’s requirement of either a warrant or probable cause to conduct a search, a student retains the right to be free from “unreasonable searches and seizures.” While the initial analysis applied to searches of students by school officials was defined in New Jersey v. T.L.O., this two-pronged test soon became a “rubber stamp” that allowed schools to perform highly invasive searches on students for minor violations of school policy. In Redding, Justice Souter’s final majority opinion, the T.L.O. standard was clarified as being a sliding scale analysis where the intrusiveness of the search is weighed against the justification, rather than a separate two-part

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66 T.L.O., 469 U.S. at 339-42.
67 Id. at 341-42.
68 T.L.O. at 341-42.
conjunctive test allowing any feasible scope where there is adequate justification to suspect wrongdoing.\textsuperscript{71} Redding is now the guide for what makes a suspicion-based search, not just strip searches, constitutional and it will have to be taken into account when analyzing a search of a cell phone for evidence of “sexting.”

1. T.L.O. Laid the Groundwork for the “Special Needs” Exception, but Ultimately Its Interpretation Became a Rubber Stamp Analysis

New Jersey v. T.L.O. is probably the most important Supreme Court decision with regards to searches of students by school officials. It had been the gold standard in analyzing school searches since it was decided, but its traditional interpretation is no longer what courts will look at when analyzing a suspicion-based search.\textsuperscript{72} In T.L.O., a teacher observed two girls, including the T.L.O., then a fourteen year-old, smoking in the women’s restroom.\textsuperscript{73} After being brought to the principal’s office, the T.L.O. denied any and all involvement in the accusations against her.\textsuperscript{74} The assistant principal then searched T.L.O.’s purse where he discovered cigarette-rolling papers, which gave him suspicion she was using marijuana.\textsuperscript{75} He then conducted a second, more complete search of the purse where he discovered marijuana, a pipe, a large sum of money, and what seemed to be a list of people who owed her drug debts.\textsuperscript{76}

The Supreme Court held that a search in the public school context need only be reasonable to satisfy the Fourth Amendment’s guarantees because of the school’s special need in maintaining order and protecting safety, which led the Court to create an exception to the warrant/probable cause requirement of the Fourth Amendment.\textsuperscript{77} The Court concluded, in the

\textsuperscript{71} Redding, 129 S.Ct. at 2642-643.
\textsuperscript{72} See id.
\textsuperscript{73}T.L.O., 469 U.S. at 328.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 340-32.
public school setting for a search to be reasonable the search must (1) be “justified at its inception” and (2) the scope of the search must be “reasonably related in scope to the circumstances that justified the search in the first place.” The Court concluded the assistant principal had a reasonable suspicion that justified the initiation of both searches and the scope of both searches was reasonable because it directly stemmed from the suspicion that lead to the search.

While *T.L.O.* technically gave students guaranteed protection from unreasonable searches and seizures under the Fourth Amendment while at school, in practice it acted more like a rubber stamp to justify nearly all searches conducted by school officials. The reason why so many searches have been upheld based upon little evidence is because Justice White, in his majority decision, was extremely vague in establishing the guidelines school officials are to follow when deciding whether to search a student. The majority said the scope of the search is to be “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.” While this sounds like a good standard, the Court offers no examples or guideposts to follow other than the two searches of *T.L.O.*’s handbag. There was also no discussion as to how *T.L.O.*’s age and sex affected the analysis of the search, offering no suggestion as to how the two factors listed fit into the analysis. Another source of confusion that comes from *T.L.O.* is there were two distinct

78 Id. at 341–42.
79 Id. at 344.
80 Katz & Mazzone, supra note 69, at 376-81.
81 See Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993) (upholding a strip search based upon a teacher claiming that the student was too well endowed and must be crotcheting drugs and information that the student had previously dealt and concealed drugs).
82 See *T.L.O.* 469 U.S. 336–43.
83 Id. at 341.
84 See id.
85 See id. at 342; Martin R. Gardner, *Strip Searching Students: The Supreme Court’s Latest Failure to Articulate a Sufficiently Clear Statement of Fourth Amendment Law*, 80.3 Miss. L.J. 955, 958 (2011) [hereinafter Gardner].
searches, both of which the Court deemed acceptable under the “special needs” standard it adopted. The first search was for evidence of cigarette smoking based upon the teacher’s suspicions that the respondent was smoking and the second was for evidence of drug use based upon what the searching principal found during the first search. It is important to keep in mind that the Court did not say the school official could have searched T.L.O.’s whole purse during the first search, but rather the search of the whole purse was only justified after evidence of drug paraphernalia was found in plain view while looking for evidence of cigarettes during the first search. The permissible scope of a search is completely dependent on the object of the search.

The lack of clarity of this decision led to the misinterpretation of the opinion. The majority avoided drawing any bright lines and stuck to the facts of the searches presented. The dissenting opinion in T.L.O. by Justice Stevens precisely predicted where the omissions of the majority opinion would lead. Justice Stevens was concerned that the watering down of the standard applied by the lower court would allow for intrusive searches on little evidentiary ground because of the ambiguities of the majority standard.

If the facts of T.L.O. involved the search of a cell phone, rather than the search of a purse, there is no telling what the court would have decided. This is a perfect example to point out the flaws in T.L.O. While the majority opinion completely stuck to the facts of the case, not offering any bright-line rules or suggestions as to how to apply the test, it is unclear how the test applies to other situations. The Court did not even offer any discussion as to how the age and sex, the

86 T.L.O., 469 U.S. at 343.
87 Id.
88 Katz & Mazzone, supra note 69, at 378.
89 Id. at 328-29, 342-46.
90 T.L.O. at 382 (Stevens, J., dissenting).
91 Id.
92 Katz & Mazzone, supra note 69, at 378.
listed factors that affect the intrusiveness, affect the analysis of a search. However, the Court in Redding was forced to apply T.L.O. to a strip search and clarified it greatly.

2. Safford v. Redding Reaffirmed T.L.O. and Strengthened the School Search Analysis by Using a Sliding Scale Approach, Rather Than the Traditional Conjunctive Test

The facts of Redding are as straightforward as they are shocking. A week prior to the search of Savana Redding, assistant principal Wilson was made aware that a student became ill after taking some pills he got from a classmate and there were students bringing drugs and weapons to school. That same student came to Wilson and gave him a pill he said he received from Melissa Grimes, a fellow student. The informing student told Wilson that students were planning on taking the pills at lunch that day. Wilson gave the pill to the school nurse who determined the pill was a prescription strength dose of ibuprofen. Wilson then pulled Melissa Grimes from class and a search of a day planner she possessed turned up several knives, lighters, a cigarette, and a permanent marker, all of which were against school policy to possess. A search of Marissa’s person produced several more white pills, a blue pill, and a razor blade. Marissa told Wilson the day planner belonged to Savana Redding, she (Marissa) was unaware of its contents, and she got the pills from Savana.

Wilson then pulled thirteen year-old Savana Redding from class and asked her about the day planner. Savana acknowledged she lent it to Marissa earlier that week, but denied

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93 See supra note 85 and accompanying text.
94 Redding, 129 S.Ct. at 2640.
95 Id.
96 Id.
97 Id.
98 Katz & Mazzone, supra note 69, at 370.
99 Redding, 129 S.Ct. at 2640.
100 Id.
101 Id. at 2641.
knowing anything about its contents. The assistant principal searched Savana’s outer clothing and backpack based on the information provided by Marissa and Savana’s general reputation for being a troublemaker. This search produced nothing. Savana was then taken into a separate room by two female school employees and strip searched. Again, no evidence of any wrongdoing was found on Savana.

In deciding the case, the Court reaffirmed the “special needs” exception to the Fourth Amendment, further allowing school officials to perform warrantless searches on students so long as there is reasonable suspicion to suspect the search will turn up evidence of a violation of school policy or law. The Court further provided what constitutes “reasonable suspicion,” saying there must be a “moderate chance of finding wrongdoing.” While this reaffirms T.L.O., the Court also modified contemporary interpretations of its holding, which will have significant impacts on how courts will analyze school searches.

The Court held that, because of the suspicions Wilson had, linking Savana to the pills found on Marissa, the initial search of Savana’s backpack and outer clothing was justified. It can be assumed that looking in Savana’s bag while in the confines of a private office and in her presence and the search of her outer clothing was not excessively intrusive given the

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102 Id.
103 Id.
104 Id.
105 Id. This strip search was very slow and deliberate. There were actually three separate searches. (1) Savana was told to take off her jacket, shoes, and socks, leaving her in a pocket less t-shirt and stretch pants. After finding nothing on Savana, Savana then was told to strip down to only her bra and underwear. Again this search produced nothing and then (3) Savana was told to pull her bra and underwear away from her body and shake them, partially exposing her breasts and pubic area. Again, the search turned up nothing. It is also interesting to point out that this qualified as a search even though Savana was merely responding to verbal commands. The school officials did not touch her and did not conduct any close examination. Id.
106 Id.
107 Id. at 2639.
108 This is actually the first time the Court has come close to quantifying “reasonable suspicion.” This simple seeming sentence will likely affect all legal analyses requiring reasonable suspicion to conduct a search, including Terry stops. Id; Katz & Mazzone, supra note 69, at 382-83.
109 Katz & Mazzone, supra note 69, at 382-83.
110 See text accompanying supra notes 98-100.
111 Unfortunately, there was no real analysis in justifying these searches; the Court merely asserted that they were justified. Redding, 129 S.Ct. at 2641.
circumstances.\textsuperscript{112} However, the analysis of the search that follows comes to a very different conclusion.

While the Court refused to define what exactly constitutes a “strip search,” it termed the following search of Savana Redding as such.\textsuperscript{113} The Court held that, since Wilson had no reason to believe Savana had the pills within somewhere other than her outer clothing, ordering her to remove her clothes for a further search was not justified.\textsuperscript{114} Even if Wilson did suspect Savana was hiding the pills in her underwear given the evidence he had against her, the strip search was unconstitutional because “[the search was of] extreme intrusiveness . . . down to the body of an adolescent[,] requir[ing] some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off.”\textsuperscript{115} In essence, for a search as intrusive as the strip search of Savana Redding to be constitutional, the object of the search must have a high potential for harm, or “danger factor,” and there must be specific individualized suspicion that the object can only be obtained by subjecting the searchee to a very high level of intrusion.\textsuperscript{116} Concluding, the Court held the strip search unconstitutional because Wilson “lacked any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.”\textsuperscript{117}

3. \textit{Redding Applies to All School Searches in That the Intrusiveness of a Search Effects the Justification Needed}

While at first glance, the holding in \textit{Redding}, may seem to be perfectly in line with \textit{T.L.O.}, in practice, it is a significant narrowing of its traditional interpretation. Historically, a

\begin{itemize}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 2642.
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.} at 2643.
\item \textsuperscript{116} Gardner, \textit{supra} note 85 at, 966 (author referring to the potential harm of the suspected object as the “danger factor” in the analysis).
\item \textsuperscript{117} \textit{Id.}
\end{itemize}
T.L.O. analysis was typically\textsuperscript{118} looked at as a conjunctive two-pronged test and the prongs were analyzed as totally separate entities.\textsuperscript{119} What Redding does is reaffirm the idea that the prongs are dependent on each other in a sliding scale analysis.\textsuperscript{120} Here, the Court ruled that because a strip search is so intrusive, the scope of the intrusion drives what justification is needed for a search to satisfy the “special needs” exception to the warrant/probable case requirement of the Fourth Amendment.\textsuperscript{121} The strip search of Savana Redding may have been justified had assistant principal Wilson had some more persuasive mix of a greater threat of harm by her suspected activity and/or more reason to believe that a strip search would have turned up evidence.\textsuperscript{122} While this is by no means a departure from the language within T.L.O., it is a departure from the traditional way in which T.L.O. has been applied.\textsuperscript{123}

Basically, all commentators tend to agree that Redding strengthened the T.L.O. test, at least as applied to strip searches.\textsuperscript{124} Many scholars anticipate that Redding will have an effect on searches other than strip searches, while some maintain that Redding, in fact, only applies to strip searches.\textsuperscript{125} This view looks at the Redding decision at its narrowest interpretation. In the narrowest sense, the court ruled that a strip search is inherently more intrusive than a simple container search of outer clothing or a purse, therefore; the justification for a strip search must be

\textsuperscript{118} The 2nd and 3rd Circuits were applying a sliding scale analysis pre-Redding. Katz & Mazzone, supra note 69, at 381.
\textsuperscript{119} See Katz & Mazzone, supra note 69, at 373-81.
\textsuperscript{120} Katz & Mazzone, supra note 69, at 386; Redding, 129 S.Ct. at 2642.
\textsuperscript{121} Katz & Mazzone, supra note 69, at 386; Redding, 129 S.Ct. at 2642.
\textsuperscript{122} Perhaps if there was a reasonable suspicion that Savana was in possession of dangerous drugs or if there was a reasonable suspicion that Savana was hiding pills in an area that could only be uncovered through a strip search. However, since Redding seems to place more emphasis on the potential harm, it is likely that a search would only be justifiable if a more dangerous drug was suspected. See Redding, 129 S.Ct. at 2642-643.
\textsuperscript{123} See Katz & Mazzone, supra note 69, at 373-81.
\textsuperscript{124} See id. (discussing how Redding mandates a sliding scale analysis analysis rather than the traditional conjunctive test); see Abbey M. Marzick, The Safest Place to Hide: Life After Safford Unified School District #1 v. Savana Redding, 43.3 PROSECUTOR, J. NAT’L DISTRICT ATT’YS ASS’N 12 (July-Sept. 2009) [hereinafter Marzick] (concluding that students will be able to hide contraband safely under clothing post-Redding).
\textsuperscript{125} See Hartsock, supra note 10; see Katz & Mazzone, supra note 69 (limiting analysis to strip searches, but suggesting that Redding will likely affect other areas of the law where reasonable suspicion is the standard); see Marzick, supra note 122, at 17 (withholding judgment as to how Redding will affect other types of searches); but see Dennis D. Parker, Discipline in Schools After Safford Unified School District #1 v. Redding, 54 N.Y.L. SCH. L. REV. 1023, (2009-2010) (“[the holding in Redding] signals a willingness of the Court to subject decisions of schools to some level of scrutiny”).
higher, i.e. the object searched for should have a high “danger factor” and/or there is specific and individualized suspicion that the object searched for is located in an area that necessitates a strip search to reach.\textsuperscript{126} In order to determine whether Redding applies to other types of searches, one needs to ask whether there is something about strip searches, aside from their high level of intrusiveness, that sets them apart from other searches that would necessitate their own analysis? Or is it the high level of intrusiveness that brings on the heightened analysis?

The Court in Redding says, “but when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that excessive calls for suspicion that it will pay off.”\textsuperscript{127} Looking at this statement, one might immediately assume it would only apply to strip searches, but taking this statement narrowly would be short sighted. For instance, would it only apply to adolescents? The use of the term “adolescent” makes it seem as though the qualifiers of this phrase refer to the facts of Redding. What about searches that are more intrusive than strip searches?\textsuperscript{128} If this was not the case, the court would be excluding the strip searches of children who have not reached the age of adolescence and this heightened analysis would not apply to searches more intrusive than the search of Savana Redding. It has to be the intrusiveness that brings on the heightened justification. It just does not make sense to limit it to a strip search of an adolescent. The Court recognized that the sufficient justification for a search varies, where a search of higher intrusiveness requires a higher justification than a lesser

\textsuperscript{126} See Redding, 129 S.Ct. at 2642-643.
\textsuperscript{127} Id. at 2643.
\textsuperscript{128} Schools have even subjected students to body cavity searches. See Barry C. Feld, T.L.O. and Redding’s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies, 80 Miss. L. J. 847, 870 (2011) (“privacy interests of youth would clearly outweigh any interest in school discipline or order which might be served by [a body cavity search]” (quoting Tarter v. Raybuck, 742 F.2d 977, 982-83 (6th Cir. 1984), cert denied, 470 U.S. 1051 (1985) (emphasis added)))
intrusive search. This is perfectly in line with the holding of *T.L.O.*, given the two search analysis where the evidence justifying the first search would not have justified the second, more intrusive search.

So how is *Redding* applied to other types of highly intrusive searches? The best, most user friendly, approach is that of Professor Lewis R. Katz and Carl J. Mazzone. The approach they take is to look at a school search as a sliding scale that balances the intrusiveness with the justification. While their analysis only dealt with strip searches, if the sliding scale is cast to all searches to all searches, not just strip searches, the following scale can be envisioned:

![Sliding scale diagram]

This makes the *Redding* analysis essentially what *T.L.O.* originally intended, a proportionality between the intrusiveness of the search and the justification of the search. If the search in *T.L.O.*, the search of a handbag, is set as the “baseline” intrusiveness of student searches, there are searches of higher intrusiveness and lower intrusiveness. For instance, a school official would need less justification to pat down a student’s outer clothing than he or she would need to conduct the search of that student’s handbag because a simple pat down is less

129 *Katz & Mazzone, supra* note 69, at 386.
130 *T.L.O.*, 469 U.S. at 343-44.
131 *Katz & Mazzone, supra* note 69, at 386-87.
132 *T.L.O.*, 469 U.S. at 341 (“one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place’” (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968))).
133 There were two searches in *T.L.O.*, each requiring a different level of justification. Assume the “baseline” intrusiveness the initial *T.L.O.* search, which was the search for cigarettes in a handbag and not the more intrusive search that followed.
intrusive than the search of a bag.\textsuperscript{134} For that school official to subject that student to a strip search, he or she would need a very high level of justification, as seen in \textit{Redding}.\textsuperscript{135} What about the area between \textit{T.L.O.} and \textit{Redding}, or between the search of a handbag and a strip search? It would be naïve to suggest that there are no searches of an intrusiveness between a strip search and the search of a handbag. In the above scale, this range of intrusiveness is termed a “highly intrusive search.”\textsuperscript{136} On the sliding scale analysis, this search would require a greater justification than the “baseline” search and a lesser justification than a strip search. How much justification would depend entirely upon the weighing of intrusiveness of the search against the “danger factor” involved and the level of suspicion, as there are not only four distinct levels of intrusiveness as depicted in the scale. Rather, the intrusiveness scale is a continuum completely dependent on the facts of the search; the four levels are merely place-holders on the scale.

B. The Intrusiveness of a Cell Phone Search is Closer to That of a Strip Search Than it is to That of a Handbag Search

In order to judge the intrusiveness of a cell phone search, one must first understand the capabilities of the technology and what cell phones are used for before comparing it to existing precedent. Cell phones have a very large storage capacity that is increasing as storage technology advances,\textsuperscript{137} cell phones have the ability to connect to the Internet and access a multitude of online accounts,\textsuperscript{138} and encompass much of the teenage social interaction through

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Terry}, 392 U.S. 1 (discussing the intrusiveness of a “pat down”).
\item See discussion supra Part II.A.2.
\item This is termed “highly intrusive” as to not down play the intrusiveness of the search of a handbag. Because of the expectations of privacy that are exhibited over handbags (or similarly situated items), a search of such is quite intrusive. See \textit{T.L.O.}, 469 U.S. 375 (Stevens, J., dissenting) (“[A purse] is a common repository for one’s personal effects and therefore is inevitably associated with the expectation of privacy” (quoting \textit{Arkansas v. Sanders}, 442 U.S. 753, 762 (1979))).
\item See discussion supra Part II.A.4.a.
\item See discussion supra Part II.A.4.b.
\end{enumerate}
\end{footnotesize}
text messaging. These factors set cell phones apart from typical closed containers and make the search of a cell phone a highly intrusive search.

1. **The Storage Capacity of a Cell Phone Adds to the Intrusiveness of a Search**

Modern cell phones, particularly “smart phones,” have the storage capacity of many personal computers. In fact, the amount of data a phone can store is only limited by current technology. This storage capacity allows users to store an incredible quantity and variety of data. The more user-friendly the technology gets, the more users will be taking advantage of the available capacity. This is in contrast to a handbag, in that a handbag has a finite storage capacity limited by its size. This limits what the user can put into it and what the handbag can be used for. For an example, assume two people are suspected of the same offense, student A uses a handbag and student B uses a cell phone. It is suspected that each student is carrying a list of people they are selling drugs to, student A has written the document by hand and student B produced the document as a Microsoft Word document stored in a cell phone of modest size, say, with a 1 gigabyte storage capacity. If student A’s handbag was filled completely it could maybe hold 100 pieces of paper, of which the searcher would look through in order to find this list. The cell phone, on the other hand, could hold an average of 64,782 documents. If the format

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139 See discussion supra Part II.A.4.c.
140 Michael Kwon, The Next Generation of SD Memory Cards is SDXC, MOBILE MAGAZINE (Jan. 8, 2009, 6:30 AM), http://www.mobilemag.com/2009/01/08/the-next-generation-of-sd-memory-cards-is-sdxc/ (describing the near future capabilities of cell phone storage capacity as being 64 gigabytes, but long term will be 2 terabytes).
141 As technology improves, a larger amount of memory can be stored in a smaller space. Since cell phones are typically small, the amount of memory they can hold is dependent on how small current technology can produce data storage units. As the units get smaller, the more memory a phone will be able to hold. See id.
143 This merely an estimate of how many sheets of paper can fit into the average sized handbag.
144 How Many Pages in a Gigabyte?, supra note 142.
is changed to a simple .txt file, the phone could hold over ten times that many.\textsuperscript{145} Obviously, most users will not reach this level of document storage, but the potential is there and it cannot be ignored.

2. \textit{The Ability of Cell Phones to Connect to the Internet and Access Online Accounts Adds to the Intrusiveness of a Search}

Another aspect of modern cell phones that completely set them apart from a handbag is the ability for cell phones to instantly connect to various online accounts.\textsuperscript{146} While this feature is not available in all cell phones, the trends are strongly shifting to phones with these capabilities.\textsuperscript{147} There is a wide variety of Internet-based features that can be accessed by modern smart phones.\textsuperscript{148} Some phones can access literally every Internet feature available.\textsuperscript{149} These features include, but are not limited to: email, bank and other financial accounts, social networking sites, picture storage sites, etc.\textsuperscript{150} Users of cell phones could potentially have large amounts of confidential information readily available through their phones with the use of saved passwords and account access. Some social networking sites even link directly to the phone’s text messaging service.\textsuperscript{151} This availability of confidential information through connection to the Internet is a capability that most modern cell phones have and is another factor that sets them apart from a handbag.

\textsuperscript{145} Id.
\textsuperscript{148} Id., supra note 146.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Mark Slee, \textit{Facebook Your Phone}, \textit{THE FACEBOOK BLOG} (Jan 10, 2007 12:45 am), http://blog.facebook.com/blog.php?posts=2228532130 (describing how to optimize a users Facebook account to be able to send and receive Facebook messages and wall posts from your phone).
3. The Place Cell Phones Occupy in Teenage Social Interaction Adds to the Intrusiveness of a Search

A final, very major, difference between cell phone usage and handbag usage, is the social lives of teenagers adapted around the use of SMS text messages as a major, perhaps primary, form of communication. The average teen sends an average of over 3,300 messages a month and cell phones store these conversations within the memory of the phone. Searching a cell phone will could potentially reveal a significant portion of the user’s conversational social life in transcript form. Imagine if someone transcribed most of his or her conversations, stored them in a handbag, and that handbag was searched. This is what going through the average teen’s text messages would be like. This search would reveal all kinds of information about the user’s life irrelevant to the search. All of the messages would be fair game under the plain view doctrine and could be used against the user. This catalogue of conversations sets a cell phone apart from a handbag and adds to the intrusiveness of a cell phone search.

4. Overall, The Search of a Cell Phone is Highly Intrusive

Because of these differences between handbags and modern cell phones, the search of a cell phone is inherently more intrusive then that of a handbag, the “baseline” intrusiveness on the scale. The users of cell phones store private data, have access to private Internet accounts, and conduct and store private conversations, perhaps a majority of their conversations, all on their cell phones. These are features that handbags cannot match. While there are very limited legal analyses of the intrusiveness of cell phones, the view that they are inherently more intrusive

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152 See supra note 16 and accompanying text.
153 The plain view doctrine essentially allows a searcher to gather any evidence of any wrongdoing, even evidence not related to the original purposes of the search, if the searcher was performing a lawful search. See Arizona v. Hicks, 480 U.S. 321 (1990).
154 See discussion supra Parts II.B.1–4.
has been adopted by the Ohio Supreme Court.\textsuperscript{155} \textit{State v. Smith} analyzed the search of a cell phone pursuant to arrest.\textsuperscript{156} The Ohio Supreme Court ruled a cell phone is not a closed container (like a handbag would be).\textsuperscript{157} This court reasoned that because of the technological capabilities of cell phones, they should receive greater Fourth Amendment protection than a simple container.\textsuperscript{158} While it did not define a new test, the court suggested that cell phones need a new and unique Fourth Amendment classification that takes into account the distinct capabilities of modern cell phones.\textsuperscript{159} It is not argued that a cell phone search is as intrusive as a strip search, but the search of a cell phone is a highly intrusive search because of the quantity of storage, variety of uses, and their place in modern the teenage social structure.

C. Due to the Highly Intrusive Nature of a Cell Phone Search, the \textit{T.L.O./Redding} Sliding Scale Analysis will Only Approve a Cell Phone Search if There is an Immediate Threat to School Safety

When deciding whether or not to conduct a search, a school official must take into consideration the competing factors described in \textit{Redding}. The intrusiveness of a search must be weighed against the “danger factor” of the suspected behavior and the individualized suspicion obtained in the investigation.\textsuperscript{160} The more intrusive the search, the higher “danger factor” and/or individualized suspicion will be needed for the search to be constitutional.\textsuperscript{161}

1. \textit{The Danger Factor of “Sexting” is Variable Depending on the Suspected Behavior}

“Sexting” is an activity of varying potential harm. It can range from naïve, but seemingly innocent, activity between two consenting individuals to predatory behavior involving coercion.

\begin{flushleft}
\textsuperscript{156} \textit{Id}.
\textsuperscript{157} \textit{Id}.
\textsuperscript{158} \textit{Id}.  Handbags are an example of closed containers.
\textsuperscript{159} \textit{Id}.
\textsuperscript{160} See discussion supra Parts II.A.2-3.
\textsuperscript{161} \textit{Id}.
\end{flushleft}
and non-consensual distribution. Asking the following questions can aid a school official in analyzing the “danger factor” of the suspected “sexting” activity: 1) What is the age of the suspected participant(s)? 2) Is it suspected that the activity is consensual? 3) Have the images been sent to third parties not involved in the making of the image? The age of the individual(s) involved can also affect the “danger factor.” Even though age has not been adequately discussed by the courts, it can be assumed that the younger the student involved, the higher the danger factor. If the suspected activity is non-consensual, then the “danger factor” will be elevated. This is because the unknowing individual is at greater risk for harm if the images get out. At least in consensual “sexting” both parties enter into the behavior willingly, presumably with some understanding of the potential risks. And finally, if the images have already been sent to third parties, or unintended recipients, the “danger factor” is, again, elevated because once the image leaves the possession of those who took it the risk goes up that it will be distributed further. All of these factors work together to form the overall “danger factor” of the “sexting” behavior and should be taken into account.

2. **There Should Be Individualized Suspicion That “Sexting” With a High “Danger Factor” Has or Will Occur(ed)**

*Redding* also factors in whether there is individualized suspicion as to where the evidence is located and what activity is suspected. This analysis merely factors into what the school official has reasonable suspicion to suspect. For a search of a cell phone to be justified, the school official should have a reasonable suspicion that a particular student has evidence on his or her phone and reasonable suspicion the evidence is of a high “danger factor.” If these are not present, the “danger factor” will have to be extraordinarily high for a search of a cell phone to be justified.

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162 See *supra* notes 115-16 and accompanying text.
constitutional. If there is no individualized suspicion, then the search is essentially a
suspicionless search, which will always be unconstitutional.¹⁶³

3. Overall, a Cell Phone Search Will Only Be Constitutional if the Suspected
   Behavior Poses an Imminent Threat to Student or School Safety

   The intrusiveness of a cell phone search is very high. Looking at the Redding sliding
scale, highly intrusive searches will only be constitutional if there is a very strong justification,
meaning the “danger factor” is very high and there is individualized suspicion that evidence of
this behavior is on a particular phone, in a particular location, and that the particular student is
involved. The justification needed is not as high as a strip search, but also, the danger level of
suspected “sexting” behavior will not reach the level of the search for dangerous drugs, so the
lowered “danger factor” of “sexting” almost evens out the analysis. Because of this dynamic,
high intrusive nature and high, but not extremely high danger factor, a search will be hard to
justify. Yet, there may be situations where the “danger factor” is so high that a search is
constitutional if there is individualized suspicion.

4. Sext Re-Ed.: Applying the Redding Sliding Scale Analysis to the
   Hypothetical Fact Set Postulated in Sext Ed. Leads to the Conclusion that
   the Search was Unconstitutional

   As of this writing, the only law review article, a student note, that has been written about
the constitutionality of a school official searching a student’s cell phone for evidence of
“sexting,” is titled Sext Ed: Students’ Fourth Amendment Rights in a Technological Age.¹⁶⁴ This
article completely down plays the significance of Redding, saying it “was unremarkable [and]
simply appl[ies] the T.L.O. framework rather than altering or expanding its scope.”¹⁶⁵  Because
of this assumption, Redding is not applied to the posited hypothetical fact set and the proposed

¹⁶³ See infra Part III.
¹⁶⁴ Hartsock, supra note 10.
¹⁶⁵ Id. at 204.
suspicion-based search of a student’s cell phone is concluded to be permissible.\textsuperscript{166} I will use the same hypothetical fact set posited and, with a proper Redding analysis, will come to the opposite result: the hypothetical search was unconstitutional because the justification of the search, which lacks a significant “danger factor,” is outweighed by high level of intrusiveness of the cell phone search.

a. Hypothetical Facts Used in the Analysis

The facts of this hypothetical are simple: in accordance with a school policy, which was in a student handbook given out at the beginning of school, fictitious “girlfriend’s”\textsuperscript{167} cell phone was confiscated for use during school hours.\textsuperscript{168} Prior to this confiscation, school officials had received several reports that girlfriend fictitious “boyfriend,” were “sexting” outside of school and even during class.\textsuperscript{169} These reports came from five students who were close to girlfriend and boyfriend, and one of them even claimed to have seen some of the explicit images.\textsuperscript{170} Based upon these reports,\textsuperscript{171} the vice principal searched the inbox, outbox, and pictures stored on girlfriend’s newly-confiscated phone.\textsuperscript{172} The vice principal found approximately twenty messages that contained explicit images on girlfriend’s phone.\textsuperscript{173} Then the vice principal showed the images to the principal.\textsuperscript{174} Girlfriend’s parents were called by a school official and girlfriend was given an out of school suspension.\textsuperscript{175}

\textsuperscript{166} There is no mention of Redding in the application. See id. at 207-11.
\textsuperscript{167} In the article, the students are called Jane and Fred. I am referring to them as girlfriend and boyfriend to make sure there is no confusion that I am not describing an actual case.
\textsuperscript{168} Id. at 205.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} The information given to the school officials by the informing students caused the school officials to suspect that a search of “Jane’s” phone will uncover evidence of “sexting” behavior. This is a suspicion-based search. In contrast, if the school searched “Jane’s” phone upon confiscation without any information suggesting “Jane” was involved in “sexting,” the search would be a suspicionless search.
\textsuperscript{172} Id. at 206.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id. There is no mention of any pre-suspension notice or hearing in the hypothetical facts.
The principal then called boyfriend into his office. He told boyfriend what had happened with student girlfriend and requested boyfriend turn his phone over. Boyfriend resisted and only after being threatened with suspension did he turn it over. The principal searched boyfriend’s phone’s inbox, outbox, and pictures, finding all of them empty. Boyfriend was not punished and his phone was returned. Both students sue the school district for the searches.

b. Applying the T.L.O./Redding Analysis to These Facts Show that This Search is Unconstitutional Because of the Intrusiveness of the Search Combined With the Relatively Low “Danger Factor,” Even Though the School Had an Individualized Suspicion

If New Jersey v. T.L.O., as traditionally interpreted, was applied to this hypothetical fact pattern, there would be a good chance the search would be approved by the Court. However, the T.L.O. analysis has been clarified and narrowed by Safford v. Redding, so the Redding sliding scale must be applied. Since this article did not take into consideration the importance of Redding and viewed it as a narrow holding that will only apply to strip searches, it concluded that a search of either girlfriend’s or boyfriend’s phone would be constitutional because it was justified by the informants and the suspected evidence was located within the cell phone. If the proper Redding sliding scale analysis is applied, a different analysis and conclusion emerges. In this fact set, there are two searches, the search of girlfriend’s phone and the search of boyfriend’s phone. Since the search of boyfriend’s phone is either justified by (1) the evidence
gathered in the search of girlfriend’s phone or (2) the same evidence used to justify the search of
girlfriend’s phone. Thus, if the search of girlfriend’s phone can be deemed a violation of her
Fourth Amendment rights, the search of boyfriend’s phone is also a violation of his Fourth
Amendment rights.\(^{184}\)

c. The Information Gathered Justified the School in Taking Some
Kind of Action by the School, But Not a Search of Girlfriends’s
Cell Phone

As the proper analysis is now a sliding scale analysis, the *T.L.O.* test, which said a search
must be (1) justified at its inception and (2) reasonable in scope, is no longer treated as a
conjunctive test.\(^{185}\) Now, the adequate justification is fully dependent on the intrusiveness of the
search. Factors, such as the “danger factor” and individualized suspicion, weigh against the
intrusiveness. In a sense, this places the emphasis on the intended search and the intrusion it will
cause while also looking at the nature of the threat, making the justification subservient.\(^ {186}\) The
traditional approach of a *T.L.O.* analysis would be as follows: 1) Is the search justified at its
inception? (yes, there were multiple student informants), and 2) was the search permissible in
scope? (yes, the school officials looked only where the suspected evidence would be found).
This typical analysis down plays the intrusiveness of the search of a cell phone, while *Redding*
places the intrusiveness at the forefront of the discussion. This is the analysis that was used in
*Sext Ed.*

The justification for the search of the inbox, outbox, and picture folders of girlfriend’s

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\(^{184}\) *Id.* at 206.

\(^{185}\) See supra Part II.A.2-3.

\(^{186}\) This is technically a backwards way to look at the *Redding* analysis, but since it is a sliding scale it is helpful to apply prong 2
(not excessive in scope) to prong 1 (justified at its inception). Looking at the intrusion first will allow the searcher to gain a true
grasp as to what justification will be needed for a search to be constitutional.
approached school officials saying girlfriend and boyfriend were “sexting” during class and after school hours, one of whom claimed to have seen the images.\(^{187}\) This use of her phone during school hours would violate the school cell phone use policy.\(^{188}\) The analysis in *Sext Ed.* suggests the search is justified because the assistant principal was not “merely acting on a hunch”\(^{189}\) and the search was not intrusive because there was a lowered expectation of privacy given the school policy.\(^{190}\) It improperly compares the initial search of Savana Redding’s outer clothing and backpack to the search of girlfriend’s phone, arguing that since the initial search of Savana Redding was justified by less information than the search of girlfriend’s phone, the search of her phone must have been justified at its inception.\(^{191}\) However, it was made clear by the Court in *Redding* that the initial search of Savana’s notebook was of minimal intrusiveness and thus was justified by the information the assistant principal had.\(^{192}\) The subsequent strip search of Savana was far more intrusive, so the search was not justified by the same information because of the minimal “danger factor” and lack of individualized suspicion that Savana was harboring pills beneath her clothes.\(^{193}\)

So the proper analysis would be to look at the intrusiveness of the search and weigh it against the justification for the search and the perceived threat of the suspected contraband.\(^{194}\)

Roughly translated, when a school official is deciding whether to perform a search, he or she

\(^{187}\) Hartsock, *supra* note 10, at 205.

\(^{188}\) There is nothing in the hypothetical facts that explicitly say that “sexting” or possession of explicit materials while on school grounds, but I assume that this would violate every school code in some capacity. I am also not discussing whether or not the school can take action based upon “sexting” while not on school grounds. I am limiting my discussion to the student being in violation for either 1) sending images while at school, or more likely, 2) the student being in possession of explicit materials while on school grounds. This limitation is followed to keep the discussion within the purviews of the Fourth Amendment.

\(^{189}\) Hartsock, *supra* note 10, at 204.

\(^{190}\) Just because a school creates a policy does not mean that a student loses all privacy expectations. *Doe ex Rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 354 (8th Cir. 2004) (affirming that students do not lose all privacy rights and interests because the “lack of mutual assent to the student handbook makes it fundamentally different . . . [than] an enforceable contract”)

\(^{191}\) Id.

\(^{192}\) *Redding*, 129 S.Ct. at 2641.

\(^{193}\) Id.

\(^{194}\) See discussion *supra* Part II.A.3.
must determine the intrusiveness of a search and then, depending on the severity of the intrusiveness, decide if there is enough evidence to justify the intrusion. As will be shown, the assistant principal has adequate justification to take some action, but not to perform a search of the cell phone because there was a very low “danger factor” in the suspected behavior.

i. The “Danger Factor” of Girlfriend’s Behavior

Here, the participants were sixteen and seventeen, the activity was consensual, and, while the images had been shown to a third party, they had not been distributed. The third question, whether the images have been distributed, is perhaps the question that adds the most to the danger factor. Once digital copies of the images are in the hands of someone who was not involved, there is a much higher chance that the images will be sent to unintended third parties. All of these answers suggest the suspected “sexting” activity of girlfriend and boyfriend has a low “danger factor.”

ii. There Was Not Enough Individualized Suspicion to Make Up For the Low “Danger Factor”

The principal has individualized suspicion as to what students are involved and where the images are likely to be located, but he does not have individualized suspicion regarding activities of a high “danger factor.” Admittedly, this is a tricky situation. There is a chance when girlfriend and boyfriend break up, if they do, the scorned party will distribute the images, however; this is where individualized suspicion comes into the analysis. The principal can only act on the evidence he has. He only has evidence to suggest the behavior described above, which is of a low “danger factor.” He cannot assume that the images will be distributed to other students. If this were the case, the strip search in Redding very well may have been justified because the principal could have argued that even though he only had reasons to suspect Savana
of having ibuprofen, students who carry pills against school policy are more likely to also have more dangerous drugs on them, thus increasing the “danger factor.” This type of preventative searching to prevent potential future behavior would be a suspicionless search.\(^{195}\) Since the school official only had reason to believe the students were sending the images between themselves, this is the only activity he can take action upon. Since these activities are of a low danger factor, they will not be able to overcome this highly intrusive nature of a cell phone search.

iii. The Search was Not Reasonable in Scope Given the Limited “Danger Factor”

The Fourth Amendment analysis mandated by \textit{Redding}, forces the searcher to analyze the intrusiveness of the search, taking into account the searchee’s age and sex, but also the “danger factor” of the suspected activity.\(^{196}\) As stated previously, age and sex are difficult to apply because the Court has had two chances to discuss how these factors affect the analysis, but have not gone any further than merely listing them as factors.\(^{197}\) However, the Court, in \textit{Redding}, discussed how the potential harm, the so called “danger factor,” affects the justification needed to perform an intrusive search. Because of the low “danger factor” of the suspected activity, the highly intrusive search was not justified. For the intrusiveness to be outweighed, the “danger factor” must be high or there must be individualized suspicion that activity with a high danger factor will occur. In the hypothetical facts neither of these factors are strongly represented and thus will not outweigh the intrusiveness, so the search of the cell phone was unconstitutional according to \textit{Redding}.

\footnote{195 See discussion \textit{infra} Part III.}
\footnote{196 See discussion \textit{supra} Part II.A.2-3.}
\footnote{197 See \textit{supra} note 85 and accompanying text.}
D. Suspicion-Based Searches of Students’ Cell Phones by School Officials Are Not per se Unconstitutional, but a High Level of Potential Harm from the Suspected Behavior Will Be Needed to Justify a Search Given the Innate Nature of the Intrusiveness of the Search

An understanding of Safford v. Redding shows that the question of whether a suspicion-based search of a cell phone is constitutional is far more intensive than a simple backpack or lock search. The “sexting” problem is not a static problem, but rather one that is extremely fact sensitive and deserves a case-by-case analysis. This analysis should be done with extreme caution given the highly intrusive nature of a cell phone search, the potential criminal charges that could be brought upon student and school officials, the civil liability the school district or officials could face, and the potential of uncovering nude images of minor students. However, strictly sticking with a Fourth Amendment analysis, whether or not the search is constitutional will depend on what behavior is suspected and the “danger factor” of that behavior. Because of the highly intrusive nature of a cell phone search, the school official will need a specific, individualized, suspicion of activity with a high “danger factor.” For a cell phone search to be constitutional, the suspected activity will have to pose an immediate threat to those involved and the school as a whole. For “sexting” to have a high “danger factor” some of the following factors will be present: coercion, unconsented distribution, someone depicted is of a young age, and/or distribution to third parties.

III. Suspicionless Searches of Students’ Cell Phones in the Public School Setting and What Existing Precedent Suggests About the Constitutionality of These Searches

198 See discussion supra Parts II.A.3, B.1-4.
199 See discussion supra Part I.
200 See discussion supra Part I.
201 See discussion supra Parts II.C.1-2.
202 Id.
203 Id.

As this is a fact sensitive analysis, this list is not exhaustive. These factors are fluid and will be taken in a totality of the circumstances. Id.
The above discussion exclusively analyzes a search that is in response to suspicion that a student is violating school policy or the law. There are schools that go even further and search any cell phone found to be used in violation of the school’s cell phone use policy. For instance, the Tunkhannock Area School district’s suspicionless searches of its students’ cell phones within the past couple years have given rise to multiple lawsuits. While no search under a policy such as this has been the subject of a full trial, if (and when) this occurs, there is question as to what Fourth Amendment analysis will be applied. I will discuss the facts of a search conducted by Tunkhannock on one of its students and apply the controlling Fourth Amendment analysis. While the typical, suspicion based school search is analyzed under the T.L.O./Redding analysis, the Court has also ruled suspicionless searches in the context of a drug-testing policy constitutional in Vernonia School District v. Acton, but only by applying a different test for constitutionality than that imposed by T.L.O.

A. T.L.O. is Not the Appropriate Analysis When Looking at a Suspicionless Search Because the Analysis Implies Individualized Suspicion

As discussed in Section II.A., the Supreme Court reasoned in T.L.O. that a search of a student by a school official, with the goal of maintaining school safety, must be reasonable to satisfy the Fourth Amendment’s guarantees. However, the facts in T.L.O. describe a search where there is individualized suspicion. While T.L.O. does not hold that individualized suspicion is required in all cases, it expressly states, in dicta, that a search without individualized suspicion is only justifiable if “the privacy interests implicated by a search are minimal and where other safeguards are available to assure the individual’s reasonable expectation of privacy

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204 See Hartsock, supra note 10, at 204-07.
205 See Complaint, supra note 12; see Miller, 598 F.3d at 139.
206 See Acton, 515 U.S. at 644.
207 Id. at 340-32.
208 See T.L.O., 469 U.S. at 328-29.
is not subject to the discretion of the official in the field.”209 Because cell phone searches are highly intrusive,210 it seems T.L.O. will not apply to a suspicionless search of a cell phone. In fact, there is only one Circuit Court that applies T.L.O. to suspicionless searches.211 All is not lost though; the Supreme Court has laid out a test to judge the constitutionality of a completely suspicionless search in Vernonia v. Acton.

B. The Constitutionality of Suspicionless Searches in Public Schools According to Vernonia v. Acton and Board of Education v. Earls

Recently, schools have implemented searches that are different than those described in T.L.O. in that there is no initial suspicion to justify the search. The seminal case dealing with suspicionless searches in schools is Vernonia School District v. Acton.212 In Acton, the Vernonia School District (“Vernonia”) sought to quell the prevalent drug culture within its schools by implementing a program that would require all student athletes to submit to a drug-testing program in order to participate.213 The school noted that the athletes were not only at the forefront of the local drug culture, but were also influencing others because to use drugs because of the inherent admiration an athlete commands.214 The school’s attempts to address the problem with less intrusive means through educational programs showed no success so they implemented

209 Id. at 342 n. 8. While footnote 8 expressly states that the holding in T.L.O. does not require individualized suspicion in all school searches, it sternly cautions that exceptions allowing no showing of individualized suspicion “are generally appropriate only where the privacy interests implicated by a search are minimal and where other safeguards are available to assure the individual’s reasonable expectation of privacy is not subject to the discretion of the official in the field.” Circuits that argue for a lenient satisfaction of prong one of the T.L.O. test often refer to the fact that T.L.O. expressly states that individualized suspicion is not required, but conveniently leave out discussion of the next sentence quoted above.

210 See discussion supra Part II.B.

211 Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005). The 6th Circuit’s approach to the first prong of T.L.O. is unique. Instead of requiring the search to be justified by suspicion that a search of a particular student will yield evidence of a violation, it assumes that the first prong is satisfied if “reasonable grounds for suspecting that the search [would] garner evidence that a student has violated or is violating the law or rules of the school.” Using this broad approach, the Sixth Circuit has allowed searches of large groups of students, without individualized suspicion, because they believed a student within that group may have violated school policy; but see Cornfield by Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993); but see DesRoches by DesRoches v. Caprio, 156 F.3d 571, 575 (4th Cir. 1998).

212 Acton, 515 U.S. at 644.

213 Id. at 650.

214 Id. at 649.
the drug-testing policy. The policy called for the testing all athletes at the start of the year and then the testing of a random ten percent of the student athletes on a weekly basis.

The Court held this policy constitutional and created a three-pronged balancing test to determine the validity of a suspicionless school search. The Court will balance (1) “the nature of the privacy interest,” (2) “the character of the intrusion that is complained of,” and (3) “the nature and immediacy of the governmental concern.” For the first prong, the Court reasoned that the privacy interest was low in this instance because students are typically required to submit to routine physicals and to be vaccinated in order to attend school so the interest in protecting medical information, such as what the tests revealed is low. This expectation is even lower because of the nature of athletics where communal showers and changing is the norm.

Next, the Court carefully analyzed the character of the intrusion imposed upon the Vernonia students. The Court admitted the collection of urine can be a great privacy intrusion, but the amount of intrusion is completely dependent on the methods used in the collection process. The methods used by the school mimicked those “typically encountered in public restrooms which men, women, and . . . school children use daily,” and only searched for the presence of drugs, thus providing little intrusion into the student’s privacy.

In the analysis of the third prong, which has two parts, (a) the nature and (b) the immediacy of the government concern, the Court held that preventing the use of drugs in its

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215 Id. at 650.
216 Id.
217 Id. at 653.
218 Id. at 657.
219 Id. at 660.
221 Id. at 657.
222 Id. at 657.
223 Id. at 658; Proctor, supra note 220, at 1352.
student athletes was of a nature that is “important—indeed, perhaps compelling.” As far as the immediacy of the concern, the Court gave deference to the District Court’s finding of fact that this was indeed a pressing issue in the community.

*Acton* has since been expanded upon by the case *Board of Education v. Earls.* *Earls* involved a drug-testing policy very similar to that of *Acton,* but the *Acton* policy applied to all extra-curricular activities, not just athletics. The Court upheld and expanded *Acton* by allowing for the concession of the third prong because of the severity of the national drug problem. Now in implementing a suspicionless drug testing policy, a school district need not show that its school has a drug problem, but can rely on the drug problem of the nation as a whole for the satisfaction of the third prong of the *Acton* test.

1. *The Real Life Facts Surrounding the Suspicionless Search of N.N.’s Cell Phone Pursuant to the Tunkhannock Area High School Policy*

To analyze the constitutionality of a suspicionless search a real life example will be used. The facts of this search are typical of a suspicionless search and scenarios such as this are relatively common. January 23, 2009 was just like any other day at Tunkhannock Area High School. N.N. showed up, on time, and reported to homeroom and began to prepare for her math test, which was later that day. While in homeroom, N.N. was caught using her cell phone while sending a text to her boyfriend. Tunkhannock had a clear policy against the use of cell phones during school hours in its student handbook, the punishment of which was stated to be

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225 *Id.* at 662-63.
227 *Earls,* 536 U.S. at 836; *Acton* 515 U.S. at 650.
228 The school district was unable to show that there was a pervasive drug problem in its schools, but rather relied upon the national drug problem to justify their policy. Proctor, *supra* note 220, at 1353, 1355-356.
229 *Id.*
230 *Complaint,* *supra* note 12, at 5.
231 *Id.* at 4-5.
confiscation of the phone until the end of the school day and a 90 minute Saturday detention for a first offense.\textsuperscript{232} The district had a second policy, which it supposedly announced at school assemblies that said confiscated cell phones would be searched for materials that should not be in school.\textsuperscript{233} Pursuant to the former policy, N.N.’s phone was confiscated and turned over to the principal’s office.\textsuperscript{234} Following the later policy, N.N.’s phone was searched.\textsuperscript{235} During the search of N.N.’s phone, of which she was not present, the school official discovered a number of photographs, several of which displayed N.N.’s exposed breasts and one picture indistinctly displayed her entire body including her pubic area.\textsuperscript{236} These pictures were not apparent on the display of the screen and, in fact, the school administrator who conducted the search of her phone would have had to take at least three steps to get to the location where the pictures were stored.\textsuperscript{237} While the search produced the explicit pictures of N.N., there was no evidence these pictures were ever sent to anyone and N.N. maintains these pictures were for her own viewing and perhaps she would show them to her longtime boyfriend.\textsuperscript{238}

After these pictures were discovered, N.N. was called to the office.\textsuperscript{239} Here, the principal informed her of what was found on her phone and that her phone had been turned over to the District Attorney (“DA”) for evidence in a possible prosecution of child pornography.\textsuperscript{240} A few days later, N.N. had a meeting with the DA, who informed her that if she did not agree to participate in an anti-child pornography re-education course she would be prosecuted for child

\textsuperscript{232} This was N.N.’s first offense. \textit{Id.} at 5.
\textsuperscript{233} \textit{Police Report, supra} note 12, at 2.
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Complaint, supra} note 12, at 9.
\textsuperscript{237} \textit{Id.} at 6.
\textsuperscript{238} When asked when the pictures were taken, N.N. estimated they were taken a week prior. \textit{Id.} at 7.
\textsuperscript{239} \textit{Id.} at 5.
\textsuperscript{240} \textit{Id.} at 5-6.
During a period where N.N.’s mother and the DA were out of the room, leaving N.N. alone with the chief county detective, he told her that it was a shame she did not wait until her eighteenth birthday to take the photos because instead of getting in trouble she could have submitted them to Playboy. In total, at least sixteen individuals, almost all of whom are adult males, have seen the photos that were found on N.N.’s phone.

N.N. completed the “re-education program” but decided to sue over the search, claiming her First and Fourth Amendment rights had been violated. The suit against the school concerned the initial search of her phone. Recently though, on September 15, 2010, N.N. settled with the school for a sum of $33,000 to be paid to her and her lawyers. Her lawsuits remain against the District Attorney, but the crux of this issue, the suspicionless search of her phone by the school will not be in front of the court when N.N. makes it there.

2. Applying the Tunkhannock Suspcionless Search Policy Implemented Against N.N. to the New Jersey v. T.L.O. Test Shows That the T.L.O. Analysis is Inapplicable to Suspicionless Searches

The Tunkhannock policy will not get very far if the T.L.O. analysis is applied. The first prong of the test is whether the search is justified at its inception. There was no justification for the search of N.N.’s phone aside from the school saying that it is trying to deter its students having inappropriate materials on their phones. While there is a history in Tunkhannock

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241 Id.
242 Id. 7.
243 Id. at 9.
244 See id.
245 Id. at 11-12.
246 Press Release, School Board Changes Its Unconstitutional Cell Phone Search Policy, AMERICAN CIVIL LIBERTIES UNION (Apr. 16, 2008) http://www.aclunc.org/cases/other_legal_advocacy/school_district_changes_its_unconstitutional_cell_phone_search_policy.shtml (discussing the ACLU’s successful campaign to get Linden Unified School District to changes its cell phone search policy that allowed school officials to search confiscated cell phones without suspicion of any violation).
247 Id.
248 T.L.O., 469 U.S. at 341.
249 Police Report, supra note 12, at 2; Complaint, supra note 12, at 5.
schools of students being found with explicit images on their phones, it seems they were all found pursuant to this suspicionless search policy.\textsuperscript{250} This policy fails all lower court interpretations of the \textit{T.L.O.} test. There was no individualized suspicion that N.N. was involved in any violation of school policy within her phone’s data storage,\textsuperscript{251} as would be required in the Fourth and likely the Seventh Circuit.\textsuperscript{252} Even the most conservative interpretation of a search being justified at its inception, coming out of the Sixth Circuit, suggests that there needs to be a specific violation, like a recent theft or a safety concern, that school officials are investigating for suspicionless searches to be justifiable.\textsuperscript{253} There was no crime or policy violation that Tunkhannock was seeking to resolve by searching N.N.’s phone.

3. \textit{Applying the Vernonia School District v. Acton Balancing Test to the Tunkhannock Suspicionless Search Policy Shows That Suspicionless Searches of Student Cell Phones Under the “Special Needs” Exception are Unconstitutional Because of the Intrusive Nature of the Searches}

The search N. N. endured was quite different from that of a suspicion-based search governed by the \textit{T.L.O.} test. The Tunkhannock school officials had no suspicion that a search of N.N.’s phone would turn up evidence she was engaged in activity in violation of school policy.\textsuperscript{254} The school merely saw a potential issue in students containing inappropriate materials on their phones and enacted a plan to search the phones.\textsuperscript{255} As the Supreme Court ruled, if there

\textsuperscript{250} See \textit{Miller} 598 F.3d at 143. The case of \textit{Miller v. Mitchell (Miller v. Skumanick}, 605 F.Supp 2d 624 (M.D.Pa. 2009) in District Court) involves cell phone searches by Tunkhannock Area School District that took place a year before the search of N.N.’s phone. I have been attempting to determine if these searches were suspicion-based or suspicionless, but have failed to make a clear determination. I have even contacted the ACLU attorney who represented Miller and fellow plaintiffs and she could not provide me with the answer either. The cases make no mention of what policy the searches were conducted under.

\textsuperscript{251} \textit{Police Report, supra} note 12, at 2.

\textsuperscript{252} See \textit{supra} note 211.

\textsuperscript{253} \textit{Id}.

\textsuperscript{254} \textit{Complaint, supra} note 12, at 5.

\textsuperscript{255} \textit{Police Report, supra} note 12, at 2.
is no suspicion an offense has occurred, the suspicionless search is analyzed under the Vernonia v. Acton analysis.\textsuperscript{256}

\begin{itemize}
  \item[a.] The Privacy Interest at Stake

  The privacy interests a student has over the information stored on his or her cell phone is substantially different than the interests at stake in Acton.\textsuperscript{257} In Acton, the Supreme Court ruled that the students had a low expectation of privacy over the chemical contents of their urine and, because of the precautions taken by the school, in having someone present during the sample producing urination because of the typical intrusions a student athlete is exposed to, like communal showers and requisite physicals.\textsuperscript{258} As discussed in the section concerning suspicion-based searches, the privacy interests over a cell phone are considerably higher than that of a typical container search because of the storage capabilities, access to outside sources via the Internet and the place cell phones hold in modern society.\textsuperscript{259}

  Even if the school official avoided all forms of communication and only searched the pictures N.N. stored on her phone, she has an equal privacy interest in her pictures. In an age where photo albums are more likely entirely in a digital format,\textsuperscript{260} searching through someone’s digital pictures is the same as searching through his or her personal photo albums or pictures contained in a wallet.\textsuperscript{261} N.N. has a significant privacy interest in protecting the information that can be gathered by looking at a picture like who she associates with, activities she participates in,

\end{itemize}

\textsuperscript{256} See discussion supra Part III.B.
\textsuperscript{257} See discussion supra Parts II.B.1-3.
\textsuperscript{258} See supra text accompanying notes 222-23.
\textsuperscript{259} See discussion supra Parts II.B.1-3.
\textsuperscript{260} Phones and cameras can hold thousands of pictures. The amount of pictures is only limited by the technology of the storage capacity. See How Many Pages in a Gigabyte?, supra note 142.
and as made obvious by this case, a digital likeness of her exposed body. Given the elevated
privacy interests N.N. had over the contents of her cell phone, the school has an uphill battle in
order for the scales of the Acton test to balance, let alone tip to the side of permissibility.

b. The Character of the Intrusion

It is hard to imagine any precautions that could be made to lessen this intrusion of a cell
phone search to a level the Court would be comfortable with under Acton. Like prong one, the
character of the intrusion Tunkhannock imposed upon N.N. is very different than that of the
approved suspicionless search in Acton. The opinion in Acton goes into great detail describing
how the methods employed by the Vernonia School District were designed to make the privacy
intrusion as slight as possible. Acton suggests that a suspicionless search must take steps to
lessen the privacy intrusion as much as feasibly possible. The Court said that the character of
the intrusion was not great because the gathering of the sample was very similar to conditions
typically encountered in public restrooms and the results were kept confidential aside from the
school officials that needed to know. The policy administered by Tunkhannock had none of
these characteristics. The unwritten policy simply stated that the phones would be searched for
evidence of the student breaking school policy. The school had no procedures in place, as used
by the Vernonia School District, to provide as little intrusion as possible during the search.

262 N.N. was seventeen at the time her phone was searched. Even though she was practically a legal adult, the school treated her as if she has no privacy interests. Using the strictest approach, the school would still have to show a “substantial” interest in order to justify an intrusion into N.N.’s privacy rights. See Robert H. Wood, The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint, 16 Mich. Telecom. & Tech. L. Rev. 151 (2009) (arguing that a minor’s maturity is to be determined on a case by case basis, which will define the depth of the interest the government must show to intrude on privacy interests).
263 Acton, 515 U.S. at 658.
264 See discussion supra Part III.B.2.
265 This is also an area that needs to be explored with regards to suspicionless searches. The Court seems to place a lot of weight on the fact that the results were not used to punish the student, but merely take away the privilege of participating in sports. In the instant case, the suspicionless searches were used to bring felony charges against the students. Id.
266 Police Report, supra note 12, at 2.
267 Complaint, supra note 12, at 5; Acton, 515 U.S. at 658.
Even more so, the school district submitted the fruits of its suspicionless search to law enforcement for possible felony charges. In *Acton*, the Court places heavy emphasis on the fact that the results of the suspicionless drug tests were kept as confidential as possible while maintaining the drug-testing program.

It is difficult to imagine a suspicionless cell phone search policy that would cause little privacy intrusion. There are methods Tunkhannock could have employed to lessen this intrusion, like defining what could be searched, seek consent, or even allow N.N. to admit to having the pictures prior to the search so she could have avoided the embarrassment of over a dozen people knowing very intimate details about her. Alarmingly, Tunkhannock had absolutely no procedures in place to lessen this intrusion. Even further, the school district chose to submit the phone to the DA for further examination. The school chose not to keep this a private matter between them and N.N., but rather used this suspicionless search policy as a policing tool to subject its students to criminal punishment, something the Fourth Amendment was ratified to protect against.

c. The Nature of the Government’s Concern and the Effectiveness of the Search Addressing the Concern

Even though the Tunkhannock cell phone search policy failed both of the first two prongs of the *Acton* analysis, since this is a balancing test, it is theoretically possible for the search to be constitutional if the success of the third prong outweighs the failures of the first two. This prong has two parts: (a) the nature of the government’s concern and (b) the effectiveness of

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269 *Complaint*, supra note 12, at 5.
270 *Acton*, 515 U.S. at 658.
271 See discussion supra Parts II.B.1-3.
273 See *Acton*, 515 U.S. at 654-60 (defining the test as a balancing test and the failure of any prong(s) is not dispositive).
search in addressing the concern. So not only does the concern of the government have to be extremely great here, but the methods must be rather effective in alleviating the problem.

Since there is no written policy stating Tunkhannock’s concern in searching every phone confiscated, it must be inferred from testimony. The police report filed regarding the submission of N.N.’s phone states that the school searches phones for “photos[] or other material that should not be in school[,] [example] messages of dangerous activity.” The school’s interest is very broad here, unlike that of the interest of the Vernonia School District in Acton. In Acton, the school district cited an ever-growing drug problem where athletes were at the forefront. So the school sought to sever the head of the beast by controlling the drug use in athletes by making a random drug testing policy a participatory requirement. Tunkhannock is concerned with the use of cell phones to violate school policy. This concern is important, perhaps even substantial, but it will not outweigh the grand failures of the first two prongs of the Acton test. There is no immediate threat of danger stemming from the activities N.N. engaged in. Her pictures were for her own enjoyment and possibly that of her boyfriend and there was not even any showing she had sent the images to him. There was no immediate danger of other students happening upon these pictures and the content of the pictures provided no threat to school security.

274 Id.
275 Id.
276 See Complaint, supra note 12.
278 Acton, 515 U.S. at 662-62.
279 Id.
281 See discussion supra Parts III.B.2.a-b.
282 See discussion supra Parts II.C.1.
283 See discussion supra Part II.C.1.
284 Complaint, supra note 12, at 7.
285 See discussion supra Part II.C.1.
The effectiveness portion of this test has been largely undiscussed by the Court. Neither Acton nor Earls engaged the effectiveness portion of the test, leaving much question regarding the importance of this sub-prong. The Court merely stated common sense led them to believe the drug testing would address the problem. While it is currently unknown how this sub-prong should be analyzed, it will be assumed here that the Court would use the same common sense analysis as used in Earls and conclude that the searches are effective.

Regardless of the concession of part (b) of the third prong, Tunkhannock has an extremely steep hill to climb in order to tip the scales of constitutionality. Even though the first two prongs weigh heavily on the side of the search being unconstitutional, theoretically, it is possible for the search of N.N.’s phone to still be constitutional with a strong showing of a substantial interest by the school district. As stated, the interest is to prevent photos or material that should not be in school from entering the school in the stored data of students’ cell phones. While this is a reasonable concern of the school, there is nothing to suggest that less intrusive means would not address the concern. While the least intrusive means are not required, it would be difficult to outweigh the serious privacy intrusions implemented by this search policy with an interest that can be addressed using alternative means. The school utilized a policy prohibiting the use of phones during school hours. Unless the school can show that confiscations and punishment for use in congruence with suspicion-based searches is not enough to address its interest, the success of the third prong will not outweigh the failures of the other prongs.

286 See Proctor, supra note 220.
287 Id. at 1364.
288 Id.
290 Complaint, supra note 12, at 5.
291 However, suspicion based-searches of cell phones will rarely be held constitutional. See discussion supra Part II.C.
Even if the Court followed the reasoning behind the holding in *Earls* and ruled all school districts, regardless of the conditions within the school in question, have an interest in keeping materials that should not be in schools from entering in the storage of cell phones, the Tunkhannock policy would still fail for the above reasons.\(^{292}\) If the Court provided a *carte blanche* concession of the third prong in the question of concerns over what enters schools in the cell phones of students, the first and second prongs will still be weighed in the analysis of the search and will weigh heavy on the side of the search being unconstitutional.\(^{293}\) Since these issues were not addressed by Tunkhannock, or in any other district with a similar policy, the search of N.N.’s phones would be deemed a violation of the Fourth Amendment.

4. **The Intrusiveness of a Susicionless Search of a Cell Phone is Too Much to Overcome in the Acton Balancing Test**

There is no adequate justification to conduct a suspicionless search of a student’s cell phone. The Fourth Amendment was put in place to protect against searches without suspicion, and there is nothing to suggest a suspicionless search of a cell phone will qualify as a “special needs” exception. While suspicionless searches have been deemed constitutional, the approved searches are far less intrusive than the search of a cell phone.\(^{294}\) Because students have a very high privacy interest in the contents of their cell phones and the searches are highly intrusive, the government interest in executing searches of student’s cell phones will never be enough to tip the scale of constitutionality, given the effective, less-intrusive means available.\(^{295}\)

IV. **Recommendations For School Districts and State Legislatures on How to Control “Sexting” in a Constitutional and Effective Manner**

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\(^{292}\) *See supra* notes 226-29 and accompanying text.

\(^{293}\) *See discussion supra* Part II.C.

\(^{294}\) *See supra* note 220-23 and accompanying text; *contra see discussion supra* Part II.B.

\(^{295}\) *See discussion supra* Parts II.B-C.
There is no clear-cut, constitutionally-sound, path a school can take to attempts to control “sexting” with a cell phone search policy; however, recent Fourth Amendment decisions detailing suspicion-based and suspicionless searches in schools show how the Supreme Court would analyze these distinct search types.\textsuperscript{296} The search of a cell phone is much more intrusive than the search of a bag or locker and must only be executed in the rarest cases.\textsuperscript{297} With the Supreme Court’s holding in \textit{Redding}, it is only prudent to advise school officials to refrain from all suspicion-based searches of student’s cell phones unless there is a high evidentiary justification for the search and there is an immediate threat or danger to students or the school.\textsuperscript{298} With regards to suspicionless searches, there is absolutely no situation\textsuperscript{299} that could arise where a suspicionless search of a cell phone will be justified without consent of the student or the student’s parent or guardian.\textsuperscript{300} To control cell phone use, schools should actively advance a cell phone confiscation policy to show they are serious about keeping cell phone use to the bare necessities while on school grounds. Schools should narrowly define their cell phone search policy as well, explicitly stating the conditions that must be met to search and how the search will be conducted. Even if all conditions are met, a search should only be conducted if it is the only way to neutralize the threat. If a search must be done, all steps that can feasibly taken to reduce the intrusiveness of the search should be taken.

I have drafted some model code and policy language to reflect the concerns addressed in this work and provide solutions that should reduce “sexting” overall and provide just punishment for type of conduct discovered. This enacted policy would achieve the following: 1) clarify

\textsuperscript{296} See discussion supra Parts II, III.
\textsuperscript{297} See discussion supra Part II.B.
\textsuperscript{298} See discussion supra Parts II.B-C.
\textsuperscript{299} Though as stated in the discussion of suspicionless searches, it is theoretically possible, but, in practice, impossible. See discussion supra Part III.B.3.c.
\textsuperscript{300} See discussion supra Part III.B.3.
district and individual school legal obligations, 2) reduce school and school official liability by giving a formal structure to the searches of a student’s cell phone when it is necessary, and 3) reduce the incidence of “sexting” by enacting a strict cell phone usage policy while at school and providing students the needed knowledge so they will make a more knowing and intelligent decision regarding whether or not to engage in “sexting.” The model policy language takes into account all of the above state concerns and lays down a road map for a constitutionally sound method of search (as the main focus of this paper is the Fourth Amendment issues surrounding school cell phone search), but also will reduce “sexting” behavior. This reduction will take pressure off schools and protect the adolescents who school districts ought to protect.

The policy proposed in Appendix A is an attempt to draft a state-wide approach to “sexting” in the form of a school code. While it is a broad suggestion, it is as broad as the language of the law guiding the policy. Appendix B is a model school policy for cell phone and “sexting” control. It is particularly important for schools to create a very explicit “sexting” policy given the confusion as to what the right approach is. While it is not a failsafe, having a very detailed action plan within the school policy will leave little question as to what the school will do if presented with a “sexting” issue. The policy reflects concerns over the constitutionality of suspicion-based and suspicionless searches. The main crux of this code is a stern confiscation policy, which should greatly reduce cell phone use during school hours, but if phones are used, this will provide the school with authority to crack down hard.

This is not a hopeless situation for school districts. While it is advised that they do not themselves conduct searches as a means to control this problem, there are other, perhaps more effective, ways to reduce “sexting” behavior, not only on school grounds, but in society as a

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301 T.L.O. and Redding are ambiguous standards and are difficult to follow. See discussion supra Parts II.A-B.
302 See discussion supra Parts II, III.
whole, that does not involve searches. The model policy language is only the first step for schools to reduce “sexting.” “Sexting” is a unique scenario brought upon by the ease at which technology allows naïve children to make split second decisions and the naiveté of the long-term consequences of this type of these decisions. It is recommended that schools also take steps to reduce “sexting” through educational and social programs.\textsuperscript{303} “Sexting” is a societal problem that will not be solved through programs designed only for punishment.

**CONCLUSION**

The times are certainly changing for school administrators in two major ways. On one hand, “sexting” activity and investigations into such activity is creating situations for administrators with no easy way out. On the other hand, cell phones and the characteristic of their use create Fourth Amendment issues seen before. “Sexting” is a major problem for school districts and it will likely become more prevalent in the future.\textsuperscript{304} This behavior is new to society and it is being entered into by emotionally immature individuals who do not understand the gravity of their behavior.\textsuperscript{305} However, schools cannot just start confiscating and searching all phones they find. Suspicionless cell phone searches are always a violation of the searched student’s Fourth amendment rights.\textsuperscript{306} Even when school officials have suspicion that a student is engaged in “sexting” behavior there will need to be a combination of a high evidentiary justification and an immediate threat to safety by the suspected behavior for a search to be constitutional given the highly intrusive nature of a cell phone search.\textsuperscript{307} Even in the very rare case where a search would be constitutional, it should only be done when absolutely necessary

\textsuperscript{303} For a very comprehensive and well thought out sexting control policy that expands well beyond the limits of the Fourth Amendment, see the following article. Nancy Willard, *Sexting Investigation and Intervention Protocol*, CENTER FOR SAFE AND RESPONSIBLE INTERNET USE, (2010), http://www.cyberbully.org/documents/documents/sextingprotocol.pdf.

\textsuperscript{304} See discussion supra Part I.

\textsuperscript{305} See discussion supra Part I A, C.

\textsuperscript{306} See discussion supra Part III.

\textsuperscript{307} See discussion supra Part II.
and in the least intrusive means possible. Schools should advance a very strict confiscation policy and establish a clear and detailed “sexting” protocol that defines what will be done in response to student cell phone use and “sexting.”

The problem does not end at the investigation stage; the school will also have to educate students about the social issues surrounding “sexting” in order to reduce its prominence in the student body. Schools should also do their best to control harassment of students whose “sexting” behavior has backfired through intervention and victim counseling. As seen, the “sexter” can quickly become a victim if an image is involuntarily distributed. By adopting the polices suggested above, schools will be able to not only control cell phone usage in a constitutionally sound manner, but also reduce “sexting” behavior and control its aftermath.

308 Id.
309 See discussion supra Part IV.
310 See source cited supra note 303.
311 Id.
312 See discussion supra Part I.C.
Appendix A*

(a) No student shall use or have in his or her possession any pocket pager, *cell phone*, or similar electronic device while in any school building or on any school property, during regular school hours or at any other time, unless the use or possession of such device by such student has first been expressly authorized by the school board acting in accordance with standards developed as provided in subsection (b) for the granting of approved exceptions to the general prohibition of this Section against such use or possession.

(b) The school board shall develop and promulgate written standards under which the board:

1. may authorize the use or possession of a pocket pager, *cell phone*, or similar electronic device by a student while in a school building or on school property as an approved exception to the general prohibition of this Section against such use or possession; and

2. may impose appropriate discipline or other sanctions against any student who violates any provision of this Section.

   (A) *appropriate discipline or sanctions shall not include the search of a cell phone or electronic device without suspicion of the student using the electronic device to violate school policy; and*

   (B) *the search of a student’s cell phone or electronic device is only lawful if there is a strong reason, supported by individualized suspicion that the student is engaging in behavior, that presents an immediate threat to another student or the school as a whole. Searches are only to be conducted if the threat cannot be neutralized without a search of the device.*

* Appendix A is taken in large part from the Illinois School Code. 105 ILCS 5, School Code § 10-21.10. My additions are in italicized and are added to reflect the constitutionality of suspicion-based and suspicionless searches of cell phones. See discussion supra Parts II, III.
APPENDIX B**

Model School cell phone policy

§101 Use and possession of electronic devices on school grounds

Electronic devices, including cell phones, shall be turned off before entering the building and remain off until the student exits the building upon completion of the school day. For a first offense, the device will be confiscated for up to 7 calendar days, only to be turned over to a parent or guardian. A second offense will result in a confiscation of up to 21 calendar days, only to be turned over to a parent or guardian, and the student will be given a one day out-of-school suspension. Subsequent violations will result of a complete bar of the possession of all electronic devices on school grounds and up to a 7 day out-of-school suspension.

§102 The use of electronic devices as a tool for the violation of school policy

If school officials have reasonable suspicion to believe an electronic device is being used to violate the school conduct policy, aside from §101, that electronic device will be confiscated. Depending on the nature and severity of the suspected violation, the confiscated device will be either (1) held until recovered by a parent or guardian, (2) searched according to § 103, or (3) turned over to police for investigation by law enforcement officials.

§ 103 Cell Phone Search Policy

If a cell phone use violation is incurred pursuant to § 102 the following factors will influence which investigatory options will be executed:

a) Minor Threat - If the suspected violation is minor (see § 104(a) for an example) and there is no immediate threat to safety, the phone will be held according to the confiscation policy set forth in §101; however, the recovering parent or guardian will be informed of the suspected behavior.

b) Intermediate Threat - If the suspected behavior is a violation of school code that exhibits a criminal nature, but does not pose an immediate threat to safety (see § 104(b) for an example), school officials have the discretion to:
   i. Hold the phone pursuant to the confiscation policy set forth in §101; however, the recovering parent or guardian will be informed of the suspected behavior;
   ii. Call the possessing student’s parent or guardian and seek consent to search the phone; or
   iii. Turn the phone and all evidence pertaining to the alleged offense over to the police for further investigation.

c) Severe Threat - If the suspected behavior is a violation of school code that exhibits a criminal nature and poses an immediate threat to safety (see § 104(c) for an example)

** Overall, this policy provides a very strict and powerful cell phone confiscation policy in § 101 and lays out in detail a model cell phone search policy in § 103 and 104. The discretion given in this policy should not be taken lightly, but rather with extreme caution to ensure any search conducted is constitutional and appropriate.
then school officials have the authority to search the cell phone, but may opt to confiscate and turn over to police pursuant to § 103(b).

d)
If a cell phone is searched, school officials will take all possible steps to minimize the intrusiveness of the search. These steps include, but are not limited to seeking student consent to search, seeking parent or guardian consent to search, use the evidence justifying the search to narrow the search as much as feasibly possible, and discontinue the search as soon as the minimum necessary evidence is gathered.

It is understood that the available means to minimize the intrusiveness of the search will be determined on a case-by-case basis and the means available will be influenced by the gravity of the threat.

§ 104 Examples of Varying Severity of Cell Phone Use Violations – “Sexting”

Pursuant to § 103, the available consequences of violating § 102 vary depending on the severity of the violation. The following are examples of the varying severities of behavior. These are only examples and the final judgment of how severe a perceived threat is will depend on the facts and is in the discretion of the investigating school official.

a) *Minor threat* – Student A and Student B are in a relationship. Student C comes to school officials and expresses concerns that A and B are exchanging explicit messages between each other or that this distribution will occur. There is no indication that the pictures have been sent to anyone other than A and B. Confiscation of the phone will occur when A or B is caught in violation of § 101 and/or students A and/or B will be questioned about the suspected behavior.

b) *Intermediate threat* – Student A has an explicit image of Student B. Student A is an unintended recipient of the explicit image of Student B.

c) *Severe Threat* – Student A has an explicit image of Student B. Student A threatens Student B with the dissemination of this image.