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Cummings: Drug Urinalysis in the Public Schools

DRUG URINALYSIS IN THE PUBLIC SCHOOLS: GOING BEYOND *T.L.O.*

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.¹

Schools represent unique settings whereby educators are not only required to foster learning of basic subject matter but also to provide discipline and safety for the students under their care. Teachers and administrators must make long term as well as instantaneous decisions affecting the enforcement of school regulations and applicable law. They must exercise control but do so without trampling the rights of the students. Drugs, as the Supreme Court recognized, have become a widespread problem and a variety of tactics have been adopted to eliminate them from schools.

In addition to locker searches, drug detection dogs, body and strip searches, urinalysis has been introduced into the schools. In Arkadelphia and Hope, Arkansas, students in grades five through twelve who are suspected of taking drugs are asked to submit to urinalysis tests.² Students found to possess drugs must withdraw from school for a semester or face expulsion.³ Several students have had to submit to the tests in Arkadelphia and refusal to do so also results in expulsion. A female student was required to provide a urine sample in the presence of a school secretary.⁴ Understandably, some of the parents believed the constitutional rights of their children were violated and requested assistance from the American Civil Liberties Union.⁵

The parents and students contend⁶ the policies violate the fourth, fifth and fourteenth amendments.⁷ They argue that such tests are illegal searches, that

¹New Jersey v. T.L.O., 105 S.Ct. 733, 742 (1985).

²Silas, *School Drug Tests: Arkansas Policy Challenged*, 70 A.B.A.J., Apr. 1984, at 36.

³*Id.*

⁴Telephone interviews with attorney Robert M. Cearley, Jr. (Feb. 21, 1985) and with attorney Clayton R. Blackstock, of Cearley, Mitchell and Roachell, Little Rock, Arkansas (May 9 and 17, 1985), who, on behalf of the American Civil Liberties Union, represent plaintiffs against the Arkadelphia School District and several of its officials. In their fourth amended complaint plaintiffs seek, first, declaratory and injunctive relief contending that the drug testing policies are unreasonable searches and seizures and deny them due process thus violating the Fourth and Fourteenth Amendments of the Constitution of the United States; and second, damages for violation of their Fourth and Fourteenth Amendment rights. See, *Anable v Ford*, No. 84-6033 (W.D. Ark. filed Feb. 29, 1984).

⁵Silas, *supra* note 2, at 36. This article also indicates that if a student is suspected of alcoholic intoxication he is required to take a breath test administered by the police.

⁶Telephone interview, *supra* note 4.

⁷Silas, *supra* note 2, at 36.

they compel self-incrimination,⁸ and that they abridge due process requirements.⁹

While much has already been written on the self incrimination and due process rights of students, this comment will focus upon the unique fourth amendment questions that are raised by the introduction of urinalysis in the public schools context. For example, do students have a privacy interest in their own body fluids? If so, how intrusive is a urinalysis, and what standard should govern the educator in his attempt to utilize this testing method? Overall, this comment will explore the permissibility of the use of urinalysis to control drugs in the public schools and will conclude that probable cause should be the standard by which to measure the reasonableness of the "search."

The approach taken here will be to discuss briefly the fourth amendment, review traditional doctrines involving school searches,¹⁰ analyze the recent United States Supreme Court decision in *New Jersey v. T.L.O.*,¹¹ describe the relevant issues in a urinalysis search and recommend the standard by which such procedures should be judged.

I. THE FOURTH AMENDMENT

The fourth amendment¹² contains several distinct elements which bear upon any analysis of the legality of a search. The fourth amendment, as applied in federal or state proceedings, cannot be triggered unless the search is accomplished through government action.¹⁴ Furthermore, the victim of the search must possess a reasonable expectation of privacy in whatever is

⁸See, e.g., *In re Gault*, 387 U.S. 1 (1967). There is also some debate as to whether giving a sample of body fluid constitutes self-incrimination at all. Since self-incrimination has usually been said to relate to the compulsion to communicate, the giving of real or physical evidence may not be prohibited by the fifth amendment. See *Schmerber v. California*, 384 U.S. 757 (1966). 8 J. WIGMORE, EVIDENCE §2265 (McNaughton rev. ed., 1961). Eckhardt, *Intrusion Into The Body*, 52 MIL.L.REV. 141, 154 (1971).

⁹See *Goss v. Lopez*, 419 U.S. 565 (1975) (property and liberty interests require procedural due process); Schiff, *The Emergence of Student Rights to Privacy Under the Fourth Amendment*, 34 BAYLOR L. REV. 209, 212 (1982); See generally Mass, *Due Process Rights of Students: Limitations on Goss v. Lopez — A Retreat Out of the "Thicket,"* 9 J.L. & EDUC. 449 (1980).

¹⁰Since there are no reported cases as of the time of this writing on drug urinalysis in the schools, this Comment will, of necessity, have to extrapolate by judging the nature and scope of other school search methods and how the courts have analyzed them.

¹¹105 S.Ct. 733 (1985), (argued March 28, 1984, reargued Oct. 2, 1984).

¹²U.S. CONST. amend. IV:

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.

¹³The fourth amendment was found to apply to the states in *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Ker v. California*, 374 U.S. 23 (1963). The exclusionary rule also applies to the states. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁴See *Burdeau v. McDowell*, 256 U.S. 465 (1921).

searched.¹⁵ Privacy may be thought of as the right to control the “intimacies about ourselves.”¹⁶ However, the privacy expectation must be one which “society is prepared to recognize as reasonable.”¹⁷

Once governmental action is in issue, and a privacy interest recognized, then the inquiry goes to the reasonableness of the search.¹⁸ The prevailing view is that any search conducted without a warrant is unreasonable unless it falls within one of the few recognized exceptions.¹⁹ The test for a warrant has been construed to mean “probable cause” — the belief, by a prudent person, that a crime has been committed and that evidence of the crime will be found on the person or within the article to be searched.²⁰ In broad terms, the exceptions to the warrant-probable cause requirements can be classed as minimally intrusive or can be justified by a balancing test that carefully weighs the privacy interest against the government’s need to search.²¹

II. TRADITIONAL SCHOOL DOCTRINE AND THE FOURTH AMENDMENT

Despite the fact that the fourth amendment refers to “persons,” it frequently has been held inapplicable to students searched by educators.²² This is not surprising considering that juveniles have been treated differently in numerous other contexts of the law. This inequality in treatment has often extended to some of the most fundamental constitutional protections which are taken as sacrosanct when applied to adults.²³ However, as the United States Supreme Court declared in *Tinker v. Des Moines Independent Community School District*, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.”²⁴ The Supreme Court, in finding the first amendment applicable to students, indicated that students are indeed “persons” within the context of

¹⁵C.H. WHITEBREAD, *CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* 102, 109 (1980). See generally W.R. LAFAVE, *A TREATISE ON THE FOURTH AMENDMENT* (1978). 1 W.E. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS*, (2d ed. 1981).

¹⁶Gardner, *Sniffing for Drugs in the Classroom — Perspectives on Fourth Amendment Scope*, 74 NW.U.L.REV. 803, 848 (1980).

¹⁷*Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¹⁸WHITEBREAD, *supra* note 15, at 102.

¹⁹*Katz*, 389 U.S. at 357; *United States v. Place*, 462 U.S. 696, 701 (1983).

²⁰*Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

²¹*Dunaway v. New York*, 442 U.S. 200, 210 (1979); *Terry v. Ohio*, 392 U.S. 1, 20 (1968). See WHITEBREAD, *supra* note 15, at 108, where six search exceptions are listed: (1) incident to lawful arrest, (2) automobile search, (3) hot pursuit or emergency situations, (4) by consent, (5) stop and frisk, or (6) plain view.

²²See generally Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974); Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57 (1976); Trosch, Williams & DeVore, *Public Searches and the Fourth Amendment*, 11 J.L. & EDUC. 41 (1982).

²³Comment, *Public School Searches and the Fourth Amendment*, 9 U. DAYTON L.REV. 521, 523-24 (1984); Buss, *supra* note 22, at 811.

²⁴393 U.S. 503, 506 (1969).

the Constitution.²⁵ In several relatively recent decisions the Court has extended other constitutional protections to juveniles.²⁶

Nevertheless, while recognizing that students are "persons," the Court has stopped short of granting them full protection in the schools. The Court has indicated, for example, that schools are special settings, such that the eighth amendment does not prohibit corporal punishment.²⁷ Similarly, numerous decisions in state and federal courts apply relaxed fourth amendment standards to school searches. But the states compel attendance and association with other students and therefore are under a duty to provide a safe and secure environment.²⁸

To illustrate the dilemma faced by the schools, a few of the more notable cases will be discussed below. In *Doe v. Renfrow*,²⁹ school officials were increasingly concerned about drug use. In response they brought in specially trained dogs to the junior and senior high schools, detained the students and systematically brought the dogs into each classroom. The sniffer dogs approached each student to detect any odor of marijuana. A dog gave an alert that it detected marijuana on the plaintiff. She was required to empty her pockets and purse but the officials failed to find any contraband. She was then escorted to a private room where she was subjected to a nude search which still did not produce any drugs. Officials subsequently discovered that earlier that morning she had been playing with her own dog which was in heat and provided the scent which "alerted" the sniffer dog.³⁰

The federal court found that use of the drug detection dogs did not constitute a search since they were merely checking the air around the students. Furthermore, the alert provided by the dog gave rise to a reasonable suspicion that the student possessed marijuana which justified a search of the pockets and purse. However, the court found that the nude search far exceeded reasonable discretion and that the educators had acted irresponsibly.³¹

²⁵*Id.* at 511.

²⁶See *In re Gault*, 387 U.S. 1 (1967) (when a juvenile is charged with a crime he is entitled to many Bill of Rights protections including notice of the charge, representation by counsel, privilege against self-incrimination and the right to confront the witnesses); *In re Winship*, 397 U.S. 358 (1970) (in criminal charges against a minor the state has the burden of proof beyond a reasonable doubt); *Goss v. Lopez*, 419 U.S. 565 (1975) (students are entitled to procedural due process).

²⁷*Ingraham v. Wright*, 430 U.S. 651 (1977).

²⁸3 W.R. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT 458 (1978).

²⁹475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981) (The Court of Appeals reversed only on the issue of the immunity of the educators and their defense of good faith).

³⁰*Id.* See Comment, *The Need for Judicial Restriction on the Use of Drug Detecting Canines*, 17 AKRON L. REV. 739, 746-49 (1984); Ashman, *Public Schools Canine Sniffing*, 68 A.B.A.J. 1311 (1982); Note, *Searches by Drug Detection Dogs in Pennsylvania Public Schools: A Constitutional Analysis*, 85 DICK. L. REV. 143 (1980); Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. CRIM. L. & CRIMINOLOGY 39 (1980); Ashman, *Student Drug Searches*, 66 A.B.A.J. 386 (1980).

³¹*Doe v. Renfrow*, 631 F.2d at 92-3. The Court of Appeals went on to say that such a search "is a violation of

In *Bellnier v. Lund*,³² someone in the fifth grade class at the Auburn, New York elementary school complained that he was missing three dollars. Teachers searched the coats, desks, bags, personal articles and ultimately took the students to restrooms and made them strip to their undergarments. They never found the money. The court held that the strip search was improper because the teachers lacked individualized suspicion. Such an extensive search needed more particularized facts.³³ Yet it appears that the court would have approved the search as to one particular student without probable cause or a warrant.

In *Zamora v. Pomeroy*,³⁴ the court approved the use of canines in sniffing students' lockers for the presence of marijuana.³⁵ The court reasoned that the school administrators have a duty to maintain an educational atmosphere which necessitates a reasonable right of inspection.³⁶

In *Horton v. Goose Creek Independent School District*,³⁷ a canine contraband detection group came into the school to sniff both lockers and students. The court denounced the search as an "intrusion on dignity and personal security" but founded its main objection on the dragnet approach used by the officials.³⁸ It appears that if there had been individual suspicion, a search without probable cause or a warrant, initiated by sniffer dogs, would have met approval by the court.

Underlying the reasoning of the state and federal courts can be found three major doctrines that have been used to justify a relaxation of fourth amendment requirements. First, the courts have perceived the actions of school officials as taken in place of the students' parents. The doctrine of in loco parentis has been given judicial approval in numerous instances where a search is conducted in a manner that would have been impermissible if imposed upon an adult.³⁹ Several states have, in fact, codified in loco parentis.⁴⁰ At the heart of in loco parentis is the belief that it "is so compelling in light of public necessity and as a social concept antedating the Fourth Amendment, that any action, including a search, taken thereunder upon reasonable suspi-

any known principle of human decency." *Id.* at 93. See O'Daniel, *Juvenile Strip Searches in Public Schools*, 14 CLEARINGHOUSE REV. 826 (1980).

³²438 F. Supp. 47 (N.D.N.Y. 1977).

³³*Id.*

³⁴639 F.2d 662 (10th Cir. 1981).

³⁵See Zirkel & Gluckman, *A Legal Brief: Student Searches*, 65 NASSP BULL., Sept. 1981, at 109.

³⁶*But see* State v. Engerud, 94 N.J. 331, 463 A.2d 934 (1983), cert. granted, 464 U.S. 712 (1983) (Locker searched by educator on anonymous tip was found unreasonable and evidence suppressed in criminal prosecution; death of Engerud prevented hearing by United States Supreme Court).

³⁷690 F.2d 470 (5th Cir. 1982), cert. denied 103 S. Ct. 3536 (1983). See Note, *Drug Use In Schools*, 7 J. Juv. L. 222 (1983).

³⁸*Horton*, 690 F.2d at 482.

³⁹See, e.g., In re G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970); D.R.C. v. State, 646 P.2d 252 (Alaska App. 1982); In re Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).

⁴⁰Schiff, *supra* note 9, at 210.

cion should be accepted as necessary and reasonable.”⁴¹

In *Mercer v. State*,⁴² the court determined that a principal who, acting on a tip that the student possessed marijuana, searched the student’s pockets did so within constitutional limitations. His search was in loco parentis — as if performed by the student’s own parents. Since parental searches clearly do not constitute governmental action the fourth amendment’s protections are not triggered.⁴³

Hybrid reasoning is sometimes used whereby in loco parentis is weighed against fourth amendment restrictions. For example, in *In re W*,⁴⁴ the educator’s search of a locker for marijuana was judged by balancing in loco parentis against fourth amendment standards of reasonableness. Thus, in this vein of analysis the fourth amendment is not rendered inapplicable but is relaxed by a balancing test.⁴⁵

Critics of in loco parentis have argued that the parent-child and teacher-child relationship are quite different and that parents do not actually intend to transfer all of their discretionary powers to the child’s educators.⁴⁶ Furthermore, there is an absence of real protective concern when a teacher searches a student. He is not conducting the search to protect the child but is seeking to protect other students in the school.⁴⁷ Since many states have incorporated the doctrine by statute, there is an underlying contradiction in its application. If in loco parentis excludes fourth amendment protections because it places the teachers in a non-governmental status, then it is indeed odd that governmental action was used to solidify the doctrine.⁴⁸

A second traditional approach used to exclude fourth amendment protections from school searches is the private citizen theory. While it was used less frequently than in loco parentis, and often somewhat confused with the latter, it brought the same result. Here, the educator conducting the search is not necessarily acting in place of the parent but is simply acting as a private citizen.⁴⁹ Since governmental action would not be involved in the activity, fourth amendment restrictions would not apply.⁵⁰

⁴¹People v. Jackson, 65 Misc.2d 909, 913, 319 N.Y.S.2d 731, 735 (1971), *aff’d*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972).

⁴²450 S.W.2d 715 (Tex. Civ. App. 1970).

⁴³*Id.*; See LAFAYE, *supra* note 28, at 454.

⁴⁴29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

⁴⁵Buss, *supra* note 22, at 768-69.

⁴⁶*Id.* at 769 n. 191.

⁴⁷*Id.* at 768.

⁴⁸Comment, *supra* note 23, at 527. See also Note, *Balancing In Loco Parentis and the Constitution*, 26 U. FLA. L. REV. 271 (1974); Note, *Search and Seizure — School Officials’ Authority to Search Students Is Augmented by the In Loco Parentis Doctrine*, 5 FLA. ST. U.L. REV. 526 (1977).

⁴⁹Buss, *supra* note 22, at 766.

⁵⁰See *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969).

The major fallacy underlying the private citizen approach is that the educator derives the very authority by which he conducts the search from the state. His very presence in the school is in the capacity of a government employee.⁵¹ Furthermore, the United States Supreme Court in *Camara v. Municipal Court*⁵² gave additional recognition to the concept that governmental action for fourth amendment purposes need not be limited to searches by police authorities. In fact, minimally intrusive searches of dwellings by health officers were held to require warrants.⁵³

The third common doctrine that has been extensively used to justify relaxation of fourth amendment protections incorporates the concept that the schools are special settings. As a unique environment the school gathers immature individuals who may not be capable of self-restraint of their behavior and who are mandated to attend by state law. The situation requires that school authorities be given broad powers to manage these juveniles.⁵⁴ Thus, fourth amendment protections must be relaxed, but not disregarded. Given the schools' special environment, searches need not be done under traditional standards of warrants and probable cause. Rather, the test has become one of reasonableness or "reasonable suspicion."⁵⁵ Among the state courts and federal courts, there has been a variety of attempts to standardize the reasonable suspicion test.⁵⁶ As will be discussed below, the United States Supreme Court in *T.L.O.* endorsed a modified approach to reasonableness.

III. NEW JERSEY *v.* T.L.O.

This Supreme Court decision represents its most comprehensive attempt to deal with school searches. The incident which gave rise to the litigation began with a teacher's observation of Terry Lee Owen and another student smoking in the restroom at Piscataway High School in Piscataway, New Jersey.⁵⁷ They were brought to the Principal's office where Assistant Vice Prin-

⁵¹Buss, *supra* note 22, at 766.

⁵²387 U.S. 523 (1967).

⁵³While the Court required probable cause to obtain the warrant the standard could be met by simple legislative recognition that violations were likely to be found. *Id.* at 539.

⁵⁴Note, *Constitutional Law — Search and Seizure — School Officials May Conduct Student Searches Upon Satisfaction of Reasonableness Test in Order to Maintain Educational Environment (In re T.L.O., N.J. 1983)*, 14 SETON HALL 738, 748-49 (1984).

⁵⁵LAFAVE, *supra* note 28, at 456-57.

⁵⁶*See, e.g.,* Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984); Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984); Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982), cert. denied 103 S.Ct. 3536 (1983); Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); State v. Young, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039 (1975). *But see* State v. Mora, 307 So. 2d 317 (La.), vacated, 423 U.S. 809 (1975), on remand, 330 So. 2d 900 (La. 1976) (Full fourth amendment protections and the exclusionary rule were extended to school search situation).

⁵⁷*T.L.O.*, 105 S.Ct. at 736; *See also* Stewart, *And in Her Purse the Principal Found Marijuana*, 71 A.B.A.J., Feb. 1985, at 50, 51.

principal Theodore Choplick questioned the girls. While Owen's companion admitted violating school rules, Owen denied that she had been smoking and claimed that she did not smoke at all.⁵⁸

Mr. Choplick asked Owen to come into his office where he demanded to see her purse. Upon opening the purse, he saw a pack of cigarettes and reached in for them. In the process, he saw rolling papers which he associated with marijuana use. With additional suspicion now aroused he proceeded to search the purse thoroughly. He found a pouch of marijuana, several one-dollar bills, a card that listed students who owed her money and two letters implicating Owen in marijuana dealing. Choplick then called Owen's parents and the police. At police headquarters with her mother, Owen confessed to selling marijuana at the school.⁵⁹

The state subsequently brought delinquency charges against Owen on the basis of her confession and the evidence seized by Mr. Choplick. The juvenile court denied her motion to suppress the evidence which she claimed had been unlawfully seized. While recognizing that the fourth amendment applies to school searches, the juvenile court held that a school official only needs "reasonable suspicion" that a crime was being committed or that a school regulation needed enforcement in order to conduct a lawful search.⁶⁰ Since Choplick's original decision to open the purse was justified, his continued search after seeing evidence associated with marijuana use was also justified.⁶¹

Ultimately, the Supreme Court of New Jersey reversed the judgment and ordered the evidence suppressed. It agreed with the lower courts that a warrantless search by an educator does not in itself violate the fourth amendment. It also agreed that a school official only needs "reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order."⁶² However, the court found, with two justices dissenting, that Choplick's search of the purse was unreasonable. The majority believed that the contents of Owen's purse were irrelevant to the question of whether she had been smoking in the bathroom since possession of cigarettes did not constitute a violation of school rules. Furthermore, even if the initial search was justified, continued probing after the discovery of the cigarettes and the rolling papers was unreasonable.⁶³

The original petition by the state for certiorari only posed the question whether the exclusionary rule should "operate to bar consideration in juvenile

⁵⁸*T.L.O.*, 105 S.Ct. at 736-37.

⁵⁹*Id.* at 737.

⁶⁰*Id.*; See *State ex. rel. T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327 (1980).

⁶¹*T.L.O.*, 105 S.Ct. at 737.

⁶²*Id.* at 738; See *State ex. rel. T.L.O.*, 94 N.J. 331, 346, 463 A.2d 934, 941-42 (1983).

⁶³*State ex. rel. T.L.O.*, 94 N.J. at 347, 463 A.2d at 942.

delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers."⁶⁴ However, the Supreme Court ordered reargument on the question "Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?"⁶⁵

The Court's plurality decision⁶⁶ reversed the New Jersey Supreme Court and found that the search of Owen's purse was indeed reasonable. The Court's opinion substantially agreed with the New Jersey court's test for reasonableness of the search but instead attacked the application of the test to the facts of the case:

We believe that the New Jersey court's application of the standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness. Our view of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.⁶⁷

In reaching its holding, the Court provided an extensive review of school search doctrine. In particular, Justice White attacked the assertions that the fourth amendment does not apply to school officials because they act in loco parentis or in a private capacity. He emphasized that the fourth amendment's prohibition on unreasonable searches and seizures applies without question to school officials.⁶⁸ Quoting from *Camara v. Municipal Court*, Justice White asserted that "the basic purpose of the Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."⁶⁹ Continuing his attack, Justice White indicated that "school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."⁷⁰

The Court, however, while finding the fourth amendment applicable to school officials, stopped short of requiring probable cause, warrants or both for searches of public school students. Instead, the Court recognized, in part, the traditional doctrine that considers schools a unique environment requiring a relaxation of fourth amendment protections. The Court asserted that "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on

⁶⁴*T.L.O.*, 105 S.Ct. at 738.

⁶⁵*New Jersey v. T.L.O.*, 104 S.Ct. 3583 (1984). (Blackmun, Stevens, Brennan and Marshall, JJ., dissenting).

⁶⁶White, J., delivered the opinion of the Court but Powell, J., and Blackmun, J., each wrote concurring opinions (Brennan, Marshall and Stevens, JJ., dissenting).

⁶⁷*T.L.O.*, 105 S.Ct. at 745.

⁶⁸*Id.* at 739-41.

⁶⁹*Id.* at 740 (quoting *Camara v. Municipal Court*, 387 U.S. at 528).

⁷⁰*Id.* at 741.

school grounds.”⁷¹ Thus, the Court recognized that public school students have privacy interests worthy of protection and that an educator’s search is indeed governmental action.⁷² Once these two elements are found, the query must then focus upon whether the search in question is “reasonable.”⁷³ Furthermore, the Court found that “‘probable cause’ was not an irreducible requirement of a valid search.”⁷⁴ Therefore, as in a number of other situations, the Court recognized the legality of a search based only on suspicion, while “reasonable,” but not reaching the level of probable cause.⁷⁵

The Court, therefore, fashioned a test for reasonableness in school search situations. First, the search must be justified at its inception. That is, that there will be reasonable grounds for suspecting that the search will reveal evidence that the student “violated or is violating the law or rules of the school.”⁷⁶

The second prong of the test is to determine if the search is “reasonably related in scope to the circumstances which justified interference in the first place.”⁷⁷ To gauge the scope of the search, a query must be made along two somewhat vague parameters. First, the measures adopted must be related to the objectives of the search. Second, the search must not be excessively intrusive in light of the student’s age, sex and the nature of the infraction.⁷⁸

The Court limited its holding to a finding that the search of Owen’s purse was valid and left several issues unresolved. The Court warned that it was not addressing whether a schoolchild has a legitimate expectation of privacy in lockers or desks⁷⁹; what standard should be used for “assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies”⁸⁰; whether the “exclusionary rule applies to the fruits of unlawful searches conducted by school authorities”⁸¹; and, whether “individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.”⁸²

In applying its own standard of reasonableness, the *T.L.O.* Court examined the sequences of the search of Owen’s purse. In being told by a teacher that Owen had been smoking, Mr. Choplick’s initial search of the purse for

⁷¹*Id.* at 742.

⁷²*Id.* at 743.

⁷³C.H. WHITEHEAD, *supra* note 15, at 109. See generally, W.R. LAFAYE, *supra* note 15.

⁷⁴*T.L.O.*, 105 S.Ct. at 743.

⁷⁵*Id.*

⁷⁶*Id.* at 744.

⁷⁷*Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

⁷⁸*Id.*

⁷⁹*Id.* at 741 n.5.

⁸⁰*Id.* at 744 n.7.

⁸¹*Id.* at 739 n.3.

⁸²*Id.* at 744 n.8.

cigarettes was reasonable. Reaching in to grasp the cigarettes was a natural reaction which then revealed evidence providing suspicion that marijuana would be found by further inquiry. "The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary 'nexus' between the item searched for and the infraction under investigation."⁸³ The Court further explained that "reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . .'"⁸⁴

Justice Blackmun, concurring, felt it necessary to qualify the *T.L.O.* balancing test to justify a relaxation of fourth amendment protections. He warned that the tone of the *T.L.O.* Court's opinion implied that balancing tests were the rule rather than the exception. He would have placed greater emphasis on the school as a special and unique setting that simply made warrants and reasonableness based on probable cause unworkable. Therefore, he would have likened the school search to special circumstances such as is found in "stop and frisk" cases.⁸⁵

In their dissent to the *T.L.O.* holding, Justices Stevens, Marshall and Brennan, in part, expressed a concern for possible abuses of the reasonableness test. They fear that full searches for very trivial infractions can result in serious intrusions into a student's privacy.⁸⁶ Justices Stevens and Marshall would use a tougher standard for permissibility of student searches. Thus, they would only allow a search when the educator has reason to believe that the search "will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process."⁸⁷

Justice Brennan would provide an even stricter test. He expressed concern that the *T.L.O.* holding would invite a "free-for-all."⁸⁸ He agrees that the school environment is a unique situation which would provide an exception only to the warrant requirement. He maintains that educators should still be held to a standard of probable cause before being permitted to conduct student searches.⁸⁹

Overall, the justices are unanimous that the fourth amendment applies to the schools, that when educators conduct a search they are acting in the name of the state, that students have recognizable privacy interests (at least to their persons) and that warrants need not be obtained to conduct a valid search. On-

⁸³*Id.* at 746.

⁸⁴*Id.* (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)).

⁸⁵*Id.* at 748-50.

⁸⁶*Id.* at 759.

⁸⁷*Id.* at 763.

⁸⁸*Id.* at 753.

⁸⁹*Id.*

ly Justice Brennan would hold the school employees to a standard of probable cause. The standard of reasonableness to be followed, even if using Justices Stevens' and Marshall's slightly more rigorous approach, still leaves many questions unsettled. It seems that the private action and in loco parentis doctrines have been put to rest. However, many of the state and federal courts were already employing various degrees of a "reasonable suspicion" standard.⁹⁰ The effect of the *T.L.O.* holding is to bring into closer focus a balancing of the student's privacy interests against the state's interest in safety and discipline in the schools. Future litigation will progress on a case by case basis as lawyers and judges grapple with the blurred parameters of reasonableness set out by the *T.L.O.* court.

IV. SEARCHING FOR DRUGS WITH URINALYSIS

One of the first cases that may explore the limits of the *T.L.O.* test is pending in the United States District Court, Western Division, in Arkansas. *Ezell v. Ford, sub nom, Anable v. Ford*,⁹¹ as mentioned in the discussion above, involved the implementation of urinalysis testing on students suspected of taking drugs. It is by now clear that such testing by school employees is governmental action for purposes of the fourth amendment. Therefore, the two remaining queries must explore whether a student has a privacy interest in his own body fluids and whether any standard of reasonableness would permit or justify this type of search.

The privacy issue appears to be the least challenging aspect of the inquiry. The Supreme Court found a recognizable privacy interest in the contents of T.L.O.'s purse.⁹² Other courts have, for example, recognized privacy interests in students being forced to remove all clothing;⁹³ in the removal of part of the clothing or a searching through it;⁹⁴ and, in some cases, in students' lockers.⁹⁵

It is, at first, tempting to look at whether privacy interests in body fluids have been recognized in adult search cases. However, the volumes of litigation on school searches indicate caution is wise on this issue. As Justice Powell indicates in his concurring opinion in *T.L.O.*: "It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally."⁹⁶ Many commentators on student privacy would find a clearly recognizable privacy interest in the chemical content of a student's urine. William G. Buss, in his seminal article on the fourth amendment's applicability

⁹⁰See *supra* note 56.

⁹¹See *supra* note 4.

⁹²*T.L.O.*, 105 S.Ct. 741-42.

⁹³See *supra* note 29.

⁹⁴See *supra* note 56.

⁹⁵See *supra* note 36.

⁹⁶*T.L.O.*, 105 S.Ct. at 747.

to the public schools, indicates that privacy interests are not factual expectations but are instead what a person ought to be entitled to expect.⁹⁷

Martin R. Gardner, in his comprehensive work on fourth amendment perspectives on canine use in the schools, gives specific examples of privacy interests: "excretory functions and aspects relating thereto are considered especially intimate such that intrusions into one's privacy in these areas is a source of extreme distress and indignity."⁹⁸ Professor Gardner indicates that the fourth amendment carries with it certain implied "subrights."⁹⁹ One of these "subrights" is the right to be free from "indecent intrusions."¹⁰⁰

Considering the types of privacy interests recognized by the courts in prior school search cases, it will be assumed for the purposes of the analysis below that a student has a recognizably strong expectation of privacy in the chemical contents of his body fluids.

There remains, however, the need to explore the reasonableness standards that may be applicable to a urinalysis test in the public school. First, a few words are in order to describe the mechanics of a urinalysis for purposes of determining the scope of such a search.

A urinalysis is not the type of test that can be administered for instantaneous analysis when the presence of drugs (usually marijuana) is in issue. While simple urine tests have been administered with instantaneous results at doctors' offices for many years, the detection of drugs involves a substantially greater degree of scientific sophistication available only at testing laboratories.¹⁰¹

A person must discharge urine in a vessel which, at times, is required to be witnessed¹⁰² to avoid possible tampering and other evidentiary problems.¹⁰³ The vessel is sent to a laboratory which will usually conduct one of two types of tests: gas chromatography with mass spectrometry or gas chromatography with flame ionization detector.¹⁰⁴ The presence of many drugs in urine are difficult to detect and, consequently, the complex tests may increase chances for error.¹⁰⁵ Furthermore, there is still a possibility that the process (as to its accu-

⁹⁷Buss, *supra* note 22, at 763.

⁹⁸Gardner, *supra* note 16, at 849.

⁹⁹*Id.* at 844.

¹⁰⁰*Id.*

¹⁰¹See generally Wiesner, *Urinalysis: Defense Approaches*, 15 *ADVOCATE* 114 (1983). (Excellent resource for detailed scientific aspects of urinalysis).

¹⁰²See *supra* text accompanying note 4.

¹⁰³Since the sample must be sent to a lab for analysis, it raises a host of possible evidentiary challenges. For example, chain of custody, examination of lab technicians, demand for production of the sample for own analysis, expert witnesses, etc.

¹⁰⁴Wiesner, *supra* note 101, at 114-17. See 22 *AM. JUR.*, P.O.F. *Instrumental Analysis* §5.5 (Supp. 1984).

¹⁰⁵Wiesner, *supra* note 101, at 119-21.

racy for detecting drugs) may be challenged as “novel scientific” evidence.¹⁰⁶ However, the admissibility of the results of the testing in the criminal litigation context is gaining recognition. A positive test result may be considered circumstantial evidence of possession.¹⁰⁷ At best, the test creates a rebuttable presumption.¹⁰⁸

In a non-judicial setting, it is difficult to estimate how much weight is given to such testing. If a student is tested positively but only school disciplinary action is taken, there will most likely be little opportunity for challenging the results. Most parents would not have the resources or inclination to invoke such a challenge.¹⁰⁹ Thus, the possibility of abuse or error would probably increase if the test and all of its evidentiary ramifications were not subjected to the rigors of trial.

Returning now to the question of the reasonableness for the use of such a test in the public schools, the urinalysis “search” will be plugged into the *T.L.O.* Court’s standard. The first prong of the *T.L.O.* analysis, as discussed above, is to determine if the search is justified at its inception; that is, where there are reasonable grounds for suspecting that the search will reveal evidence that the student “violated or is violating either the law or rules of the school.”¹¹⁰

“Reasonable suspicion” is not a new concept and has been applied by many of the state and federal courts who have heard school search cases.¹¹¹ Nevertheless, the concept escapes clear definition. W.R. LaFave indicates that the reasonable suspicion necessary for the search of a student is that which is “a quantum of evidence somewhat short of that which is needed for the usual police search.”¹¹² The concept implicitly incorporates “good faith” on the part of the educator and practically mandates that the reasonableness of the suspicion to be analyzed on a case by case common sense approach.

By way of illustration, Martin Schiff discusses the Georgia court’s finding that reasonable suspicion was the perception (by the educator) of an “obvious consciousness of guilt.”¹¹³ On the other hand, there was no justifiable reasonable suspicion in a student suspected of being a drug dealer in his making two quick trips to the bathroom.¹¹⁴

¹⁰⁶*Id.*

¹⁰⁷*See* United States v. Yanez, 89 N.M. 397, 553 P.2d 252 (1976).

¹⁰⁸Wiesner, *supra* note 101, at 125.

¹⁰⁹*See supra* note 9.

¹¹⁰*T.L.O.*, 105 S.Ct. at 744.

¹¹¹*See* LAFAVE, *supra* note 28, at 456-57; and *see supra* note 56.

¹¹²LAFAVE, *supra* note 28, at 456.

¹¹³Schiff, *supra* note 9, at 215 (quoting State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975)).

¹¹⁴Schiff, *supra* note 9, at 215 (discussing People v. D., 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974)).

To gain some feel for this elusive concept, it is helpful to examine the *T.L.O.* Court's perception of how a search is justified at its inception. Owen was seen by a teacher smoking in the bathroom. Hence, this was reasonable enough suspicion for Mr. Choplick to initiate the search of her purse. Next, his discovery of rolling papers gave additional justification to a full blown search of the purse.¹¹⁵ The Court indicated that such suspicions arise out of a "common-sense conclusion about human behavior" upon which "practical people — including government officials — are entitled to rely."¹¹⁶

Assuming for the purposes of discussion that an educator had reasonable suspicion that a student had taken drugs, could he properly demand a urinalysis? The second prong of the *T.L.O.* Court's test is then triggered: that the search be reasonably related in scope to circumstances that justified interference in the first place.¹¹⁷ This second prong of the test has, as discussed above, two distinct steps. First, an analysis must be made as to whether the measures adopted (urinalysis) are reasonably related to the objectives of the search¹¹⁸ (presence of drugs).

It can be argued that a urinalysis clearly is related to a determination of whether a student has ingested drugs. Urinalysis would simply involve a chemical process to detect traces of the prohibited substance. The reliability of the tests are another subject and has been alluded to earlier. For the sake of discussion, it will be assumed that the test is reliable enough to sustain evidentiary challenges. Bridging this assumption, the last prong of the *T.L.O.* Court's standard will be addressed.

The search must not be excessively intrusive in light of the student's age and sex and the nature of the infraction.¹¹⁹ The student's age and sex do not appear to be an obstacle to the urinalysis if all other criteria for the search have been satisfied. Furthermore, the nature of the infraction would not seem to be troublesome. Drugs in the schools have received great notoriety and are of grave concern. The Supreme Court has recognized this and it is the very substance of the incident that gave rise to the *T.L.O.* litigation.¹²⁰

The intrusiveness of the search, however, deserves careful focus. It is already clear that students have legitimate expectations of privacy and would probably include the privacy of the content of body fluids, but the urinalysis goes beyond simple chemical analysis. It is the act of having to deliver up the sample, sometimes in front of a witness, that must also be considered. To ob-

¹¹⁵*T.L.O.*, 105 S.Ct. at 747.

¹¹⁶*Id.* at 746 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

¹¹⁷*Id.* at 744.

¹¹⁸*Id.*

¹¹⁹*Id.*

¹²⁰*Id.* at 737.

tain a feel for the extent of intrusiveness it is helpful to view other situations where body fluids are examined.

In some prisons, inmates are tested for drug ingestion. In *Ferguson v. Cardwell*,¹²¹ the court found that blood may be drawn from prisoners suspected of taking drugs if no force is used, the facilities are sanitary and if done by medical personnel. However, in *Storms v. Coughlin*,¹²² the United States District Court found that random urinalysis tests at the prison would be permissible on less than probable cause since body cavity searches need not rise to probable cause standards.¹²³ While public school students are not equivalent to prisoners, such cases indicate that at least in certain situations body fluid analyses are permissible as against adults without warrants or probable cause, but only under extreme conditions.

In the realm of drunk driving litigation, urinalysis is permitted without necessitating warrants. For the most part, these situations involve direct police involvement and such tests are often mandated by statute under the concept of implied consent.¹²⁴ However, in *Briethaupt v. Abram*,¹²⁵ Chief Justice Warren (dissenting) indicated that:

We should, in my opinion, hold that due process means at least that law-enforcement officers in their effort to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.¹²⁶

In *Schmerber v. California*,¹²⁷ the issue concerned the drawing of blood of someone suspected of intoxication after a serious car accident. While the court ultimately found the blood sample and resulting positive reading as valid, some clear remarks from the court assist in judging the degree of intrusiveness involved in body fluid analyses. The *Schmerber* Court found no self-incrimination problems since the blood was neither testimony nor communication. However, before approving the body fluid extraction, the Court insisted that such intrusions cannot be left to the standard of "mere chance" that evidence of intoxication would be found. Instead, the court required a "clear indication that evidence will be found."¹²⁸ There is no doubt that the Court considered any intrusion into the body for evidence an extremely serious undertaking.

¹²¹392 F. Supp. 750 (D. Ariz. 1975).

¹²²600 F. Supp. 1214 (S.D.N.Y. 1984).

¹²³Here the court relied on *Bell v. Wolfish*, 441 U.S. 520 (1979).

¹²⁴See, e.g., OHIO REV. CODE ANN. §4511.191(A) (Baldwin 1979).

¹²⁵352 U.S. 432 (1957).

¹²⁶*Id.* at 442.

¹²⁷384 U.S. 757 (1966).

¹²⁸*Id.* at 770.

A final area that may be viewed for guidance is the use of urinalysis in the military. The armed forces use civilian standards to judge permissibility of the extraction of blood or urine and any subsequent use of it in formal proceedings. The military has collected urine samples as part of its health and welfare program. However, the samples are taken under strict chain of custody procedures enabling use of the evidence against the serviceman in the event drug presence was detected.¹²⁹

Arguments against such tactics have been forcefully voice in the law journal published by the U.S. Army Judge Advocate General's Corps, *The Advocate*. Since military personnel are compelled and conditioned to obey orders, they are in an inferior position to resist demands to produce urine samples¹³⁰ (not entirely unlike public school students compelled to attend under compulsory education laws). Nevertheless, they are entitled to some fourth amendment protections. Assuming that an expectation of privacy exists in a servicemember's body fluids, then, as in the school situation, the permissibility turns upon the reasonableness of the search. The extent of the privacy interest bears upon the question of reasonableness:

The primary privacy interest at issue in the context of taking urine samples is in protecting body fluids contained within one's person from seizure and chemical analysis. An intrusion into the body is recognized as being an intrusion upon the integrity and dignity of a human being. Body fluids such as urine are closely tied to bodily functions which are considered to be particularly intimate.¹³¹

Finally, it is argued that while drugs in the military are a major problem, there are various other methods available. To detect the presence of drugs, lockers may be searched, barracks inspected and the use of drug detection dogs may be employed. In considering the wide range of alternative measures at the commander's disposal, it is "difficult to show why urinalysis should be permitted, given the degree of intrusion involved."¹³²

It is clear that a urinalysis represents a significant degree of intrusion into a person's expectation of privacy. As demonstrated above, in other contexts such as in prison, DWI investigations and the military, intrusions into the body for evidence is regarded as one of the most severe shocks to individual privacy interests. While the courts have not flatly prohibited such intrusions, they review their use with great care.

Commentators and judges of the schoolhouse search cases also bring

¹²⁹See Maizel, *Urinalysis: Search and Seizure Aspects*, 14 *ADVOCATE* 402 (1982).

¹³⁰*Id.* at 406.

¹³¹*Id.* at 410. See also *Cupp v. Murphy*, 412 U.S. 291 (1973).

¹³²Maizel, *supra* note 129, at 418.

some guidance to the inquiry into the degree of allowable intrusiveness. In commenting on a strip search of a student in *M.M. v. Anker*,¹³³ the court indicated that "when a teacher conducts a highly intrusive invasion such as a strip search in this case, it is reasonable to require that probable cause be present."¹³⁴ In *Tarter v. Raybuch*,¹³⁵ the court generally discussed the limitations on school searches and agreed that, by way of example, school officials would have no authority to conduct a body cavity search to check for contraband.¹³⁶

It appears, then, that a determination of the degree of intrusiveness is a balancing of interests. This leads, in almost circular reasoning, back to the first prong of the *T.L.O.* test where there must be reasonable grounds for suspecting that the search will reveal evidence. What is "reasonable grounds for suspecting" turns partly on the degree of intrusiveness. Making full circle, the degree of intrusiveness is judged, among other things, upon the strength of the "reasonable grounds for suspecting" the evidence.

This is not to say that the test is unworkable, but rather that it requires an almost simultaneous weighing of factors. A step by step standard would be almost impossible to develop because of a shading of the elements of the *T.L.O.* test. While the *T.L.O.* test is an articulation of an approach to the problem of school searches, there will be many years of continued case by case litigation before the standard for reasonableness of a search can be brought into sharper focus.

V. CONCLUSIONS

Given the vagueness of the *T.L.O.* test, it is anything but clear as to how the courts will handle urinalysis in the schools. To summarize, a student has a recognizable privacy interest in his body fluids and searches by educators are governmental searches,¹³⁷ which then leads to the test for reasonableness of the urinalysis. It appears that under certain circumstances, a request for a drug search urinalysis could be justified at its inception (by reasonable grounds for suspecting drug ingestion), that the scope of the urinalysis would appear reasonable as related to the objectives of the search and that the student's age and sex may not present obstacles for the search. However, the degree of intrusiveness that a urinalysis represents is the very heart of the issue and it is upon this element of the *T.L.O.* test that it predictably will fail.

The greater the indignity of the search and as the degree of intrusion ex-

¹³³607 F.2d 588 (2d Cir. 1979).

¹³⁴*Id.* at 589.

¹³⁵742 F.2d 977 (6th Cir. 1984).

¹³⁶*Id.*

¹³⁷Where searches are conducted by or with the police with a dual goal of law enforcement and school discipline, the courts have been more willing to require full fourth amendment protection. See, e.g., *W.R. LAFAYE*, *supra* note 15, at 180 n. 21.1 (Supp. 1984); *M.J. v. State*, 399 So.2d 996 (Fla. App. 1981); and *Gardner*, *supra* note 16, at 817.

tends into the realm of intimate privacy, the more likely the courts will require a stricter standard before recognizing its validity. As the court said in *Anker*, "as the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context."¹³⁸

If, for the sake of argument, circumstances existed that would justify urinalysis use in the schools, does it make any difference whether a student is coerced by threat of suspension or expulsion or is asked to voluntarily submit to the test? In the Arkadelphia schools, the students either had to submit or face expulsion. It appears clear that in this situation the school must meet fourth amendment standards.

If a student is truly capable of rendering consent then he may forfeit his fourth amendment protection.¹⁴⁰ However, it is questionable that a student's consent to a process that may lead to disciplinary, delinquency proceedings or both is ever free of coercion. Students are within an authoritarian and intimidating atmosphere when confronted by school administrators. Combined with a student's lack of maturity, such "consent" should be viewed with suspicion.¹⁴¹ In *Bilbrey v. Brown*,¹⁴² the court found that a fifth grader's consent to a search was invalid as a matter of law because of coercive circumstances.¹⁴³

If school authorities employ drug urinalysis tests and, as predicted, it fails the *T.L.O.* test for reasonableness, a student's remedies are still limited.¹⁴⁴ If a situation arises in the school environment that is of such gravity that a highly intrusive search, urinalysis, is thought to be necessary,¹⁴⁵ it is recommended that the test used to determine reasonableness be one of probable cause. Even then, considering the alternative means available for controlling drugs such as locker searches, detection dogs, clothing searches and the like, it may still fail to satisfy judicial scrutiny. Whether urinalysis becomes widely implemented in the schools will depend greatly upon how the courts interpret the *T.L.O.* test

¹³⁸*Anker*, 607 F.2d at 589.

¹³⁹See *supra* note 4.

¹⁴⁰See, Buss, *supra* note 22, at 776-77; *State v. Stein*, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970); and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

¹⁴¹W.R. LAFAVE, *supra* note 15, at 471.

¹⁴²738 F.2d 1462 (9th Cir. 1984).

¹⁴³*Id.* at 1464.

¹⁴⁴In a delinquency proceeding, the student may seek the protection of the exclusionary rule. However, the question of whether evidence, seized illegally by school officials, can be suppressed via the exclusionary rule is an open one. See, *T.L.O.*, 105 S.Ct. at 739 n.3. In civil proceedings, a student may attempt to sue for violations of civil rights under 42 U.S.C. §1983 (1982). See *Wood v. Strickland*, 420 U.S. 308 (1975); *Potts v. Wright*, 357 F. Supp. 215 (E.D. Pa. 1973); and *O'Daniel*, *supra* note 31, at 826.

¹⁴⁵While the *T.L.O.* Court indicated that its holding does not reach the question of whether individualized suspicion is an essential part of the reasonableness test, it indicated that in certain circumstances outside the school, there is no strict constitutional requirement of such. But it cautions that individualized suspicion has only been dispensed with when the search was minimally intrusive. *T.L.O.*, 105 S.Ct. at 744 n.8.

and how closely they examine the degree of intrusiveness in relation to the grounds justifying a search at its inception. Unless we are prepared to admit that schools are analogous to prisons, then school authorities will have to forego the use of this highly intrusive testing technique.

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