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Stripped Bare: Students' Fourth Amendment Rights, School Searches, and the Reasonableness Standard

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NOTE

STRIPPED BARE: STUDENTS' FOURTH AMENDMENT RIGHTS, SCHOOL SEARCHES, AND THE REASONABLENESS STANDARD

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I. Introduction

In *Beard v. Whitmore Lake School District,*[1] the Sixth Circuit examined whether the law governing searches of students, specifically strip searches, was clearly established and deprived school officials of qualified immunity.[2] The Sixth Circuit first evaluated the strip search's constitutionality under the Fourth Amendment.[3] Then, the Sixth Circuit addressed whether qualified immunity protected school officials.[4] *Beard* demonstrates that students' Fourth Amendment rights receive less protection than teachers' liability and could result in students shedding "their constitutional rights at the school house gate."[5] With violence and drug use on the rise in schools, courts consider students' constitutional rights less important than the school's safety and security.[6] *Beard* held that the strip search's scope was unconstitutional because the students' privacy expectations, the search's intrusive nature, and "the severity of the school system's needs" favored the students—not

[1] 402 F.3d 598 (6th Cir. 2005).
[2] *Id.* at 601.
[3] *Id.* at 603.
[4] *Id.* at 606.
[5] Cales v. Howell Pub. Sch., 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).
[6] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) (internal citations omitted); New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (internal citations omitted).

the school.[7] Nonetheless, the teachers received qualified immunity because the law was not clearly established.[8]

This synopsis will show how courts have approached the constitutional issues surrounding school searches and how students' rights have decreased over time under the reasonableness standard and qualified immunity. Prior to the Supreme Court's ruling in *New Jersey v. T.L.O.*,[9] schools used various approaches to school searches.[10] After *T.L.O.*, courts began to limit students' Fourth Amendment rights. Today, schools search for drugs, weapons, and evidence of drug use, and according to the courts, these searches do not violate students' rights.[11] Even if the courts consider some searches unreasonable, qualified immunity protects teachers from liability because the law surrounding these searches often is not clearly established. Thus, school officials can act with impunity because courts will likely perceive the search as reasonable or grant school officials qualified immunity for their actions. If this pattern continues, students will retain no constitutional rights within school walls, and this deprivation of Fourth Amendment rights could extend beyond school walls into everyday citizens' lives.

II. Back in the Day . . . The History of School Searches and Students' Fourth Amendment Rights

Before 1985, courts in every jurisdiction approached students' Fourth Amendment rights differently.[12] The approaches offered four different levels of protection:

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[7] *Beard*, 402 F.3d at 604 (citing *Vernonia*, 515 U.S. at 664-65).
[8] *Id.* at 601.
[9] 469 U.S. at 325-26 (holding that the Fourth Amendment, excluding the warrant requirement, applied to schools).
[10] *See id.* at 340.
[11] *See Vernonia*, 515 U.S. at 664-65; *T.L.O.*, 469 U.S. at 346-48.
[12] Bellnier v. Lund, 438 F. Supp. 47, 52 (N.D.N.Y. 1977) (mem.) (internal citation omitted).

the Fourth Amendment did not apply; the Fourth Amendment applied, but the Exclusionary Rule did not; the Fourth Amendment did apply, but *in loco parentis* used the reasonableness standard to evaluate the search; or the Fourth Amendment fully applied.[13] Although the courts varied on students' Fourth Amendment rights, the Seventh Circuit declared that nude searches of children "exceeded the 'bounds of reason' by two and a half country miles."[14] Meanwhile, the Sixth Circuit adopted a balancing test, which weighed "the [F]ourth [A]mendment rights of individual students with the interests of the state and the school officials in the maintenance of a proper educational environment to educate today's youth."[15]

In 1985, the Supreme Court decided a watershed case, *New Jersey v. T.L.O.,*[16] which created the "special needs" doctrine for school searches.[17] The special needs doctrine allowed for warrantless searches when "a careful balancing of governmental and private interests suggests 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."[18] If the search fulfilled the two-part test, then it met the reasonableness standard.[19] The search had to be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."[20] The Supreme Court did not decide if "individualized suspicion [was] an essential element of the reasonableness standard" because the Fourth Amendment did

[13] *Id.* (internal citations omitted).
[14] Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (per curiam).
[15] Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984).
[16] 469 U.S. 325 (1985).
[17] *Id.* at 351 (Blackman, J., concurring) (internal citation omitted).
[18] *Id.* at 341 (majority opinion).
[19] *Id.*
[20] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

not list it as a requirement.[21] The Supreme Court believed that school officials could easily apply a reasonableness standard.[22] The dissent, however, warned that this standard would cause "greater uncertainty among teachers and administrators."[23]

The courts applied the two-part test to determine the constitutionality of searches, but some courts clarified the Supreme Court's test. In one case, the court held that a student's conduct must create "a reasonable suspicion that a specific rule or law has been violated and that a search could reasonably be expected to produce evidence of that violation."[24] Without reasonable suspicion of a violation, the court cannot deem a search reasonable.[25]

The courts also considered the search's reasonableness under a "totality of the circumstances" analysis.[26] If a search occurred because of a student's tip, the courts look at the totality of the circumstances to determine if school officials need to investigate further before conducting a search.[27] The totality of the circumstances applied to strip searches because factors, like "age and sex of the student and the nature of the infraction," determined if a search's scope was reasonable.[28] Small sums of money did not warrant a strip search, and courts considered these searches

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[21] *Id.* at 342 n.8 (internal citations omitted).
[22] *See id.* at 343.
[23] *Id.* at 365 (Brennan, J., concurring in part, dissenting in part).
[24] Cales v. Howell Pub. Sch., 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.); *see T.L.O.*, 469 U.S. at 342 (footnote omitted).
[25] *See Cales*, 635 F. Supp. at 457.
[26] Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 888 (6th Cir. 1991) (quoting Alabama v. White, 496 U.S. 325 (1990) (holding that an informant's tip needs to be evaluated under a totality of the circumstances inquiry)).
[27] *See id.* at 888-89.
[28] *T.L.O.*, 469 U.S. at 342 (footnote omitted).

as unreasonable.[29] Without individualized suspicion, strip searches lacked justification unless a "legitimate safety concern" existed, and officials "must be investigating allegations of violations of the law or school rules . . . ."[30] Additionally, these searches needed to be "minimally intrusive."[31]

Courts attempted to limit the use of suspicion-less searches if the students were not athletes.[32] Because athletes chose to participate in school athletics, they should "expect intrusions upon normal rights and privileges, including privacy."[33] Physical education students, however, "[do not] willingly subject themselves to this degree of intrusion."[34] Additionally, a suspicion-less search will not be considered reasonable in lieu of a possible "suspicion-based search" because the government's needs "will never be strong enough to outweigh" an individual's privacy interests.[35] If school officials request the police officers' presence, or the police officers work at the school, then the reasonable suspicion standard applies.[36] Otherwise, they must show probable cause.[37]

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[29] *See* Oliver *ex rel.* Hines v. McClung, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995) (mem.) (referring to the argument in *Doe v. Renfrow* that a strip search for $4.50 is unreasonable under the Fourth Amendment).
[30] Konop *ex rel.* Konop v. Nw. Sch. Dist., 26 F. Supp. 2d 1189, 1201 (D.S.D. 1998) (mem.). *But see* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (holding that student athletes were subject to suspicion-less drug testing because they had a "decreased expectation of privacy," the search was relatively unobtrusive, and the severity of drug use in schools was a serious concern).
[31] *Konop*, 26 F. Supp. 2d at 1201.
[32] *See Vernonia*, 515 U.S. at 663; Bell v. Marseille Elementary Sch., 160 F. Supp. 2d 883, 887-88 (N.D. Ill. 2001) (mem.).
[33] *Vernonia*, 515 U.S. at 657 (internal citations omitted).
[34] *Bell*, 160 F. Supp. 2d at 888.
[35] *Id.* at n.5 (quoting Willis v. Alderson Cmty. Sch. Corp., 158 F.3d 415, 421 (7th Cir. 1998)).
[36] Reynolds v. City of Anchorage, 379 F.3d 358, 372 (6th Cir. 2004) (Moore, J., dissenting) (internal citations omitted).
[37] *Id.* at 372-73.

III. Qualified Immunity: School Officials' "In Case of Unreasonable Search—Break Glass" Defense

A school official may claim qualified immunity if courts deem the search unreasonable. Qualified immunity "is an affirmative defense," and as state officials, school officials can invoke it.[38] Before the Supreme Court's decision in *Harlow v. Fitzgerald,*[39] this immunity had objective and subjective elements.[40] The Supreme Court, however, eliminated the subjective element because the "judicial inquiry" could disrupt "effective government."[41] Because qualified immunity is a question of law, courts must determine if qualified immunity protects the official.[42]

Qualified immunity requires an examination of "the objective reasonableness of an official's conduct."[43] If the courts think, "the law was clearly established," then the official loses the immunity because a "public official should know the law governing his conduct."[44] To determine whether a right is clearly established, courts examine Supreme Court decisions; its own decisions, as well as other decisions in its circuit; and other circuits' decisions.[45]

Most cases turn on whether a right is clearly established, but "a constitutional or statutory violation" must occur.[46] Thus, courts must look at the situation and determine whether "the [official's] conduct violated a constitu-

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[38] Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (citing Gomez v. Toledo, 446 U.S. 635 (1980)).
[39] *Id.* at 800.
[40] *Id.* at 815.
[41] *Id.* at 817 (footnotes omitted).
[42] *See* McBride v. Village of Michiana, 100 F.3d 457, 460 (6th Cir. 1996) (internal citations omitted).
[43] *Harlow*, 457 U.S. at 818 (footnote omitted).
[44] *Id.* at 818-19 (footnote omitted).
[45] *See McBride*, 100 F.3d at 460.
[46] Saylor v. Bd. of Educ. of Harlan County, 118 F.3d 507, 512 (6th Cir. 1997) (internal citations omitted).

tional right[.]"[47] If the official violated a right, then the court considers whether that right was clearly established.[48] A right is clearly established if "a reasonable official would understand that what he is doing violates that right."[49] Even if courts have not previously addressed the exact conduct, an official may lose qualified immunity if "in the light of pre-existing law the unlawfulness [is] apparent."[50] Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[51]

Finally, courts must examine the official's actions for objective unreasonableness, which can be determined "from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs."[52] This evaluation "requires a careful balancing of . . . the individual's *Fourth Amendment* interests' against the countervailing governmental interests at stake."[53] Once these criteria are met, the official loses qualified immunity and may be liable for the unconstitutional conduct.

IV. The *Beard* Strip Search

Beard began with a strip search for stolen money during a gym class.[54] The acting principal called the police

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[47] Saucier v. Katz, 533 U.S. 194, 201 (2001) (internal citations omitted).
[48] *See id.*
[49] *Id.* at 202 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
[50] Champion v. Outlook Nashville, Inc., 380 F.3d 893, 901 (6th Cir. 2004) (quoting *Anderson*, 483 U.S. at 640).
[51] Hope v. Pelzer, 536 U.S. 730, 741 (2002).
[52] *Champion*, 380 F.3d at 902 (quoting Feathers v. Aey, 319 F.3d 843, 848 (6th Cir. 2003)).
[53] Solomon v. Auburn Hills Police Dep't, 389 F.3d 167, 173-74 (6th Cir. 2004) (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).
[54] Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 601 (6th Cir. 2005).

and asked three teachers for assistance.[55] The teachers separated the students and searched their backpacks.[56] During the search, a male teacher made the boys remove their shirts, lower their pants, and lower their underwear.[57] To avoid gender discrimination, the girls endured a strip search, which required them to lift their shirts and lower their pants.[58] The teachers did not touch the students, and the search yielded no stolen money.[59]

The students sued the school, and the school filed a motion for summary judgment asserting qualified immunity.[60] The district court denied the motion on the basis that the law involving strip searches for missing money was clearly established.[61] The defendants appealed to the Sixth Circuit, which reversed the district court's decision.[62] The Sixth Circuit held that "the law did not clearly establish that the searches were unconstitutional under these circumstances."[63]

In this case, the court addressed the issue of whether the law clearly establishes that suspicion-less strip searches of students are unconstitutional under the Fourth Amendment. This case demonstrates that school officials have protection from liability even in an unconstitutional school search. Therefore, students lack constitutional protections from a search under the reasonableness standard. The Supreme Court's claim that students "do not shed their consti-

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 602.
[59] *Id.* at 601-02.
[60] *Id.* at 601.
[61] *Id.* at 602.
[62] *Id.*
[63] *Id.*

tutional rights at the school house gate" is practically obsolete in today's schools.[64]

The Sixth Circuit had to decide if school officials merited qualified immunity.[65] First, the court examined whether the searches violated the students' Fourth Amendment rights under the reasonableness standard.[66] The Sixth Circuit evaluated whether the search was "justified at its inception" and "reasonably related in scope to the circumstances."[67] The search was "justified at inception," but the search's scope was unconstitutional.[68] The search occurred in a compulsory gym class, and the students, unlike athletes, did not choose "to be regulated more closely than the general student population."[69] As such, they merited a greater expectation of privacy than student athletes did.[70] The search was highly intrusive because the students disrobed, and the girls' searches, unlike the boys' searches, occurred with other students present.[71] Finally, the search attempted to locate missing money, which courts have considered to serve "a less weighty governmental interest than a search undertaken for items that pose a threat to the

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[64] Cales v. Howell Pub. Sch., 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[65] *Beard*, 402 F.3d at 603.

[66] *Id.*; *accord* Champion v. Outlook Nashville, Inc., 380 F.3d 893, 901 (6th Cir. 2004).

[67] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (internal citation omitted).

[68] *Beard*, 402 F.3d at 604-06.

[69] *Id.* at 605.

[70] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 662, 664-65 (1995) (holding that suspicion-less drug searches are constitutional when performed on student athletes).

[71] *Compare Beard*, 402 F.3d at 606 *with* Reynolds v. City of Anchorage, 379 F.3d 358, 365 (6th Cir. 2004) (demonstrating that a strip search's intrusive nature can be minimized by conducting them in private rooms with a minimal number of staff).

health or safety of students, such as drugs or weapons."[72] These factors, along with no individualized suspicion or consent, caused the search's scope to be unconstitutional under the Fourth Amendment.[73]

Because a constitutional violation occurred, the Sixth Circuit had to determine if the law was clearly established "in light of the specific context of the case, not as a broad general proposition."[74] In search of guidance, the Sixth Circuit examined Supreme Court cases, cases in the Sixth Circuit, and cases in other circuits.[75] The Sixth Circuit noted that *Vernonia*[76] and *T.L.O.*[77] articulated basic search principles. [78] These cases, however, offered school officials no guidance about what would constitute notice "that the searches . . . were unreasonable" because the Supreme Court's test for reasonableness did not "explain *how* the factors should be applied" when school officials encountered these situations.[79] Additionally, the Sixth Circuit noted, "the reasonableness standard . . . has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a . . . cause of action."[80]

The Sixth Circuit cases do not clarify whether the law surrounding strip searches was clearly established. The court granted qualified immunity in two cases because of individualized suspicion of certain students, but in another

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[72] *Beard*, 402 F.3d at 605; *accord Vernonia*, 515 U.S. at 661; Oliver *ex rel.* Hines v. McClung, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995) (mem.).

[73] *Beard*, 402 F.3d at 606.

[74] Saucier v. Katz, 533 U.S. 194, 201 (2001).

[75] *Beard*, 402 F.3d at 606-07; *see* McBride v. Village of Michiana, 100 F.3d 457, 460 (6th Cir. 1996).

[76] 515 U.S. 646 (1995).

[77] 469 U.S. 325 (1985).

[78] *Beard*, 402 F.3d at 607 (internal citations omitted).

[79] *Id.*

[80] *Id.* (quoting Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 886 (6th Cir. 1991)).

case, the court denied qualified immunity because a rule or law violation may not have occurred.[81] Thus, the Sixth Circuit cases yielded no clear stance on strip searches for school officials.[82]

Other circuits have established a clear stance on strip searches, but the Sixth Circuit believes that these cases do not clearly establish "the unlawfulness of the defendants' actions in this case."[83] The Sixth Circuit only uses opinions from other circuits if they "point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting."[84] Because these cases do not meet this standard, the Sixth Circuit held that the law was not clearly established and granted the school officials qualified immunity.[85]

V. Ramifications of *Beard* on Future School Searches and Students' Rights

Beard shows how the reasonableness standard and qualified immunity has eroded students' rights and granted school officials enormous leeway in their searches. Initially, students' Fourth Amendment rights varied from school to school, but after *T.L.O.*, a reasonableness standard governed school searches.[86] The courts have broadened this standard. Under the reasonableness standard, school officials do not necessarily need individualized suspicion, but

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[81] *See Williams*, 936 F.2d at 889; Tarter v. Raybuck, 742 F.2d 977, 984 (6th Cir. 1984) (footnote omitted). *But see* Cales v. Howell Pub. Sch., 635 F. Supp. 454, 458 (E.D. Mich. 1985) (mem.).

[82] *Beard*, 402 F.3d at 608.

[83] *Id.*

[84] *Id.* (quoting *Williams*, 936 F.2d at 885) (alteration in original).

[85] *Id.*

[86] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

individualized suspicion could ensure that school officials will be entitled qualified immunity.[87] Thanks to the confusion, teachers do not know which searches are constitutional and perform questionable searches as a result. Justice Brennan's prediction in *T.L.O.* that the reasonableness standard would cause confusion has come true.[88]

Beard proves that courts need to define the law surrounding school searches more clearly. Otherwise, teachers can act with impunity because either they do not know the law, or they know that the confusion in the law will protect them. Because the law in various circuits is in a state of disarray, students lack protection within school walls. The added exceptions and qualifications to the reasonableness standard do not aid teachers in understanding the law; they only create more confusion. Without a clearly established standard for school searches, teachers almost always merit qualified immunity, and no check or balance exists to prevent them from trampling on students' rights. Thus, students' Fourth Amendment rights practically do not exist because the courts consider the searches reasonable or qualified immunity exists. *Beard* is a distress signal to the courts to reach a consensus on what is and is not constitutional in school searches.

Beard has far-reaching future implications. First, *Beard* demonstrates that teachers can conduct unreasonable and unconstitutional searches with little fear of liability. The decision allows teachers to see how far they can tread on students' rights because liability will not result thanks to qualified immunity. Second, if schools continue to conduct strip searches, the courts may eventually consider them reasonable in all situations. For example, the courts may

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[87] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653-54 (1995); *see also Williams*, 936 F.2d at 889 (stating that the principal's reasonable suspicion that students were concealing drugs provided him with qualified immunity for his search).

[88] *T.L.O.*, 469 U.S. at 365. (Brennan, J. concurring in part, dissenting in part).

find a school's actions reasonable enough to allow strip searches in group situations without individualized suspicion. Third, *Beard* demonstrates that a clearly defined standard on student searches must exist to prevent students from "shed[ding] their rights at the school house gate."[89] If students have no rights in school searches, then the trend will spread from schools into society at large.

Fourth, this decision demonstrates that schools have become more concerned with crime prevention and safety than educating students. Teachers conduct unconstitutional searches under the guise of protecting students. The courts deem these searches unconstitutional, but the teachers still receive qualified immunity for their actions because the courts believe that today's schools are unsafe. If teachers must evaluate reasonableness, conduct a search, and prove that the law was not clearly established, when do they educate students? Teachers spend more time policing students and defending their actions than educating students. Without education, our government, judicial system, and society in general will suffer from ignorance.

VI. Conclusion

In conclusion, *Beard* demonstrates how students' Fourth Amendment rights and school searches have come full circle. Even with the reasonableness standard, a state of confusion still exists, and qualified immunity protects teachers from liability. Students receive no benefits from the reasonableness standard. The courts must reach a consensus on the law in this area, or students will continue to endure unreasonable searches. If the law continues in its state of disarray, then students may have no Fourth Amendment rights in schools because the courts continue

[89] Cales v. Howell Pub. Sch., 635 F. Supp. 454, 457 (E.D. Mich. 1985) (mem.) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

to add exceptions. The courts must set a clear standard on school searches so that teachers and students can return to the important tasks of teaching and learning.

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