

Minimal Protection of Public School Students' Privacy Under the Fourth Amendment—How Little is Too Little?

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I. Introduction

Under the Fourth Amendment of the Constitution, in order for a search to be reasonable issuance of a warrant to conduct the search must be supported by probable cause. Or does it? Over the years, the Supreme Court has created countless exceptions in the criminal investigation context to the probable cause requirement such as searches in exigent circumstances, motor vehicles, searches incident to arrests, and border searches.¹ These exceptions apply to police in furtherance of their criminal law enforcement responsibilities² and have proven to be necessary and in many circumstances crucial to protect the innocent, prevent criminal activity, and facilitate maximum safety.

However, exceptions have also been created for police and public officials in furtherance of community caretaking functions, or more generally, non-law enforcement purposes.³ Most of these non-criminal exceptions fall into the group of exceptions described as the ambiguous “special needs” exception. Through case law the Court has articulated that a search falls into this category when a perceived need makes the warrant and/or probable-cause requirements of the Fourth Amendment impracticable or irrelevant. Hence, the Court abandons the traditional probable-cause tests employed to determine whether a search is reasonable or not and the governmental activity is evaluated by a reasonableness balancing standard. The Court’s deviance from the traditional requirements of the Fourth Amendment has resulted in suspicionless

¹ JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE INVESTIGATING CRIME (3rd ed. 2006).

² *Id.* at 411.

³ *Id.*

searches of public school students by upholding a policy that required all students participating in interscholastic competitive activities to submit to drug testing.⁴ Consequently, in such cases the reasonableness standard is used and the Court considers the nature and immediacy of the government's concerns regarding drug use and the efficacy of the means of drug testing weighed against the nature of the privacy interest and the character of the intrusion of those subjected to the testing.

First, this paper evaluates the cases and questions the reasoning the Court employs to decide the constitutionality of a contested policy requiring searches of students in the public school context. Second, this paper argues that employing this reasonableness standard in the public school context is leading to a slippery slope and infringes on rights protected by the Fourth Amendment. Lastly, this paper analyzes questions left unanswered in the Supreme Court's decisions on this issue and how state courts have interpreted these decisions.

II. The Reasonableness Standard in Random Searches of Students

The first Supreme Court case that presented the unresolved issue of random suspicionless searches of students in public schools was *Vernonia School District 47J v. Acton*.⁵ This case was brought by a seventh grade student that challenged the constitutionality of a district wide policy of random drug testing of student-athletes. The school district adopted the drug-testing program after recognizing a major rise in drug use among the students in the Oregon school district and attempting to deter the drug problem through classes, speakers, and presentations that ultimately

⁴ Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 7 (2004)

⁵ *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

failed.⁶ The district justified its focus on student-athletes reasoning that there was a prevailing concern that some of the athletes were “leaders of the drug culture”, student-athletes were considered role models in the school and the district thought that preventing athletes’ use of drugs would positively influence the rest of the student body and lastly school officials were concerned about the high risk of injury that drug use posed to student-athletes.⁷ The drug-testing policy required all athletes to be tested at the beginning of each season and to provide a list of any medications they were taking to prevent false results.⁸ Additionally, ten percent of the student-athletes would be randomly selected each week to be drug tested.⁹ These students had to provide a urine sample that was monitored by a school official; for boys the monitor would stand behind the urinal and for girls the monitor would stand outside the stall.¹⁰ If there was a positive test, a second test was performed to confirm the results and if the second test was also positive the student-athlete was given the option of either participating in a drug assistance program consisting of counseling and weekly drug tests for six weeks or being suspended from the remainder of the current season as well as the following season.¹¹ In addition, these results would be kept within the school administration (superintendent, principals, vice-principals, and athletic directors) and would not be shared with law enforcement.¹²

The Supreme Court applied the “special needs” doctrine, articulated a balancing test to evaluate the constitutionality of the suspicionless search of students in public schools, and under this test held that the random drug-testing policy did not violate the Fourth Amendment.

⁶ *Id.* at 650.

⁷ *Id.* at 649.

⁸ *Id.* at 650.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 651.

¹² *Vernonia*, 515 U.S. at 651.

Specifically, the Court found that the privacy interest is minimal even though urination is “an excretory function traditionally shielded by great privacy” reasoning that student-athletes have less of an expectation of privacy compared to non-athletes exemplified by communal undress, insisting sports are not played by the bashful, and preseason physical exams consisting of urine samples. Furthermore, the Court also found the character of the intrusion weak given the protections in place to shield the student’s privacy, combined with the fact that the test results were not divulged to the police.¹³ On the other hand, the Court determined the government’s interest in deterring drug-use among school children was compelling, the “special need” existed because of the drug crisis, and the drug-testing program was an effective way to respond to it. Thus, the balancing test led to a decision upholding the policy, but the Court “caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts,” and stressed the “most significant element in this case is...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.”¹⁴

Less than ten years later in *Board of Education of Independent School District No. 92 v. Earls*, the Supreme Court was faced with another case involving suspicionless searches of public school students by random drug testing; however, this policy applied not only to student-athletes but to all students participating in competitive extracurricular activities.¹⁵ Furthermore, the drug-testing program was implemented to prevent drug abuse, not in response to a drug problem that already existed as it did in *Vernonia*. The plaintiff, a student that participated in several extracurricular activities, attempted to distinguish *Vernonia* with the facts of this case arguing

¹³ *Id.* at 658.

¹⁴ *Id.* at 665.

¹⁵ *Bd. Of Educ. Of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002).

that this policy required a greater intrusion upon privacy because the policy was not limited to student-athletes and there was no proven drug problem in the district.¹⁶ Nonetheless, despite the Court's caution made in *Vernonia*, the it held the policy constitutional stating that the discussion of student-athletes' reduced privacy expectations was "not essential to our decision [in *Vernonia*]," and deemed the lack of a drug problem irrelevant stating that "we cannot articulate a threshold level of drug sue that would suffice to justify a drug testing program for schoolchildren."¹⁷

When considering both of these cases, it is difficult to categorize the decision in *Earls* as an "expansion" on the *Vernonia* ruling. The *Earls* decision attempts to conceal and distort deviations from the reasoning and analysis utilized in *Vernonia* in a manner that does not disrupt the principle of stare decisis. Although both decisions conclude the drug-testing policies are constitutional, the majority opinion in *Earls* diminishes the factors and reasons the *Vernonia* Court relied on in its reasonableness analysis of the disputed policy. This discrepancy occurs because the factors present in *Vernonia* that the Court used to determine the policy permissible under the Fourth Amendment were lacking in *Earls*, which would have strengthened the argument to find the policy unconstitutional.

For example, the *Earls* majority states, "[communal undress] was not essential in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority."¹⁸ Furthermore, the Court stated that "[w]hile in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was 'fueled by

¹⁶ *Id.* at 831, 834-835.

¹⁷ *Id.* at 831, 836.

¹⁸ *Id.* at 823.

the role model effect of athletes' drug use,' such a finding was not essential to the holding."¹⁹ In addition, the *Earls* Court stated " [a] demonstrated problem of drug abuse... [is] not in all cases necessary to the validity of a testing regime."²⁰ Therefore, these factors that were recognized and assessed in favor of the government's position to ultimately tip the reasonableness scale (in effect the constitutionality scale) in favor of upholding the drug-testing policy in *Vernonia* were discredited and quote "not essential" to the holding. However, the *Vernonia* factors also present in *Earls*, the protections given to protect the privacy of a student when conducting the test, the confidentiality of the results, and the consequences of a failed test, were evaluated and discussed to decide the constitutionality of the *Earls* Policy. This questionable tactic the Court engages in effectively implies that the discussed factors are fungible and inconsequential. It suggests what only really matters is the fact that the subjects of the policy are children who have been committed to the temporary custody of the state as schoolmaster and as long as these types of policies are not egregiously unreasonable, deference will be given to schools based on their custodial responsibility to keep students safe. Hence, this balancing test that turns on reasonableness bears the typical deficits of all balancing tests such as raising the risks of unrestrained constitutional decision making and decreasing the law's predictability.²¹ And although the Court has attempted to mitigate these deficiencies in "special needs" cases by considering factors protecting against unconstitutional government—the evaluation,

¹⁹ *Id.* at 837-38 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)).

²⁰ *Earls*, 536 U.S. at 835-836.

²¹ Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1229 (2004).

consideration, and determination of how significant the factors are in coming to a decision is subjective and results in a common factor to be treated differently from one case to another.²²

II. The Reasonableness Standard: Practically Unreasonable

Under the Fourth Amendment, the constitutionality of governmental searches in the criminal context is determined by the reasonableness standard, and as the text of the Fourth Amendment states, requires a showing of probable cause and in the majority of cases a search warrant. However, whether a governmental search of students passes constitutional muster is determined by the reasonableness-balancing test of the search under the “special needs” doctrine. The Supreme Court has established that a warrant requirement is “unsuited to the [public] school environment because it would “unduly interfere with the maintenance of the swift and informal disciplinary proceedings needed in the schools.”²³ In addition, the Court has stated the probable cause requirement in this context is unnecessary “where a careful balancing of governmental and public interests suggest that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.”²⁴ Despite the Court’s patent justifications for relaxing the strictures of the Fourth Amendment in the public school setting the Court has not clearly articulated “special needs” situations. For this reason, the unfortunate infringement of student rights have been upheld in these “special needs” circumstances while “little or no effort has been made to explain what

²² See Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1043, 1047-48 (1978) (explaining how constitutional balancing tests can be reduced to intuitionism by any particular judge at a particular time), Arcila, Jr., *supra* note 21, at 1229-30.

²³ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

²⁴ *Id.*

these ‘special needs’ are...and the term turns out to be no more than a label that indicates when a lax standard will apply.”²⁵

The Court adopted this reasoning in cases evaluating searches of students in public schools and consequently, although only expressly mentioned in a concurring opinion, gave birth to the “special needs” doctrine in *New Jersey v. T.L.O* where a student’s purse was searched after being caught smoking on school grounds in violation of school rules. In this case, the Court ruled that public school teachers and administrators may search students without a warrant if two conditions are met: (1) “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school”; and (2) once initiated, the search is “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”²⁶ Next, Fourth Amendment standards were further relaxed when this line of reasoning was extended to cases with facts similar to *Vernonia*, i.e., cases that involve public school educators conducting random, mandatory, suspicionless searches of student-athletes. And most recently, in *Earls*, the Court “clarified and extended” the relaxed Fourth Amendment rules on suspicionless searches by finding a policy constitutional that required all students participating in interscholastic competitive activities to submit to drug testing.²⁷

Therefore, by using the reasonable standard in evaluating searches of public school students, as exemplified in case law, the Supreme Court has engaged in a digression of the protections for students deserved under the Fourth Amendment. In constitutional jurisprudence,

²⁵ William J Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV 553, 554 (1992).

²⁶ *Id.* at 342.

²⁷ Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After Board of Education v. Earls*, 56 S.C. L. REV. 1, 7 (2004).

this standard is as low as possible thus courts will only reject the most blatantly offensive, content-based, or unreasonable of educator choices invading students' privacy.²⁸ Ironically, in this area the "special needs" doctrine often gives "the Court one of its rare opportunities to hear face-to-face, as Fourth Amendment claimants, those law-abiding citizens for whose ultimate benefits the constitutional restraints on public power were primarily intended,"²⁹ and instead has enabled government to overreach Fourth Amendment contours.

III. What Comes Next?

The most obvious lingering question that has resulted from the Supreme Court's relaxation of the Fourth Amendment in this context is whether suspicionless testing of the entire student body and staff at a public school would be constitutional. "If, by the Court's reasoning, keeping kids off drugs is of primary importance," and guardian status of schools "allows a relaxed privacy standard, searching all students should be perfectly legitimate"³⁰. In *Vernonia*, Justice Ginsburg joined the majority while conditioning her vote on the belief that the ruling's application would only apply to athletes. In *Earls*, the departure from that condition resulted in Ginsburg joining the dissent making Justice Breyer the swing vote. Justice Breyer conditioned his concurrence on two facts: (1) the testing program avoided subjecting the entire school to testing and (2) it preserved an option for an objector of the policy—"refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from school."³¹ That

²⁸ *Id.* at 64.

²⁹ Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, SUP. CT. REV. 87, 88 (1989).

³⁰ Tony LaCroix, *Student Drug Testing: The Blinding Appeal of in Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 B.Y.U. EDUC. & L.J. 251, 267 (2008).

³¹ *Earls*, 536 U.S. at 841.

these facts seem to be determinative in *Earls* shows how unstable the Court's position on the issue is.³² Therefore, if the factors Justice Breyer conditioned his concurrence on were not present, he would then fortify the dissenters' view that interpretation of the Fourth Amendment in this context is "so expansive or malleable as to render reasonable any program of student drug testing a school district elects to install."³³ In any event, the Supreme Court composition has changed since 2002 and being that the of reasonableness standard in the "special needs" context provides minimal guidance and the application of which is arguably subjective it is unclear how the four new Justices appointed since that time (Justices Roberts, Alito, Sotomayor, and Kagan) might rule on the issue.

Vernonia and *Earls* resulted in unsettled issues and questions within the federal court system. Consequently, despite the unresolved murkiness, state courts had to decide how to interpret the U.S. Supreme Court decisions discussed herein. This is especially important considering a state court is not required to, when interpreting state law, follow the Court's decisions in which no violation of the Federal Constitution occurs as in *Vernonia* and *Earls*.³⁴ As expected, among the states the decisions of such cases have differed. Some state courts joined Supreme Court's bandwagon most likely abandoning the principals of federalism by assuming federal law covers the contested issues and disregarding the rights of state litigants to have their own state's law applied.³⁵ Other state courts have joined the dissenting opinion in *Earls* by interpreting provisions of their own constitutions that are substantially similar to the Fourth

³² LaCroix, *supra* note 30, at 267.

³³ *Earls*, 536 U.S at 843 (Ginsburg, J., *dissenting*).

³⁴ LaCroix, *supra* note 32, at 266.

³⁵ LaCroix, *supra* note 32, at 276-277, *see* Joye v. Hunterdon Cent. Reg'l High Sch. Bd. Of Educ., 826 A.2d 624 (N.J. 2003).

Amendment.³⁶ Maybe if the Supreme Court had been more precise and consistent in its reasoning in *Vernonia* and *Earls* the divergence among state courts would not be so prevalent.

VI. Conclusion

As this paper has shown, the Supreme Court has judicially altered and relaxed Fourth Amendment protections against unreasonable searches of students within the public school context. With each case decided, the Court has incrementally empowered schools to infringe on students' constitutionally protected rights supported by lackluster, inconsistent, and questionable reasoning. The reasonableness standard in this "special needs" context has left significant questions unanswered, supports imposition of subjectivity, and has resulted in state courts to diverge in their analysis' and rulings of factually similar cases.

The rights afforded in the Fourth Amendment, irrespective of within the public school context or not, deserve more protection than given under the judicially applied reasonableness balancing test that regularly undervalues Fourth Amendment interests jeopardized by every search, while overvaluing the countervailing governmental interests.³⁷ Furthermore, this test "has neither systematically evaluated the marginal law enforcement benefits of challenged searches, nor regularly incorporate the 'least intrusive alternative' requirement, which is an integral component of other balancing tests."³⁸ In effect, the fundamental Fourth Amendment privacy right is relegated to a status less protected than that possessed by other constitutional rights.³⁹

³⁶ See *Theodore v. Delaware Valley Sch. Dist.*, 836 A.2d 76 (Pa. 2003); *In re William G.*, 709 P.2d 1287 (Cal. 1985).

³⁷ Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1176 (1988)

³⁸ *Id.*

³⁹ *Id.*

Thus, the Supreme Court's decisions in *Vernonia* and *Earls*, despite students' diminished right to be secure in their persons, have not carefully considered the Supreme Court principle that "[c]onstitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"⁴⁰ In actuality, when it comes to searches of public school students the latter warning that has been adhered to for over fifty years has effectively been disregarded as a relic of the constitution-abiding past.

⁴⁰ *Byars v. United States*, 273 U.S. 28, 32 (1927) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886))