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Drug Testing in Public Schools: Can It Survive the "Reasonableness" Test?

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DRUG TESTING IN PUBLIC SCHOOLS: CAN IT SURVIVE THE "REASONABLENESS" TEST?

I. INTRODUCTION

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[1]

Although this ideal was the backbone of judicial regulation in the area of student rights during the 1930's and 1940's, a recent trend in the case law has created an uneasiness about the rights of students.[2] This new concern has focused on whether drug testing should be permitted in public schools. The trend, culminating in the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*,[3] has resulted in a lower standard to which school officials must adhere when imposing regulations on students' constitutional freedoms.[4] Previously, school officials could only regulate constitutional freedoms if they "materially and substantially" interfered with the requirements of appropriate discipline in the operation of the school.[5] This was the test enunciated by the Court in *Tinker v. Des Moines Independent Community School District*.[6] The Supreme Court based its decision in *Tinker* on the belief that students possess fundamental rights which the state must respect. The Court in *Tinker* reasoned that a student's first amendment rights cannot be restricted unless they "materially and substantially" interfere with the operation of the school.[7] Since *Tinker*,

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding that under the first amendment a student may not be compelled to salute the flag).

2. Garner, *The Fourth Amendment and Mandatory Drug Testing of Students: Phantom Protection?*, N.Y. ST. B.J., Oct., 1986 at 41, 42.

3. 484 U.S. 260 (1988).

4. *Id.* at 273 (*Hazelwood* involved censorship of a school newspaper).

5. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969) (holding that students could wear symbolic armbands as long as they did not disrupt classes or infringe on rights of other students); *see also* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966) (first application of materiality test).

6. 393 U.S. at 503.

7. *Id.* at 505.

this standard has been used in relation to many issues in the schools, including dress codes[8] and free expression.[9]

The new standard promulgated in *Hazelwood* requires only that the scope of the restriction on a student's constitutional rights be reasonably related to the circumstances which justify the rule.[10] The *Hazelwood* Court stated: "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[11]

However, it is not clear whether the *Hazelwood* standard will apply to all constitutional challenges in schools or only to those which involve school-sponsored activities. The cases in which the Supreme Court has discussed the standard[12] have arisen out of situations in which the actions of school officials were viewed by students as violations of their constitutional rights.

This comment will trace the development of the newest standard, its current applications, and the likely ramifications of those rulings on students' rights with regard to drug testing. It will begin with a discussion of the traditional test used by the Supreme Court before the *Hazelwood* decision. The comment will then look at the shifting of the test towards one of "reasonableness," and the Supreme Court's affirmation of that test in *Hazelwood*. Finally, it will apply the "reasonableness" test to the question of drug testing in public high schools.

II. BACKGROUND

A. *Traditional Tests: Pre-Hazelwood School District v. Kuhlmeier*

Until *Hazelwood School District v. Kuhlmeier*,[13] the landmark decision in the area of student rights was *Tinker v. Des Moines Independent Community School District*.[14] *Tinker* determined that, although the constitutional rights of students are different in school than

8. Stull v. School Bd. of W. Beaver Junior-Senior High School, 459 F.2d 339, 345–46 (3d Cir. 1972), *rev'd*, 517 F.2d 600 (3d Cir. 1975) (holding that dress codes governing length of hair were unconstitutional in the absence of any evidence of disruption, health hazard, or effect on academic accomplishment); *see also* Miller v. Gillis, 315 F. Supp. 94, 100 (N.D. Ill. 1969) (striking down hair length regulation).

9. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (upholding disciplining of student for using sexually explicit language in a speech at a school assembly).

10. *Hazelwood*, 484 U.S. at 273.

11. *Id.*

12. *See id.*; Perumal v. Saddleback Valley School Dist., 109 S. Ct. 327 (interim ed. 1988) (denying certiorari to lower courts decision denying students the right to advertise in a public school for a non-school sponsored prayer group which met during the lunch hour).

13. 484 U.S. 260 (1988).

14. 393 U.S. 503 (1969).

outside of the school, those rights still cannot be suspended except when the exercise of such rights will "substantially interfere with the work of the school or impinge upon the rights of other students."[15]

In *Tinker,* high school students wore black armbands to school to protest the war in Vietnam.[16] When told to remove the armbands, the students refused and were sent home under suspension.[17] The plaintiffs contended that their suspension from school for wearing black armbands violated their first amendment rights.[18] The Court ruled that "school officials do not possess absolute authority over their students" because students are still "persons" under the Constitution.[19] The *Tinker* Court further stated that students have fundamental rights which the state must respect.[20] The Court reasoned that the symbolic wearing of armbands is akin to pure speech, which cannot be restricted unless it "materially and substantially" interferes with the operation of the school.[21] The Supreme Court concluded that, in the absence of a specific showing of constitutionally valid reasons to regulate the students' speech, those students are entitled to the free expression of their views.[22] Since the record "[did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," the suspension of the students was constitutionally impermissible.[23]

This intermediate level of scrutiny[24] was consistent with then current case law, where the Supreme Court sought to protect constitutional rights, but at the same time did not want to impose the strictest level of review on state legislation.[25] Applying this level of scrutiny, the school must show: (1) that control of the students' behavior is constitutionally valid, and (2) that the regulations imposed have a substantial

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15. *Id.* at 509.
16. *Id.* at 504.
17. *Id.*; *see also* U.S. CONST. amend. I.
18. *Tinker,* 393 U.S. at 511.
19. *Id.*
20. *Id.*
21. *Id.* at 513.
22. *Id.*
23. *Id.* at 514.
24. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that gender classifications must serve important governmental objectives and must be substantially related to achievement of those objectives).
25. *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (finding unconstitutional a law criminalizing the distribution of contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding unconstitutional a law which criminalized the distribution of information concerning birth control). These cases, although not specifically stating the intermediate level of scrutiny test, represent the trend of the Court to provide greater constitutional protection for personal liberties.

relationship to the behavior with which the school is concerned.[26]

Lower courts have applied this standard to drug abuse evaluations in public schools by examining alleged violations of a student's right to privacy.[27] In *Merriken v. Cressman*,[28] a school board proposed a drug abuse prevention program which was designed to aid the school district in identifying potential drug abusers at the junior high level.[29] The program made use of a questionnaire which inquired directly as to individual family relationships and the interaction of the child with his parents.[30] The tests were to be interpreted by teachers and others who had little psychological training.[31] These personnel were then going to determine which students were potential drug abusers based on the answers given by the students.[32]

In *Merriken*, the Federal District Court for the Eastern District of Pennsylvania reiterated that students are "persons" under the Constitution.[33] "They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[34] The *Merriken* court described why the individual's privacy interests must be upheld against the school regulations which had violated those rights:

> The Court, in balancing the right of an individual to privacy and the right of the Government to invade that privacy for the sake of public interest, strikes the balance in favor of the individual in the circumstances shown in this case . . . . There is too much of a chance that the wrong people for the wrong reasons will be singled out and counselled in the wrong manner.[35]

The district court was concerned that the school did not meet the second criterion of the intermediate level of scrutiny[36] because the regulation was not sufficiently related to the goal of the school board.[37]

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26. *Tinker*, 393 U.S. at 511.

27. *See* Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985) (holding that requiring a student to urinate into a tube is an excessive intrusion upon the student's legitimate expectation of privacy); Merriken v. Cressman, 364 F. Supp. 913, 917 (E.D. Pa. 1973) (finding a proposed program of questioning students about personal and family relationships in order to identify potential drug abusers an unconstitutional violation of the right to privacy).

28. 364 F. Supp. 913 (E.D. Pa. 1973).

29. *Id.* at 914.

30. *Id.* at 916.

31. *Id.* at 915.

32. *Id.*

33. *Id.* at 918 (quoting *Tinker*, 393 U.S. at 511).

34. *Id.*

35. *Id.* at 921.

36. *See supra* note 25 and accompanying text.

37. *Merriken*, 364 F. Supp. at 920. The *Merriken* court expressed concern that these tests, which were designed to identify potential drug abusers, were deficient in that they were designed

In 1979, the District Court for the Northern District of Indiana applied a stricter standard to the use of a strip search of a student suspected of possession of an illegal substance in *Doe v. Renfrow*.[38] The *Renfrow* court held that a continued alert[39] to a student by a trained police dog did not create sufficient cause to believe the student possessed marijuana.[40] Although the *Renfrow* court articulated a "reasonable cause" standard, it imposed a more strict requirement. The court stated that the alert by the dog would establish only enough "reasonable cause" to justify a requirement that the student empty his pockets.[41] On appeal, the Seventh Circuit Court of Appeals awarded damages to the student subjected to the nude search in *Renfrow*: "[T]he conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under 'settled indisputable principles of law.' "[42]

Similar cases were decided in the years following *Merriken*.[43] Courts began recognizing the right of privacy with regard to personal relationships and child rearing and were striking down regulations which intruded upon these areas.

B. *The Shift Toward "Reasonableness": New Jersey v. T.L.O.*

In 1985, the Supreme Court began to shift gears in regulating student rights, beginning with its decision in *New Jersey v. T.L.O.*[44] It was in the context of a search and seizure issue, that the Court first applied the "reasonableness" test to student rights.[45] In *T.L.O.*, a fourteen-year-old student was required to submit her purse to a search after it had been discovered that she had been smoking a cigarette in a school lavatory.[46] After the principal made an initial search of the purse, which turned up both tobacco cigarettes and cigarette rolling papers,

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to identify only patterns, and included no statements about what constituted drug abuse. The study nowhere defined what is a potential drug abuser and is vague in the relationship of the questions asked to the intended result. *Id.*

38. 475 F. Supp. 1012 (N.D. Ind. 1979).

39. *Id.* at 1017 n.5.

40. *Id.* at 1024–25.

41. *Id.* at 1024.

42. Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980).

43. *See e.g.*, Runyon v. McCrary, 427 U.S. 160, 178 (1976) (finding that privacy interests are implicated in the school as well as the home); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 693–94 (1977) (ban on distribution of contraceptives to those under sixteen is an unconstitutional violation and invasion of right to privacy); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (blanket requirement that minors seeking abortions obtain parental consent is unconstitutional violation of privacy).

44. 469 U.S. 325 (1985).

45. *Id.* at 337.

46. *Id.* at 328.

he proceeded to search the purse thoroughly and discovered evidence of marijuana.[47]

Although the Court stated that the fourth amendment's prohibition against unreasonable searches and seizures applied to searches conducted by public school officials,[48] it concluded that the school's need to maintain an environment in which learning could take place required some "easing" of the restrictions applied to searches by public authorities.[49] The *T.L.O.* Court reasoned that searches need not be based upon probable cause, but could be justified upon the reasonableness of the search, in light of the circumstances.[50] Using the suspicion of smoking as a reasonable rationale for the search, the Court applied this reasonableness test and upheld the initial search of the purse.[51] Likewise, the first search of the purse uncovered reasonable grounds (rolling papers) for the more comprehensive search.[52]

According to *T.L.O.*, under ordinary circumstances a search of a student by a teacher or other school official will be justified at its inception when 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.[53] "Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[54]

C. *Lower Court Scrutiny of Drug Testing: In Search of a Standard*

In *Anable v. Ford*,[55] these constitutional standards were applied to school regulations involving drug testing in public schools. In *Anable*, a student was led to believe that she was required to take a urine test or be dismissed from school.[56] It had been alleged that she or a friend had been smoking marijuana in a school lavatory.[57] After citing *T.L.O.* and applying a reasonableness test to the use of a urine test to determine whether the student had been using drugs, the *Anable* court concluded:

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47. *Id.*
48. *Id.* at 333.
49. *Id.* at 340.
50. *Id.* at 341.
51. *Id.* at 345–46.
52. *Id.* at 347.
53. *Id.* at 341–42.
54. *Id.* at 342.
55. 653 F. Supp. 22 (W.D. Ark. 1985). Although this case dealt with breathalyzer tests for alcohol, as well as urinalysis for drugs, this comment will consider only the latter, as the Court's decision on this aspect has the greatest impact on the future of drug testing in public high schools.
56. *Id.* at 27.
57. *Id.* at 26.

> Rules reasonably related to the maintenance of security and order in the classroom and the preservation of a proper educational environment are certainly within the proper sphere of authority of school officials. However, . . . because of the described deficiencies of the test, the court concludes that use of the test is not reasonably related to the maintenance of order and security in the schools nor to the preservation of the educational environment and processes.[58]

The *Anable* court reasoned that under *T.L.O.* there must be a "clear indication" or a "high probability" that the search will turn up evidence that the student has violated or is violating either criminal laws or the rules of the school.[59] Officials may test only if there is a high probability that evidence will be discovered by the test.[60] Yet, officials cannot make the determination of this probability unless there is an overt manifestation by the student of a recent use of intoxicants. If there is enough knowledge to create a clear indication that evidence will be found, the drug test will not be necessary and the student may be disciplined without it.[61] If there is no clear indication that evidence will be found, the test may not be conducted.[62] Thus, under *Anable,* drug testing of students by school officials will rarely be justified.

In the same year that *Anable* was decided, the Superior Court of New Jersey addressed a similar question. In *Odenheim v. Carlstadt-East Rutherford Regional School District,*[63] the court struck down a school policy under which all entering students would be tested for drug use through the use of a urine examination.[64] The court added to the *T.L.O.* test by applying a reasonableness definition based on other United States Supreme Court decisions. The Superior Court of New Jersey stated:

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58. *Id.* at 40. The deficiencies in the test, which the court uses as part of its rationale, are the inabilities of the test to determine whether a student is currently under the influence of a drug and when the student may have taken the drug which is found in his or her system. These factors become important in considering the ramifications of the reasonableness test developed in *Hazelwood* and the development of more effective methods of testing for drugs. *Id.; see also infra* note 86 and accompanying text.

59. *Anable,* 653 F. Supp. at 41.

60. *Id.*

61. *Id.*

62. *Id.* For example, the test which was used in *Anable* would have never clearly indicated that evidence of drug use during school would be found because such a test is not capable of determining when the intoxicants were actually consumed. Therefore, the test in this situation would, in effect, become an attempt by school officials to impermissibly regulate and control the activities of students which are unrelated to the school environment. *Id.* at 40.

63. 211 N.J. Super. 54, 59, 510 A.2d 709, 712 (Ch. Div. 1985) (finding unconstitutional a proposed program whereby students must submit to drug tests, as part of a general physical exam, before entering school each year).

64. *Id.* at 56, 510 A.2d at 710.

> [Reasonableness] is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.[65]

The court concluded that the school district's activities were not reasonably related in scope to the circumstances which initially justified the interference because the number of students who might be found to use drugs was insignificant in relation to the scope of the intrusion.[66]

Although the lower courts in the cases discussed above have laid out their understanding of the current status of drug testing in public schools, based on the guidelines of *T.L.O.*, the specific issue of drug testing in public schools has not yet been considered by the United States Supreme Court. The *Hazelwood* decision may shed some light on the Supreme Court's attitude toward the entire area of student rights and thus on the area of drug testing in public schools.

D. Hazelwood: The Current Status of Student Rights

In *Hazelwood,* high school students alleged that their first amendment rights were violated when the school principal removed two controversial articles from an issue of the school newspaper.[67] The articles censored involved teenage pregnancy as well as the effect of divorce on students.[68] The publishing of the newspaper was part of a Journalism II class.[69]

The Supreme Court determined that, because the newspaper was school-sponsored and not a public forum, the principal's decision to regulate the content need only be reasonably related to legitimate pedagogical concerns.[70] The Court added that there was a difference between the regulation of personal speech or expression which happens to occur at school and speech that is actually connected with a school function.[71] Essentially, the Court implied that the test for regulations of personal speech that occurred at school would still be the test articulated in *Tinker.*[72] However, the Court reasoned that the test to be ap-

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65. *Id.* at 59, 510 A.2d at 712 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)); *see also* Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (applying fourth amendment restrictions to searches by building inspectors).

66. *Odenheim,* 211 N.J. Super. at 61, 510 A.2d at 713.

67. *Hazelwood,* 484 U.S. at 260.

68. *Id.* at 262.

69. *Id.*

70. *Id.* at 273.

71. *Id.* at 270–71.

72. *Id.* at 270.

plied to expression in school-sponsored activities would be simply one of "reasonableness."[73]

The dilemma which now faces school administrators as well as advocates of student rights is whether students on drugs are a "legitimate pedagogical concern which implicates school-sponsored activities."[74] If drug abuse by students is within this category, the reasonableness test of *Hazelwood* would be triggered.[75] Although current drug testing may be too tenuous to be considered reasonable under any circumstance, increasing sophistication and accuracy of the tests may make these questions of greater importance in the near future.

E. T.L.O. Versus Hazelwood

The test for determining whether a school regulation is constitutionally valid as developed in *T.L.O* differs from the one developed in *Hazelwood*. The former requires a two-part analysis to determine whether something is reasonable "under all of the circumstances,"[76] whereas the latter is a negative test where the challenger must show that there is "no valid educational purpose" for the regulation.[77] The *Hazelwood* test carries with it a presumption of constitutionality, while the test in *T.L.O.* is a true test of rationality.[78] *T.L.O.* states that the twofold inquiry necessary to determine the reasonableness of any search requires first, that one consider whether the action (regulation or search) was justified at its inception,[79] and second, whether the search conducted was reasonably related in scope to the circumstances which justify the interference in the first place.[80]

The lower courts must now look to both tests to determine which

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73. *Id.* at 272–73.

74. *Id.* at 273. With the ruling in *Hazelwood*, this will be the only way educational professionals will be able to determine which test to use for the validity of school regulations.

75. *See, e.g.*, Gluckman, *Drug Testing in Public Schools*, CRITICAL ISSUES IN EDUCATIONAL LAW: THE ROLE OF THE FEDERAL JUDICIARY IN SHAPING PUBLIC EDUCATION 1, 5 (1988). A related question for consideration is whether the decision in *Hazelwood* is the latest consequence of a trend toward the Court's use of the reasonableness test for all constitutional questions in the schools.

76. *T.L.O.*, 469 U.S. at 326.

77. *Hazelwood*, 484 U.S. at 273.

78. In many cases decided under a supposed "rationality" standard, the courts merely act as a rubber stamp for the legislators. *T.L.O.*, 469 U.S. at 341 (citing Terry v. Ohio, 392 U.S. 1 (1968); Delaware v. Prouse, 440 U.S. 648, 654–55 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)) (all cases recognizing the reasonableness standard). However, the test in *T.L.O.* requires judges to actually look at what society is prepared to recognize to determine its true rationality. *Id.* at 338. The fourth amendment command is reasonableness, which in turn depends on the context in which the search takes place. *Id.*

79. *Id.* at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).

80. *Id.*

one applies in a given situation. After they decide whether drug testing is a school function (*Hazelwood*) or a search and seizure issue (*T.L.O.*), they must then determine how to apply the respective test.

III. ANALYSIS

After the middle 1980's, it seemed to some commentators that the validity of drug testing of students in public schools was a closed issue.[81] In *New Jersey v. T.L.O.*,[82] the Court determined that in order for a search to be valid it must be reasonable under all circumstances involved.[83] These circumstances are carefully scrutinized by a court only after consideration as to whether the search was reasonable at its inception and whether, the search as conducted, was reasonably related in scope to the circumstances.[84]

Lower courts have interpreted *T.L.O.* and concluded that drug testing by urinalysis is not reasonable under any circumstances because there would first have to be a clear indication that evidence of drug use would be found. The burden of showing a clear indication is so heavy, that if there is enough information for that clear indication, then the urinalysis is not necessary in order to discipline the student.[85]

Lower courts have also considered whether current drug testing methods are able to determine when drug use by a student actually occurred. Since the urine test cannot determine whether a school regulation was violated when the student took the drug or drugs, courts have held that schools are trying to control an activity which is outside the scope of the school setting.[86]

For the most part, these lower court decisions have been decided, like *T.L.O.*, on the basis of the fourth amendment's protection against unreasonable searches and seizures. In *Anable v. Ford*,[87] the court approached the privacy issue in a cursory fashion: "[R]equiring a teenage student to disrobe from the waist down while an adult school official, even though of the same sex, watches the student urinate in the 'open'

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81. *E.g.*, Gluckman, *supra* note 75, at 1. Gluckman states that, although many issues dealing with schools have been argued for years, drug testing is one which has been resolved by the courts within a few years. *Id.*

82. 469 U.S. 325 (1985).

83. *Id.* at 337.

84. *Id.*

85. Anable v. Ford, 653 F. Supp. 22, 41 (W.D. Ark. 1985).

86. *Id. But cf.* Fenton v. Stear, 423 F. Supp. 767, 772 (W.D. Pa. 1976) (upholding punishment of student for using "fighting words" to teacher outside of school); Braesch v. DePasquale, 200 Neb. 726, 733, 265 N.W.2d 842, 846 (1978) (upholding exclusion from interscholastic athletics for violating rules prohibiting team members from drinking or using drugs); McLean Indep. School Dist. v. Andrews, 333 S.W.2d 886, 891 (Tex. Civ. App. 1960) (regulation of student driving car to school upheld).

87. 653 F. Supp. at 22.

into a tube is an excessive intrusion upon the student's legitimate expectations of privacy under the circumstances present."[88] The excessively intrusive nature of such a search is not justified by the "need."[89]

This limited consideration of the privacy issue by the court seems surprising in light of the nature of the testing. Where a student is required to disrobe and to urinate into a container, a serious invasion of privacy has occurred. This intrusion upon the rights of students appears excessive regardless of the "need" set forth by the school.

Rather than clarifying the rights of students in the school setting, *Hazelwood School District v. Kuhlmeier*[90] served only to throw the rights of a student into a chaotic state. If the activities implicated are school-sponsored, *Hazelwood* states that even the most precious of a student's constitutional rights, the right to freedom of speech, can be curtailed based on a finding of reasonableness.[91] The lower courts have labelled drug testing an "excessive intrusion." Yet even an excessive intrusion into free speech was upheld in *Hazelwood.* It appears that a court finding the intrusion of drug testing similar to an intrusion upon free speech could hold school regulations involving drug testing to a standard of reasonableness as well. This is a drastic turnaround from *Tinker v. Des Moines Independent Community School District,*[92] in which the Supreme Court held that only constitutional expressions which "materially and substantially" interfere with the educational process may be regulated.[93]

The trend toward reasonableness and its impact on drug testing in the school can be resolved by answering two questions: (1) Is drug testing adequately related to school-sponsored events so that it falls under *Hazelwood,* and (2) If not, will *T.L.O.*'s two-part test of "reasonableness under all the circumstances" be applied to the realm of drug testing?

A. Drug Testing and School-Sponsored Events

The statement from the Court in *Hazelwood,* that "reasonableness" should be used when "school-sponsored expressive activities" are involved,[94] begs the question of what activites are "school-sponsored expressive activities." In answering this question, a court will look to school publications, theatrical productions, and other expressive activi-

88. *Id.* at 41.
89. *Id.*
90. 484 U.S. 260 (1988).
91. *Id.* at 272–73.
92. 393 U.S. 503 (1969).
93. *Id.* at 511.
94. *Hazelwood,* 484 U.S. at 273.

ties that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.[95] The *Hazelwood* test affects activities which could be considered part of the curriculum whether or not they occur in a traditional classroom setting. It matters only that the activities are supervised by faculty members and are designed to instill particular knowledge or skills to student participants and audiences.[96]

When applied literally, this test would apply to most activities which are available in a typical public school including sports, theatre, student government, and music activities. It seems clear that the Court is saying that excessive regulation of expression in all of these areas can be implemented with only a bare showing of reasonableness. The Court has stated that it is only when the decision to regulate these types of activities has no valid educational purpose, a student's constitutional rights are so directly and sharply implicated as to require judicial intervention to protect those rights.[97] But does this mean that the excessive intrusion of urine testing is valid with regard to all types of extracurricular activities?

It is in answer to this question that the inaccuracy and lack of specific results of the urinalysis work to preserve the constitutional rights affected by the test. Accordingly, it appears that the current urine tests are not accurate enough to meet the *validity* portion of the *Hazelwood* test.[98] Urine tests can only detect if someone may have taken drugs sometime within the past several weeks.[99] They cannot detect whether the drugs were taken during school, during a particular extracurricular activity, or even if the drugs detected were illegal.[100] Clearly this inaccuracy will result in the Supreme Court's finding that, even if drug tests are not excessively intrusive with regard to school-sponsored events, they have no "valid educational purpose," and therefore, the Court's intervention is necessary to protect the constitutional rights of the student to be free from unreasonable search and seizure.

B. Lower Court Application of the T.L.O. Standard

If the trend in the lower courts[101] is any indication of the position

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95. *Id.* at 271.

96. *Id.*

97. *Id.* at 273.

98. *Id.*

99. *Anable*, 653 F. Supp. at 39 (finding that the test can detect marijuana that has been in the subject's system for weeks but it cannot establish how much was ingested or when it was taken).

100. *See id.*

101. *See, e.g.*, Tarter v. Raybuck, 742 F.2d 977, 982 (6th Cir. 1984) (finding reasonable search of student's person by school officials was not a violation of the fourth amendment where

of the judiciary toward drug testing in public high schools, the Supreme Court will likely follow the *T.L.O.* test rather than the test espoused in *Hazelwood*. Lower courts have applied the *T.L.O.* standard to drug testing in situations where a school official has enough evidence to give him the reasonable grounds necessary to do the search. However, he already has enough evidence to discipline the student, and therefore, the search is beyond the scope necessary to solve the problem of drug use by students.[102] Additionally, in discussing scope, the intrusiveness will always be excessive if the urine test requires a student to urinate into a container but does not result in evidence that the student has violated school regulations.[103]

The Supreme Court would be wise to follow these lower court decisions because the *T.L.O.* standard will neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children. It is true that students on drugs may well be a legitimate concern of the schools, but to require students to submit to a urinalysis in order to determine their guilt or innocence is an unreasonable and unnecessary intrusion upon their constitutional rights.

If the Court does adopt the *T.L.O.* test with regard to drug testing of students, another problem may arise within the next several years. As the sophistication and accuracy of drug testing increases, a more rational relationship will develop between urine testing in the public schools and the problem of students using drugs. Current urine tests cannot distinguish between the amount of drugs ingested and the time they were taken. As urine tests develop these capabilities, school officials may be able to make a more effective argument that they can use the tests to determine whether students are on drugs during the school day. However, if the Court continues to follow the reasonableness test of *T.L.O.*, the school officials will still have the difficulty of justifying the excessive intrusion that a urine test would entail.

IV. CONCLUSION

This comment has traced the development of case law in the area of student rights with regard to the future of drug testing. The comment has concluded that, although this area has undergone substantial

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reasonable cause existed); Bilbrey v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984) (discussing reasonable cause requirement in situation where students were searched for drugs); Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 478 (5th Cir. 1982) (using reasonable cause as standard for measuring school official's action in using dogs to search for drugs); Bellnier v. Lund, 438 F. Supp 47, 53 (N.D.N.Y. 1977) (requiring reasonable grounds to search students).

102. *Anable*, 653 F. Supp. at 41.

103. *Id.* at 39.

change over the past twenty years, it will continue to evolve well into the future, as the problem of drugs in society is tackled. One step in the war against drugs will be the development of more accurate and sophisticated drug tests. School administrators will certainly continue to fight to establish drug tests as part of the disciplinary procedures of their public schools.

Although the development of the reasonableness standard is consistent with decisions in similar areas of constitutional law, this trend may have serious ramifications with regard to developments in drug testing. The reasonableness standard has served to adequately protect students from drug testing thus far, but as the drug problem continues, drug tests and similar responses may be found by the courts to be more and more "reasonable."

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