

# Reasonable Expectations of Privacy for Youth in a Digital Age

OR  
WHAT IF SAVANA HAD A CELL OR  
SMART PHONE?

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## Outline

- Reasonable Expectation of Privacy
  - Evolution
  - Youth
- Current Research on Youth, Technology, Media Consumption
- Guidance from Analogous Caselaw
- Future? Trends and cases to watch

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**U.S. v. Katz, 389 U.S. 347 (1967)**

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- “The Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”
  - Katz, 389 U.S. at 350

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**Katz - majority**

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- “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”
  - Katz, 389 U.S. at 351

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**Katz – Harlan Concurrence**

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- Test:
  - “a twofold requirement, first that a person have EXHIBITED an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”
    - Katz, 389 U.S. at 361

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Smith v. Maryland, 442 U.S. 735 (1979)

- “Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection...”
  - “if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy...”

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Smith v. Maryland

- “...if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well.”

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Smith v. Maryland

- Such situations are ones in which: “**individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms...**

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### Smith v. Maryland



- **those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was**
- **in such cases, a normative inquiry would be proper.”**
  - *Smith*, 442 U.S. at 741, n. 5

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### Concerns about standard



- **U.S. v. White, 401 U.S. 745 (1971) Harlan, dissenting:**
  - “While these formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the substitution of words for analysis. The analysis must, in my view, transcend the search for subjective expectations . . .”

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### Concerns about standard



- **U.S. v. White (1971) Harlan, dissenting:**
  - we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.”
    - *White*, 401 US at 786.

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Concerns about standard

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- U.S. v. White (1971) Harlan, dissenting:
  - “The critical question, therefore, is whether under our system of government, ...we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement....

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- ...This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.”
  - *White, 401 U.S. at 786*

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Minn. v. Carter, 525 U.S. 83,97 (1998)

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- “those ‘actual (subjective) expectation[s] of privacy’ that society is prepared to recognize as ‘reasonable,’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”
  - *Scalia, concurring*

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**Searches of Youth**

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- Individualized Suspicion

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**New Jersey v. T.L.O., 469 U.S. 329 (1985)**

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- Students are persons.
- Fourth Amendment does apply to searches by School Officials.
- Warrant requirement does not apply.
- Level of suspicion is modified.
- But...

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**New Jersey v. T.L.O., 469 U.S. 329 (1985)**

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- **Searches of students must be REASONABLE:**  
“determining reasonableness of any search involves a two fold inquiry:
  - *First, one must consider whether the action was “justified at its inception.”*
    - × *TLO, 469 US at 742-743*

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When is a search justified at its inception?

- *when there are REASONABLE GROUNDS FOR SUSPECTING THE SEARCH WILL TURN UP EVIDENCE that the student has violated or is violating EITHER the LAW or the RULES OF THE SCHOOL.*
- *TLO, 469 US at 743.*

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New Jersey v. T.L.O.

- ***Second, the search actually conducted must be “reasonably related in SCOPE to the circumstances which justified the interference in the first place.”***
- *TLO, 469 US at 743*

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When is it reasonably related in scope to justification?

- ***when “the measures adopted are REASONABLY RELATED TO THE OBJECTIVES OF THE SEARCH and not excessively INTRUSIVE IN LIGHT OF THE AGE AND SEX of the student and the nature of the infraction.”***
- *TLO 469 US at 742*

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Safford Unified School District v. Redding, 129 S.Ct. 2633 (2009) – search?

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- “it is common ground that Savana had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack.”
  - Redding 129 S.Ct. at 2641, N. 3.

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Safford Unified School District v. Redding

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- *Expectation relating to the search of her person*
  - *“THE REASONABLENESS OF HER EXPECTATION ...IS INDICATED BY THE CONSISTENT EXPERIENCES OF OTHER YOUNG PEOPLE SIMILARLY SEARCHED WHOSE ADOLESCENT VULNERABILITY INTENSIFIES THE PATENT INTRUSIVENESS OF THE EXPOSURE.”*
  - *Safford, 129 S.Ct. at 2642.*

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Safford Unified School District v. Redding, 129 S.Ct. 2633 (2009)

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- 8-1 search was unconstitutional as it exceeded the scope necessary
  - “Here, the content of suspicion failed to match the degree of intrusion.”
    - ✦ *Redding, 129 S.Ct. at 2643.*

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**Suspicionless Searches**

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- ***Vernonia School District v. Acton, 515 US 646, (1995)***
  - *“The legitimacy of certain privacy expectations ...may depend on the individual's legal relationship to the state.”*
    - × *Vernonia, 515 US at 655*

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**Suspicionless Searches**

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- *“Taking into account ...-the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search-we conclude Vernonia's Policy is reasonable and hence constitutional. . . . The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.”*
  - *Vernonia, 515 US at 664-665*
- ***Bd. Of Education v. Earls, 536 US 832 (2002)***

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**Technology and Fourth Amendment**

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- Katz
- Smith
- Ciraolo
- Dow Chemical
- Kyllo
- Quon?

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### Recent Studies

- <http://www.pewinternet.org/>
  - Teens, Privacy & Online Social Networks (2007)
  - Teens and Mobile Phones Over Five Past Five Years: Pew Looks Back (2009)
  - Generations Online (2009)
  - Teens and Social Media (2007)
  - Cyberbullying and Online Teens (2009)




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### Recent Studies



- <http://www.kff.org/entmedia/8010.cfm>
  - Generation M2: Media in the Lives of 8- to 18-Year-Olds (2009)

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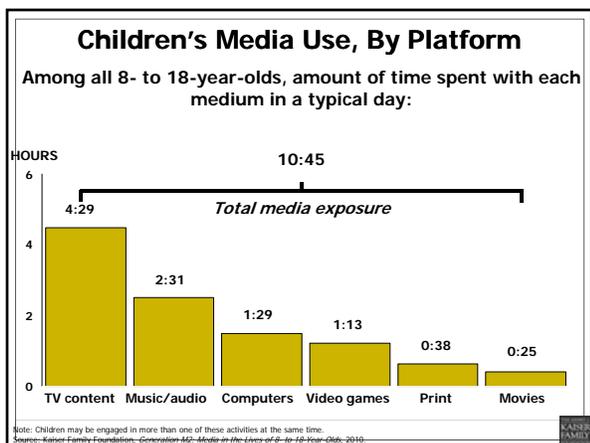
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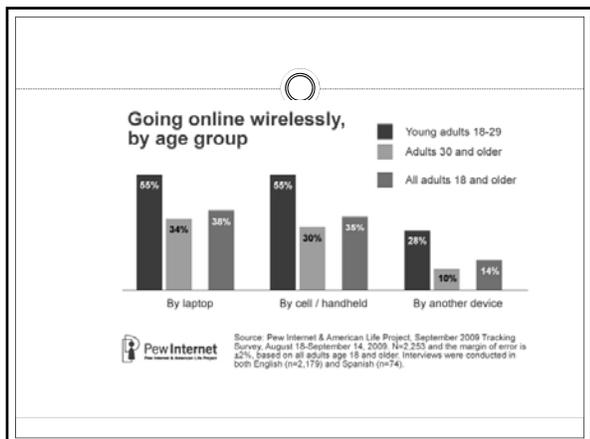
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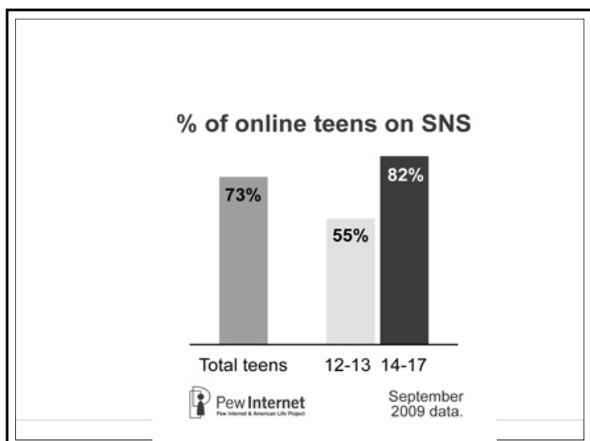
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facebook

Facebook helps you connect and share with the people in your life.

myspace.com

twitter

Share and discover what's happening right now, anywhere in the world.

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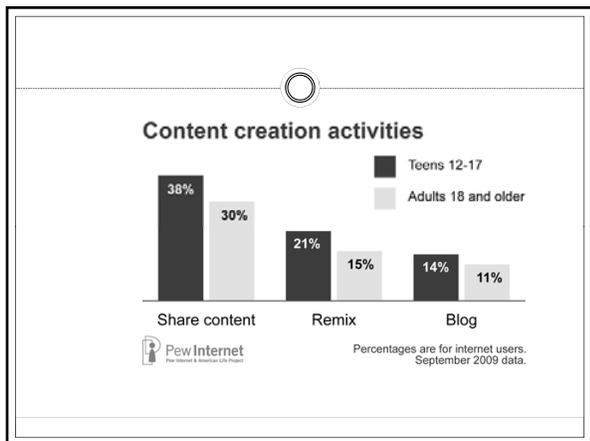
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**CYBER CORNER**

**Facebook changing privacy settings**

By Wells Gabriel III  
Associated Press Writer  
Published: December 10, 2009

NEW YORK (AP) - Facebook is giving its users a bit more control over who gets to see what on their personal pages. The Web site is asking its users to review and update their privacy settings. Facebook has 350 million users and the new controls are designed to help them better keep tabs on what kinds of information can be accessed by those trolling through the site's pages to find out about their friends, family and co-workers. Despite the changes, privacy advocates still worry that users will be exposing too much about themselves, whether they want to or not. For example, many an employee has been chagrined to find that their boss has been able to check out the same party photos they planned to share with their buddies, only.

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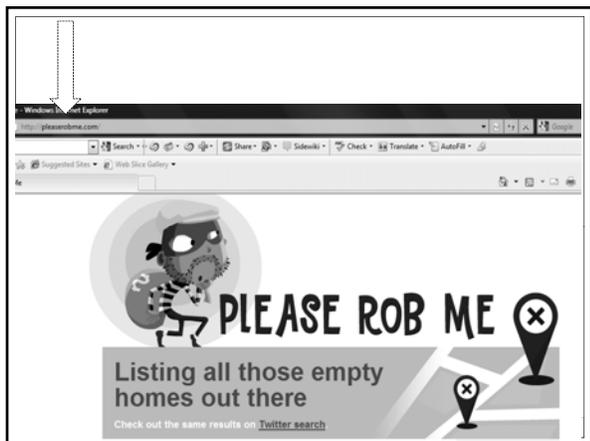
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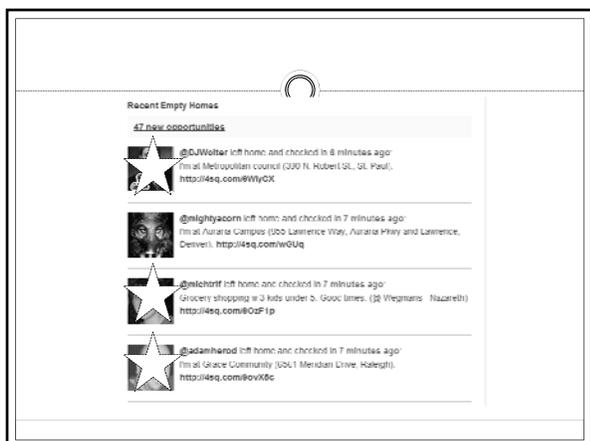
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**So, what if Savana Redding Had a Cell Phone?**

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- Search?
- TLO/Redding Framework
  - Klump v. Nazareth School District, 425 F.Supp. 2d 622 (2006).
- Cell Phone Search Framework
  - ✦ Agreement: REP in content of cell phones
  - ✦ Exigent Circumstances
  - ✦ Incident to Arrest
  - ✦ Consent
  - ✦ Auto Exception

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**Cell Phone Search Framework - sampling**

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<ul style="list-style-type: none"> <li>• Search Invalid – Cell Phones are Special                     <ul style="list-style-type: none"> <li>○ Ohio v. Smith, 920 NE 2d 949 (Ohio 2009)</li> <li>○ U.S. v. Park, 2007WL 1521573 (N.D. CA 2007)</li> <li>○ U.S. v. Zavala, 541 F.3d 562 (5<sup>th</sup> Cir.2008)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Search Valid – Cell Phones are closed containers                     <ul style="list-style-type: none"> <li>• U.S. v. Murphy, 552 F3d 405 (4<sup>th</sup> Cir. 2009)</li> <li>• U.S v. Young, 2008 WL 2076380 (4<sup>th</sup> Cir 2008)</li> <li>• U.S. v. Finley, 477 F.3d 250 (5<sup>th</sup> Cir. 2007)</li> </ul> </li> </ul>
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**The Debate: Ohio v. Smith**

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- 5-4 Opinion
- Majority:
  - Rejects Finley (5<sup>th</sup> Cir.) analysis and embraces Park (ND CA – unpublished)
  - Cell Phones are special – must get a warrant:
    - ✦ “[W]hether the warrantless search of a cell phone passes constitutional muster depends upon how cell phone is characterized because whether search is reasonable is always fact driven.”
    - ✦ “Given their unique nature as multifunctional tools, cell phones defy easy categorization. . . .their ability to store large amounts of private data gives their users a reasonable and justified higher expectation of privacy in the information they contain.”

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**Ohio v. Smith**

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- SICPA:
  - neither dual rationale is present
  - Cell phones are NOT closed containers
  
- Exigent Circumstances:
  - State failed to present any evidence that call records and phone numbers were subject to immediate destruction.
  - Failed to raise below
  
- Necessary for Identification
  - There may be some instances where this will be the case, but not with these facts.

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**Ohio v. Smith**

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- Dissent (4 votes)
  - Cell phones are containers and this is a straightforward case
  - Embraced Finley
  - A cell phone's digital address book is akin to traditional addresses carried on the person and courts have upheld these searches. This is the same.
  - "unworkable to devise a rule that required police to determine cell phone's storage capacities. . . And risk that telephone numbers stored on the phone could be lost over time."

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**Future Guidance?**

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- City of Ontario v. Quon, 529 F.3d 892 (2008), cert. granted No. 08-1322 (2009).

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**Quon**

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- **Issues**
  - REP in texts sent on pager when written policy says no, but informal policy says possibly?
  - REP in texts sent to another?
  - Is 9<sup>th</sup> Circuit's resurrection of "less intrusive means" test correct standard?

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**Quon**

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Why important?  
Relevance of the presence of a school or work policy?  
Test look familiar?

- *Test for government employer searches*
  - Reasonable in its inception?
    - *Were there reasonable grounds to suspect that search is necessary for a non investigatory work related purpose?*
  - Reasonable in scope?
    - *Was it reasonably related to the objective of the search and not excessively intrusive in light of the nature of the [misconduct]?*

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**Trends?**

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- **JW v. Desoto County School District, No. 2:09CV155-M-S (N.D. Miss.) filed 2009.**
- **Robbins v. Lower Merion School District, No. 2:10-CV-00665-JD (E.D. PA) filed 2009.**
  
- **Boulder Valley School District**
  - ACLU letter leads to change in policy
- **Linden Unified School District**
  - ACLU letter leads to change in policy

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### Back to Katz

- Have we reached the point warned about in White?
  - Can technology, not a government, condition the reasonable expectation of privacy?
- If so:
  - majority view: normative analysis?
  - Harlan's view: nature of the action and the likely impact on individual's security balanced against utility to LE?
  - Quon? No REP, no search; Is REP, then analyze reasonableness of search.

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### Conclusion



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