

The Newest Prom Accessory: Breathalyzer Tests

A Discussion of the Fourth Amendment Implications Raised by
Mandatory Breathalyzer Tests at Prom

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I. Introduction

It's that time of year again. The time when the weather gets warm, the flowers begin to bloom, and high school students anxiously await their prom. Shopping malls are littered with brightly colored dresses, nail salons and hair dressers are booked through the month of May, and tuxedo rental companies are constantly explaining the difference between a bow tie and a regular tie to high school boys. But prom is not just about the fancy clothes, the nice hair, the limousines, or the flowers; it is also closely associated with spiked-punch bowls, pre- and post-prom parties that serve alcohol, and unfortunately an increase in drunk driving accidents. The prevalence of underage drinking at prom has prompted community groups, such as Mothers Against Drunk Driving and Students Against Destructive Decisions, to set up presentations, demonstrations, television commercials, and other awareness campaigns to help curb the presence of alcohol at prom.

While schools have traditionally followed suit with school assemblies discussing the dangers of drinking and live demonstrations of drunk driving accidents,¹ high school boards and administrators have recently used a new approach: breathalyzer tests. Schools across the country now require attendees to take a breathalyzer test before being admitted to prom. While the intent of this procedure is clearly to prevent drinking before prom, some question whether it goes too far. A number of parents and organizations have been outspoken against breathalyzer tests at prom because, they argue, these tests violate the student's Fourth Amendment rights to be free from unreasonable search and seizure. With the danger of alcohol use at prom and the likelihood

¹ For example, a high school located in the southwest suburbs of Chicago, Illinois, held a live demonstration for all junior and senior students. This demonstration had two cars drive on the high school track, crash into each other, and the drivers taken away on ambulance stretchers. The presentation concluded with statistics on drunk driving accidents and a brief discussion on the dangers of drunk driving exhibited by the live demonstration. In another high school, a destroyed car was placed outside of the front entrance to the high school for several weeks before prom to serve as a constant reminder of the dangers of drunk driving. These are just two examples of the different programs and presentations conducted by high schools around the country to help prevent drunk driving accidents and underage drinking, especially around prom.

of drunk driving accidents as a result, are the students truly being denied their constitutional rights by these new policies?

This paper begins with a discussion on the Fourth Amendment and its application to high school children through a series of United States Supreme Court cases. Then, Section III sets forth the constitutional issues raised by requiring students to submit to breathalyzer tests before prom. In Section IV, the paper argues that despite the Fourth Amendment concerns, it is likely breathalyzer tests would withstand a constitutional challenge in court. Finally, this paper concludes by offering recommendations on how schools can enact a breathalyzer requirement for prom without greatly infringing on the rights of students.²

II. The Fourth Amendment as Applied to High School Students

The Bill of Rights was set forth by the founding fathers to “prevent the misconstruction or abuse of . . . power” and to protect the rights of American citizens.³ The Fourth Amendment upholds this purpose by preventing unreasonable searches and seizures.⁴ It states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵

This right, however, is subject to certain limitations and does not apply equally to all members of society. American public high school students are not afforded “the same protections guaranteed by the Fourth Amendment inside the schoolhouse gate as they are outside

² The discussion and recommendations offered in this paper apply to public high schools. While the same issues may be present in private high schools, private schools are generally afforded greater flexibility in their school policies, which will not be discussed in this paper. The term “school,” therefore, is used throughout paper as shorthand to refer only to public high schools.

³ See U.S. Const. Preamble to the Bill of Rights, *available at* http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html (last visited May 3, 2011).

⁴ See U.S. Const. amend. IV.

⁵ U.S. Const. amend. IV.

that gate.”⁶ In several opinions, the United States Supreme Court upheld school policies that infringe on students’ constitutional rights because those policies qualify under the “special needs” exception to the Fourth Amendment.⁷ The cases below explain the court-approved restrictions on public students’ Fourth Amendment rights.

In *New Jersey v. T.L.O.*, a high school principal searched a female student’s purse after accusing her of smoking in the school bathroom.⁸ When the principal opened the purse, he found a pack of cigarettes.⁹ He continued to search the student’s purse and also found rolling papers, a small amount of marijuana, a number of small plastic bags, a substantial amount of money, and a list of students that owed the student money.¹⁰ In deciding the Fourth Amendment claim, the Supreme Court stated the reasonableness of the search depends on the context in which the search takes place.¹¹ Given school administrator’s responsibility for the safety of the students, the Court rejected the probable cause requirement set forth in the text of the Fourth Amendment and instead adopted a reasonableness standard for searches of a student by a school official.¹² In this case, the Court found the search reasonable and denied the student’s Fourth Amendment claim.¹³

⁶ MICHAEL KAUFMAN, *EDUCATION LAW, POLICY AND PRACTICE: CASES AND MATERIALS* 666 (2d ed. 2009).

⁷ *New Jersey v. T.L.O.*, 469 U.S. 325, 333, 339-40 (1985) (adopting a special needs exception that balances the need for student protection in the school environment against the intrusiveness of the policy on the students’ constitutional rights). *See T.L.O.*, 469 U.S. at 355-56 (Blackmun, J., concurring in judgment) (“The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement”); *see also T.L.O.*, 469 U.S. 350 (Powell, J., concurring, joined by O’Connor, J.) (“Without first establishing discipline and maintaining order, teachers cannot begin to educate their students”).

⁸ *T.L.O.*, 469 U.S. at 328.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 337.

¹² *Id.* at 341-42.

¹³ *Id.* at 347-48.

The Court upheld this reasonableness standard a decade later in *Vernonia School District 47J v. Acton*.¹⁴ In this case, the Court found a school policy requiring all student athletes to submit to drug testing constitutional under the Fourth Amendment.¹⁵ The Court determined the expected level of privacy for athletes was even less than that of non-athlete high school students because athletes must submit to regular physicals and use communal locker rooms.¹⁶ Additionally, the Court decided the search was relatively unobtrusive, and the importance of the search fell within the special needs exception to prevent the drug crisis at the high school.¹⁷ In *Vernonia*, the Court is extending the reasonableness standard set forth in *T.L.O.* to permit suspicion-less searches of student athletes by school officials.

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls expanded the *Vernonia* decision even farther by permitting an Oklahoma high school to require all students involved in competitive school organizations to submit to drug testing.¹⁸ In this case, the Court stated all students involved in competitive programs have lower expectations of privacy because they must follow the rules of other organizations outside of the school.¹⁹ While students on the academic team do not submit to regular physicals or change in a communal locker room, the Court still determined their voluntary participation in the competitive activity gives those students reason to expect intrusions on their normal rights.²⁰ As such, the Court concluded that the relatively unobtrusive nature of drug testing and the

¹⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995).

¹⁵ *Acton*, 515 U.S. at 666.

¹⁶ *Id.*

¹⁷ *Id.* at 664-65.

¹⁸ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 837-38 (2002).

¹⁹ *Id.* at 831-32.

²⁰ *Id.*

importance of preventing drug use justified the infringement of the students' Fourth Amendment rights.²¹

In *Earls*, the Court permitted the drug testing policy for all competitive student activities even though the school did not have a history of drug abuse or drug problems.²² According to the Court:

The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.²³

The justification used in *Earls* was first established in *Chandler v. Miller*, where the Court stated that a “demonstrated problem of drug abuse is not always necessary to validate a drug testing program.”²⁴

Despite the Court's initial recognition of a public school student's Fourth Amendment rights in *T.L.O.*,²⁵ the Court has subsequently narrowed this right by permitting reasonable searches and suspicion-less drug testing of not only athletes but also all competitive student organizations. Will schools' policies requiring breathalyzer tests at prom be the next restriction on students' Fourth Amendment rights?

III. Constitutional Concerns With Breathalyzer Tests at Prom

Some parents and activist groups have been outspoken against school policies that require student to submit to a breathalyzer test before entering the prom. This Section provides a brief overview of several constitutional concerns invoked by requiring breathalyzer tests for admission

²¹ *Id.* at 833-38. *See also* *Todd v. Rush Cnty Schs.*, 133 F.3d 984 (7th Cir. 1998) (holding suspicion-less urine testing for illegal drugs, alcohol, and cigarette usage did not violate students' Fourth Amendment rights).

²² *Earls*, 536 U.S. at 837-38.

²³ *Id.* at 837.

²⁴ *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

²⁵ *T.L.O.*, 469 U.S. at 338.

to prom. It seems fairly clear from the case law that requiring students who exhibit signs of intoxication to submit to a breathalyzer would fall within the reasonableness standard upheld by the Court in *T.L.O.*²⁶ As such, the concerns discussed below focus mainly on the requirement that *all* students attending prom submit to a breathalyzer test even if they are not exhibiting signs of intoxication.

A. Nature of Breathalyzer Test. Most mandatory breathalyzer test policies require student to take the breathalyzer test when they are in line, waiting to enter the prom.²⁷ The test is given to each student while others wait in line for their turn. Picture a line of big dresses, tuxedos, tiaras, and flowers all shuffling along waiting to blow into a breathalyzer machine. The nature of the breathalyzer makes each student submit to the test in front of their peers, who will all then be aware of the results of the test. The nature of the breathalyzer test intrudes on the student's privacy because the test is conducted in the presence of other students and the results are known to a larger number of people (both school officials and students).

B. Location of Prom. For many high schools, prom is located in a hotel ballroom, museum, or other private venue not on school property. While prom is still a school-sponsored event, students can chose to attend or not attend, and usually pay for a ticket and take their own transportation to and from the event. In this instance, do the restrictions imposed on students' Fourth Amendment rights behind the "school gates"²⁸ apply when the student is outside the physical gates but still at a school function? Because prom is beyond the physical premises of

²⁶ *T.L.O.*, 469 U.S. at 347-48.

²⁷ In one high school located in the suburbs of Chicago, Illinois, students must first check in for the event by giving showing their entrance ticket, and then each student must wait in line outside the prom venue to take the breathalyzer test before entering the prom. The breathalyzer test is administered by the school principal or other school administrators. After students wait in line to hand over their ticket and wait in line to take the breathalyzer test, only then are they admitted to the event (if the breathalyzer does not demonstrate alcohol consumption.)

²⁸ KAUFMAN, *supra* note 6.

the school, some may argue the constitutional restrictions imposed on students no longer apply or no longer apply to same degree.

C. Personnel Administering the Breathalyzer Test. Generally, schools have administrators, teachers, or other chaperons administer the breathalyzer test as students enter the prom.²⁹ In this case, the reasoning of the Supreme Court outlined in Section II applies to the tests given by school personnel. The issue becomes a greater constitutional infringement if police officers or other law enforcement personnel administer the breathalyzer test. Now, there are shuffling dresses and tuxedos blowing into a breathalyzer machine operated by a police officer, possibly in uniform. Some may argue this is unreasonable given the intent of the policy to prevent drinking before prom. The possible criminal and legal ramifications associated with involving law enforcement officials in breathalyzer testing at prom may be a greater infringement on the students' rights that outweighs the need for such a policy.

D. High School Seniors. Prom is usually for high school junior and seniors. In many cases, high school seniors have turned eighteen by the time prom occurs. If a student has reached the age of majority, he or she is no longer subject to the restricted constitutional freedoms associated with minority.³⁰ Now that these students are viewed as adults in the eyes of the law, are able to vote, and can serve in the military, some believe these students should not face the same restrictions in their Fourth Amendment rights as other minor students.

E. Voluntary Attendance at Prom. While it is true that students decide whether to attend prom and are not forced by the school to go, is prom really voluntary? In *Santa Fe*

²⁹ See *supra* note 27.

³⁰ Some may argue that the special needs exception employed for minor students may not apply to the same extent for students that have reached the age of majority. This position rejects the Court's belief that the need for protection in the school environment discussed in *T.L.O.* applies to all students equally, and instead argues that students that are eighteen years of age should not be subjected to the same restricted constitutional rights as students that have not reached the age of majority.

Independent School District v. Jane Doe, the Court held high school football games were not completely voluntary because some students had to attend them for extra curricular activities or class credit and the social pressure of being in high school made it difficult for students not to attend.³¹ Prom, even more so than football games, is an iconic moment in high school that is built-up throughout the entire school year. Not only is there food, music, and dancing with friends, but also prom themes, prom songs, and even a king and queen. Similar to the reasoning employed in *Santa Fe*, requiring students to submit to a breathalyzer may prevent students, who do not wish to submit to a breathalyzer test, from attending their high school prom.

F. Alcohol Abuse and Drunk Driving Prevention. As a final consideration, the intent of the policy is to prevent drinking before prom and reduce the number of alcohol-related accidents involving high school students, but does the policy actually accomplish this goal? Instead of attending prom, those that wish to drink may do so in unsafe environments, exposing themselves and others to greater risk. Additionally, if a student comes to prom and tests positive for alcohol, what happens to that student? Is he or she sent home? What if they drove to prom, do they drive home? There are various additional considerations that must accompany the breathalyzer test policy for it to actually have its intended affect. Without these additional steps, it may only make the problem worse.

IV. Required Breathalyzer Tests Before Prom Will Likely Pass Constitutional Muster

Despite the concerns and constitutional infringements highlighted above, it seems that mandatory breathalyzer tests before entering prom will be held constitutional by the courts.

³¹ See *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 530 U.S. 290 (2000) (finding the school district's argument that attendance at football games was voluntary unpersuasive and instead arguing (i) students are sometimes required to attend football games for class credit or as members of student organizations or teams, and (ii) football games are part of the complete high school experience and social pressure makes it hard for students not to attend or want to attend the games).

After examining the policy and its intent, it is likely a court will find the special needs exception is also present in this case. To understand this position, this Section applies the Court's balancing test outlined in *T.L.O.* and subsequent cases to a mandatory breathalyzer test policy for admission to prom.³²

A. Expectation of Privacy

The first factor in the balancing test examined by the Court is the “nature of the private interest upon which the search . . . at issue intrudes.”³³ While the Court recognizes that children lack some of the most fundamental rights of self-determination, *Tinker* demonstrates students do not give up all of their constitutional liberties when they go school.³⁴ Therefore, high school students do have an expectation of privacy even at school. In the case of prom, students may even have a higher expectation of privacy because they are usually no longer on school property. Additionally, the student or the student's date purchased the ticket, making it seem that prom is a private event. As such, students have a heightened expectation of privacy at prom compared to their expectation of privacy when attending class on a routine basis at the school.

The Court has consistently held, however, the Fourth Amendment does not protect all subjective expectations of privacy, but rather, only those expectations which society recognizes as “legitimate.”³⁵ While the reasonableness standard set forth in *T.L.O.* does little to shed light on the constitutional question raised by mandatory, suspicion-less breathalyzer testing, the Court's reasoning in *Vernonia* indicates that the students' legitimate expectations of privacy are

³² *T.L.O.*, 469 U.S. at 333, 339-40.

³³ *Acton*, 515 U.S. at 654.

³⁴ *Acton*, 515 U.S. at 654 (“Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.”); *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506 (stating “However one may characterize their privacy expectations, students properly are afforded some constitutional protections. In an often quoted statement, the Court said that students do not “shed their constitutional rights . . . at the schoolhouse gate.”).

³⁵ *T.L.O.*, 469 U.S. at 340-42.

actually less than they might think. Despite the argument that prom is a “right of passage” and social pressure requires students to attend, prom is very much a voluntary event.

Prom tickets must be paid for by students, there is usually no school requirement to attend prom, prom is not a mandatory part of high school that must be completed before graduation, and a number of students do not attend prom each year. At almost any school, prom is completely voluntary. By purchasing the ticket, students agree to subject themselves to the additional regulations and restrictions imposed by the school. These additional regulations may include what the student can wear, who the student can bring as a date, where the student can go after prom, and now what tests the student must perform to get in to the event.³⁶ As reasoned in *Vernonia*, students who voluntarily participate in an activity have “reason to expect intrusions upon normal rights and privileges, including privacy.” Therefore, a court will likely determine that students have a reduced legitimate expectation of privacy by choosing to attend prom.

This line of reasoning is even stronger when students are afforded notice of the additional requirements. If students are aware, prior to deciding to attend prom, that they will be forced to take a breathalyzer test to get into the event, their legitimate expectation of privacy is further reduced when they still decide to attend. Many schools post the regulations (including the mandatory breathalyzer test) on prom flyers throughout the school, print them on prom tickets, or even announce them at a meeting for students and their parents. With advanced notice, a student’s legitimate expectation of privacy is made even less than that of student athletes or members of competitive student organizations. Therefore, a court is even more likely to

³⁶ Schools around the country set age requirements on student’s prom guests (usually no one over the age of twenty-one may attend the prom). They also require students to dress in formal attire and usually prohibit jeans or t-shirts at the event. In an effort to minimize post-prom parties, other school districts required students to attend an after-prom party at the school or other venue.

determine that students have a reduced legitimate expectation of privacy when it comes to attending prom.

B. Level of Intrusiveness

Under the balancing test, the students' legitimate expectation of privacy is weighed against the level of intrusiveness of the search.³⁷ While blowing on a breathalyzer machine is not an "excretory function" in the same sense as a urine drug test,³⁸ a breathalyzer test may still be intrusive. Testing a person's breath is a very close encounter and can be considered highly intrusive because the "body and its odors are highly personal."³⁹ In both *Vernonia* and *Earls*, however, the Court held a student urine test conducted partially in front of school officials was not highly intrusive so as to make the policy unconstitutional.⁴⁰ For the breathalyzer test, students remain fully clothed, are not in a traditionally private place (such as a bathroom), and are not performing an excretory function in front of school officials. Given the nature of the breathalyzer test, it seems unlikely a court will deem it overly intrusive.

However, in both *Vernonia* and *Earls*, the Court relied on the fact that the results of the drug test would be used for a narrow purpose of determining athletic eligibility and only a limited number of school officials would receive the results.⁴¹ The breathalyzer test is conducted outside the prom venue, in front of the other students waiting to take the test, and in the presence of school officials. The results of the test are immediately known to anyone and everyone at prom. Even if other students do not see a student taking the test, they will know if another student tested positive for alcohol consumption by word of mouth and the simple fact the student

³⁷ *T.L.O.*, 469 U.S. at 341-42.

³⁸ *Skinner v. Railway Labor Execs' Ass'n*, 489 U.S. 602, 604 (1991).

³⁹ *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1267 (9th Cir. 1990).

⁴⁰ *Acton*, 515 U.S. at 666; *Earls*, 536 U.S. at 837-38.

⁴¹ *Id.*; *Earls*, 536 U.S. at 837-38.

did not enter the event. If a police officer administers the test or if the results are given to law enforcement officials, this may create additional intrusion issues that should be considered by a court. However, because the breathalyzer test only provides results on alcohol consumption, the same concerns of medical history and disease disclosure present with drug testing are not an issue in this case. As such, it is likely a court will find the level of intrusiveness of a breathalyzer test relatively low despite the concerns raised above.

C. Nature and Immediacy of the Government's Concern

The final factor of the balancing test examines the nature and immediacy of the governmental concern at issue. No one will argue deterring underage drinking is not an important concern that should be addressed by the government. According to a 2009 study by the National Institute of Drug Use, nearly three-quarters of students (72%) have consumed alcohol by the end of high school and more than a third (37%) have done so by eighth grade.⁴² Alcohol consumption is the cause of 60% of all teen deaths involving car accidents, with the number of accidents increasing around prom season.⁴³ With staggering statistics like these, the nature and immediacy factor of preventing underage drinking at prom will be met. Given underage drinking is a national problem, even preventative policies aimed at deterring alcohol consumption by high school students will pass the nature and immediacy test at all high schools. Therefore, a high school does not have to wait for a demonstrated alcohol consumption problem among its students, but rather, it can require breathalyzer tests at prom given the nature and immediacy of the national underage drinking problem.

⁴² Students Against Destructive Decisions, *Statistics* (Jan. 2011), available at <http://www.sadd.org/stats.htm>.

⁴³ Car Accident Advice, *Statistics of Drunk Driving*, <http://www.car-accident-advice.com/statistics-of-teen-drunk-driving.html> (last visited May 2, 2011).

D. Balancing the Factors

To summarize, high school students attending prom have a relatively low legitimate expectation of privacy at prom, especially if given notice. Additionally, a breathalyzer test is fairly unobtrusive given the other school policies the Court has recognized as unobtrusive. These two concerns create a small infringement on a high school student's Fourth Amendment right to be free from unreasonable search and seizure. This small infringement will likely be outweighed by the great need to deter high school students from engaging in underage drinking. As such, a school policy requiring mandatory breathalyzer tests to enter prom will likely withstand a constitutional challenge given the current decisions of the Supreme Court.

V. **Recommendations for Instituting a Mandatory Breathalyzer Test Policy for Prom**

In 2002, the Office of Drug Control Policy published a guide for schools to decide whether and how to conduct drug tests of their students.⁴⁴ In adopting a similar approach, this Section of the paper provides recommendations for high schools considering whether and how to implement a mandatory breathalyzer test requirement for prom.

- First, schools should determine there is a need for this policy by considering the underage drinking problem in the school and surrounding school districts. Then, the school should consider alternative policies also aimed at reducing underage drinking to determine if mandatory breathalyzer tests at prom are the best option.
- Having decided to adopt a breathalyzer requirement for prom, schools need to decide the type of policy and test to be administered, who should administer it, where the test takes place, the consequences of the test, the procedure for a student that is found to have consumed alcohol, etc. School districts will differ in the specifications of their respective policies. Schools need to consider what policies work best for their students and for reducing underage drinking in their community. The less intrusive the policy, the more likely it will be accepted by students and parents and pass a constitutional challenge.
- Each of the decisions described in the previous recommendation should be a product of discussions and research conducted by the school board, school administrators,

⁴⁴ KAUFMAN, *supra* note 2, at 691.

teachers, counselors, parents, and the community. Only by involving each of these parties can a school create support for the policy and explain the reasons and goals of instituting such a policy.

- Once the parameters of the policy are decided, students and parents should be notified of the policy prior to making the decision to attend prom. This can be done by posting prom rules and regulations throughout the school in the weeks leading up to prom, giving students a handout with this information before they purchase their tickets, putting the information on the back of the prom ticket, and by telling parents and students at a mandatory meeting for those wishing to attend prom.
- At the event, schools should adhere to the policy that was implemented and disclosed to the students and their parents. The test results should be given to as few school officials as possible and not disclosed to other students or the community.

The mandatory breathalyzer test requirement for prom can infringe on the constitutional rights of the high school students. As such, school districts should take care in creating these policies to ensure the students' rights are protected as much as possible while also working to reduce the prevalence of underage drinking around prom.