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STUART L. LEVITON*

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IS ANYONE LISTENING TO OUR STUDENTS? A PLEA FOR RESPECT AND INCLUSION

STUART L. LEVITON*

I. INTRODUCTION

TODAY'S youth bring many problems with them when they attend public school: sex, drugs, violence, and despair. In response to these problems, school administrators have increasingly restricted students' rights in the name of the greater good. The United States Supreme Court, initially a stalwart defender of students' rights, has submitted to this trend. At the heart of this Article is an exploration of the rhetoric used by the Court to justify its acquiescence to and facilitation of a trend away from a viewpoint hailing the United States Constitution as a baseline of protected students' rights, and toward a deferential approach to school administration that requires school administrators'[1] actions to be merely reasonable, regardless of the student right at issue.

Exploration of public high school students' rights[2] is hardly an original idea. However, this Article is different because it takes a broader look at the implications of the balancing test enunciated in *New Jersey v. T.L.O.*,[3] a case that addressed, *inter alia*, the requisite level of suspicion needed to conduct a search in a public high school. While *T.L.O.* and its First Amendment cousins, *Bethel School District No. 403 v. Fraser*[4] (student speech) and *Hazelwood School District v. Kuhlmeier*[5] (student press), give lip service to the notion of balancing the interests of the State and students in the context of the First and

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1. The term "school administrator" is used broadly to include teachers, principals, and other school officials who interact with and supervise students.

2. This Article is limited to a discussion of students' rights in public secondary schools and does not include the rights of private secondary school students. This limitation is necessary because the Constitution is implicated in the school setting only because of State action. *See* New Jersey v. T.L.O., 469 U.S. 325, 333-34 (1985) (holding that the Fourth Amendment's prohibition against unreasonable searches and seizures is applicable against public school officials through the Fourteenth Amendment).

3. *Id.*

4. 478 U.S. 675 (1986).

5. 484 U.S. 260 (1988).

Fourth Amendments, they really enunciate a constitutional standard that requires an evaluation of a school administrator's actions only in light of a "reasonable educator"[6] standard. Today, if a school administrator concludes that a student or his or her belongings should be searched, or that a school newspaper should be censored, or that a student's speech should be silenced or sanctioned, the Court will defer to the administrator as long as a reasonable educator would search, censor, or silence that student.

Parts II and III of this Article review the Court's de facto sanctioning of a broad range of discretionary searches, censorship, and silencing of students, and the lower courts' deference to school administrators to the detriment of students' rights. Some might argue that this is the correct path to take to address the reality presented in Part IV of this Article.[7] This reasoning is flawed for two reasons: (1) the lower courts and school administrators often disregard what the Court insists are students' constitutional rights in public schools;[8] and (2) the present approach is not working.

Part V proposes that the Court redefine the students' baseline of constitutional rights to require, at a minimum, a counterbalancing force to the reasonable educator in the form of a "reasonable student."[9] Under this new test, a true balancing of interests between the student and the school administrator would be required before a school administrator could restrict a student's rights. At the very least, this approach to balancing would require schools to respect the Court's dictate that public school students have constitutional rights. Furthermore, but perhaps secondarily for purposes of this Article, such a requirement has the potential to foster a dialogue between stu-

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6. Extrapolating from the Court's reasonableness standard in *T.L.O.*, 469 U.S. at 341, a "reasonable educator" is defined as follows: A school administrator whose behavior, when evaluated under all of the circumstances, could be justified by a representative school administrator at its inception and is reasonable in scope in light of the particular facts and circumstances that warranted the behavior at the outset. For the *T.L.O.* standard, see *infra* text accompanying note 69.

7. *Cf.* HOWARD L. HURWITZ, THE LAST ANGRY PRINCIPAL 9 (1988):

> Poverty workers and the New York Civil Liberties Union were united in protecting the right of the vilest miscreant to attend school. They invoked every conceivable procedure to harass me and other principals in the city. The easy out was to give in to them. And I must say sadly that it is the easy way out that has driven schools up and over the wall. I resisted them every inch of the way and was supported by the community.

8. *See infra* text accompanying note 40 for one of the Court's pronouncements on students' constitutional rights.

9. Similar to that of a reasonable educator as defined *supra* note 6, a "reasonable student" is defined as follows: A public high school student whose behavior, when evaluated under all of the circumstances, could be justified by a representative public high school student at its inception and as actually carried out.

dents and school administrators currently missing from our public schools. Perhaps by listening to our students, we can better understand what is truly troubling them, address these issues honestly, and work together for the mutual good.

II. THE LEGAL STANDARD (AS DEVISED BY THE COURT)

Some believe "the school—not the student—must prescribe the rules of conduct in an educational institution."[10] This view facilitates the reasonable educator standard[11] currently being employed by courts to evaluate students' rights. Courts justify reliance on the reasonable educator standard by pointing to the schools' responsibility to look after the welfare of their students.[12] This justification has not changed over the past fifty years, but what has changed is the rhetoric used by courts to support the increasing deference to school administrators, and the concomitant narrowing of students' rights. As a result of the lower courts' reliance on the reasonable educator standard, school administration has become increasingly dictatorial, or at a minimum, has begun exercising a student-exclusive form of student supervision and regulation.

This Part traces the development and downfall of students' First Amendment[13] and Fourth Amendment[14] rights in the public high schools by reviewing six United States Supreme Court cases: *West Virginia State Board of Education v. Barnette*,[15] *Tinker v. Des Moines Independent Community School District*,[16] *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,[17] *New Jersey v.*

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10. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 692 (1986) (Stevens, J., dissenting) (citing Arnold v. Carpenter, 459 F.2d 939, 944 (7th Cir. 1972)); *see also* Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting) ("We can all agree that as a matter of *educational policy* students should have wide access to information and ideas. But the people elect school boards, who in turn select administrators, who select the teachers, and these are the individuals best able to determine the substance of that policy." (emphasis added)).

11. *See supra* note 6 for the definition of a reasonable educator.

12. *See infra* text accompanying note 78 (discussing the need for protecting youth against violence, drugs, and other problems in schools).

13. The First Amendment reads in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend I. This Article looks specifically at students' rights with respect to speech and the press.

14. The Fourth Amendment reads in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend IV. The scope of searches and seizures is specifically addressed in this Article. *See infra* notes 121-29.

15. 319 U.S. 624 (1943).

16. 393 U.S. 503 (1969).

17. 457 U.S. 853 (1982).

T.L.O.,[18] *Bethel School District No. 403 v. Fraser*,[19] and *Hazelwood School District v. Kuhlmeier*.[20] This part explores the development of students' constitutional rights, with the Court beginning on a highnote in *Barnette*,[21] establishing a constitutional baseline in *Tinker*,[22] carrying forward the dictate of *Barnette* in *Pico*,[23] redefining the baseline in terms of a reasonableness test[24] in *T.L.O.*, and balancing away students' rights in *Fraser*[25] and *Kuhlmeier*.[26] In reviewing this line of cases, it becomes evident that the Court has become increasingly willing to defer to school administrators on issues of student/administration interaction. This increasing deference becomes obvious upon observation of the current shift away from an implicit presumption favoring students' rights that was advocated in *Barnette*, *Tinker*, and *Pico* to one implicitly presuming deference to administrators in *T.L.O.*, *Fraser*, and *Kuhlmeier*. The judicial branch's increasing passivity and implicit shift in presumptions will be the focus of this critique.

A. Respect: Barnette, Tinker, *and* Pico

Barnette, *Tinker*, and *Pico* each have victorious students in common. Their theme is one of respect for students as individuals deserving constitutional protection regardless of the exigencies of the moment or of the surroundings. While each of these opinions contains caveats that limit students' rights, the underlying principle of each opinion is a warning to school administrators that limits exist on both the amount and the kind of regulations and restrictions that can be imposed on students.

It is a tribute to the Court that during a World War the Court would nevertheless strike down, in *West Virginia State Board of Education v. Barnette*,[27] parts of a state statute requiring students to salute the American flag.[28] The Court noted the importance of recognizing and protecting students' constitutional rights because the public schools "are educating the young for citizenship [and this] is reason

18. 469 U.S. 325 (1985).
19. 478 U.S. 675 (1986).
20. 484 U.S. 260 (1988).
21. *See infra* text accompanying notes 27-32.
22. *See infra* text accompanying notes 33-42.
23. *See infra* text accompanying notes 43-52.
24. *See infra* text accompanying notes 62-74.
25. *See infra* text accompanying notes 81-99.
26. *See infra* text accompanying notes 100-08.
27. 319 U.S. 624 (1943).
28. *Id.* at 626 (citation omitted).

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."[29] The Court reviewed the dangers of attempting to "coerce uniformity of sentiment in support of some end thought essential,"[30] and concluded that "[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[31] This is one example of an implicit presumption of students' constitutional rights and the Court's resolve to preserve them.

The Court's defense of students' rights and its opposition to coercive tactics foster a view of the Constitution as a baseline, deviations below which we will not tolerate and above which we constantly strive.[32] While *Barnette* establishes the principle of a baseline, it does not clearly define it for all purposes. This uncertainty sparked a debate involving the following core issues which have been contested over the fifty years since *Barnette*: Exactly what does it mean to have a baseline, what is protected and what is not, and who decides? It is enough to mention at this point that *Barnette* indicated that students possess constitutional rights that must be respected by school administrators. *Barnette* also presented what is perhaps the most inclusive, respectful, and deferential view of students' rights—according students powerful protection under the Constitution, and refusing to allow school administrators, even reasonable ones, to invade a sphere of protected students' rights.

If *Barnette* established the principle of a constitutional baseline, *Tinker*[33] further refined it and provided an implicit balancing test for determining which rights are protected and which are not. In *Tinker*, several students attempted to express their disapproval of the Vietnam War by wearing black armbands to their respective schools.[34] The schools attempted to suppress the demonstrations by suspending the

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29. *Id.* at 637. Note that Justice Jackson refers to students as the "young" or "youth," rather than children, as do later Courts. *See, e.g., infra* text accompanying note 70 (*T.L.O.*); *infra* text accompanying note 89 (*Fraser*). This reference is interpreted as affording more respect to students than the reference to children.

30. *Barnette*, 319 U.S. at 640.

31. *Id.* at 642 (footnote omitted).

32. *Cf.* Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) ("[W]e have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.").

33. 393 U.S. 503 (1969).

34. *Id.* at 504.

students involved.[35] The Court, in supporting the students' right to protest, held that proscription of speech and expression was justified only if a school could show that the proscribed speech or expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,"[36] or that the activity in question would "impinge upon the rights of other students."[37]

Tinker's elaboration on and justification of protecting students' constitutional freedoms was powerful.[38] The Court began with a straightforward statement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[39] The Court further noted:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[40]
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> . . . .

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35. *Id.*

36. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

37. *Id.*

38. *See infra* text accompanying notes 39-42. Some commentators acknowledge the long tradition of court-employed rhetoric, but discount its long-term significance, at least in the case of youth. *See* William S. Geimer, *Juvenileness: A Single-Edged Constitutional Sword*, 22 GA. L. REV. 949, 949-50 (1988) ("Supreme Court cases have been characterized by declarations, often accompanied by soaring rhetoric, that the constitutional guarantee at issue is indeed available to juveniles. However, the Court also employs what I call 'juvenileness' to reach the conclusion that the young person loses.") (footnote omitted). Geimer continues by stating:

> Why the Court continues to insist that the Bill of Rights is facially applicable to juveniles is a mystery. The ingredients of juvenileness could easily form the rationale of a definitive opinion holding that, until adulthood, juveniles are committed to the sound discretion of adults, protected officially by the sound discretion of those bastions of orthodoxy, the state legislatures and the United States Congress. Such a pronouncement would have the virtue of candor, would enhance the integrity of constitutional discourse, and would more accurately reflect reality.

Id. at 953.

39. *Tinker*, 393 U.S. at 506. This line has been adopted, in whole or in part, by each of the succeeding principle cases that are discussed in this Article. *See* New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) ("In an often quoted statement, the Court said that students do not 'shed their constitutional rights . . . at the schoolhouse gate.'") (quoting *Tinker*, 393 U.S. at 506); Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 680 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988). Note that in *Pico*, Justice Brennan, citing *Tinker*, stated, "'First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students.'" Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982).

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

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.[41]

The Court concluded that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[42]

Tinker carried forward *Barnette*'s emphasis on protecting students' rights, and enunciated a test by which these rights could be determined. While students were not given free reign in the public schools, they were included as an integral part of the school setting, and their views were to be tolerated, if not always respected. The Court understood that, as an educational institution, schools can teach as much by example as they can by what they expressly say. A school administrator's respect for students' rights demonstrates to students that it is important to respect the Constitution and its dictates, regardless of the circumstances of the moment.

Pico[43] is the last case discussed in which the students win. *Pico* involved a question of how much control a school board can exercise

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41. *Id.* at 513. A New Jersey Superior Court judge argued a similar point in *T.L.O.*, in the context of the Fourth Amendment:

> Although the trial judge in the opinion which has been adopted by my colleagues gave lip service to the Fourth Amendment, he applied the diminished standard of reasonableness in such a way as to render the protection of the Fourth Amendment virtually unavailable to juveniles in public schools who are suspected of violation of school regulations.

State *ex rel.* T.L.O., 448 A.2d 493, 494 (N.J. Super. Ct. App. Div. 1982) (Joelson, J.A.D., dissenting).

42. *Tinker*, 393 U.S. at 512 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). Justice Brennan preached the same message in *T.L.O.*; however, it fell on deaf ears:

> Teachers, like all other government officials, must conform their conduct to the Fourth Amendment's protections of personal privacy and personal security. . . . [T]his principle is of particular importance when applied to schoolteachers, for children learn as much by example as by exposition. It would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections.

T.L.O., 469 U.S. at 353-54 (Brennan, J., concurring in part and dissenting in part). Justice Stevens also echoed this sentiment in *T.L.O.*:

> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.

Id. at 373-74 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

43. 457 U.S. 853 (1982).

over the removal of books[44] from a public school's libraries.[45] The Court, after reviewing *Barnette* and *Tinker*,[46] stated that the rule which evolved from those cases is simply that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students."[47] The Court concluded that students' constitutional rights were "directly and sharply implicated by the removal of books from the shelves of a school library,"[48] that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge,"[49] and that students have a "right to receive information and ideas."[50]

The Court's justification for this holding was that "just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[51] The Court further noted that "'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' The school library is the principal locus of such freedom."[52]

In summary, *Barnette*, *Tinker*, and *Pico* stand for these propositions: (1) public school students presumptively possess constitutional rights; (2) school administrators must respect these rights unless a student "materially and substantially" interferes with discipline generally[53] or "impinge[s] upon the rights of other students";[54] (3) school administrators cannot limit student activities for political reasons; and (4) there are valid educational purposes, such as setting the proper example, for respecting students' constitutional rights. These cases create a sphere of rights that must be respected. As an

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44. The following books were subject to the school board's removal: ELDRIDGE CLEAVER, SOUL ON ICE (1968); ALICE CHILDRESS, A HERO AIN'T NOTHIN' BUT A SANDWICH (1973); BERNARD MALAMUD, THE FIXER (1966); GO ASK ALICE, of anonymous authorship (1972); KURT VONNEGUT, JR., SLAUGHTERHOUSE FIVE (1969); THE BEST SHORT STORIES BY NEGRO WRITERS (Langston Hughes ed., 1967); RICHARD WRIGHT, BLACK BOY (1945); OLIVER LAFARGE, LAUGHING BOY (1929); DESMOND MORRIS, THE NAKED APE (1967); PIRI THOMAS, DOWN THESE MEAN STREETS (1967); and A READER FOR WRITERS (Jerome Archer ed., 1962). *Id.* at 856-57 n.3.

45. *Id.* at 863.

46. *Id.* at 865-66.

47. *Id.* at 866 (quoting Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 506 (1969)).

48. *Id.*

49. *Id.* (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

50. *Id.* at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

51. *Id.* at 868.

52. *Id.* at 868-69 (citation omitted) (footnote omitted).

53. Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503, 509 (1969).

54. *Id.*

educational matter, they suggest that there is independent educational justification for respecting constitutional rights.

Chief Justice Burger's framing of the issue in his dissent in *Pico* can now be recognized as a harbinger of how the Court has evaluated school cases since *Pico*:

> Stripped to its essentials, the issue comes down to two important propositions: *first*, whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils; and *second*, whether the values of morality, good taste, and relevance to education are valid reasons for school board decisions . . . .[55]

In *T.L.O.*,[56] *Fraser*,[57] and *Kuhlmeier*,[58] the Court becomes increasingly deferential to school administrators.[59] Students' enjoyment of a baseline of constitutional rights is diminished. The Court's deference to school administrators inevitably results in decisions that conclude—school wins, students lose.[60]

B. Disregard: T.L.O., Fraser, *and* Kuhlmeier

During the 1980s, except for *Pico*, the Court's attitude toward students' rights changed and the implicit presumption in favor of protecting students' rights shifted to one of deference to school administrators. Students started losing when "reasonableness" became part of the vernacular, which began with *T.L.O.* in the context of the Fourth Amendment, and continued in *Fraser* and *Kuhlmeier* in the context of the First Amendment.[61] Even more interesting than the

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55. *Pico*, 457 U.S. at 885 (Burger, C.J., dissenting).

56. New Jersey v. T.L.O., 469 U.S. 325 (1985).

57. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

58. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

59. *See* Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1288 (1991) ("[T]he *Kuhlmeier* standard's protection of student speech is significantly more deferential to school authorities than the *Tinker* standard . . . .").

60. *See id.* at 1275 ("[T]he practical effect of the judicial deference to school officials expressed in *Kuhlmeier* leaves little real protection for student expression not approved by school authorities." (footnote omitted)).

61. Some may argue that students should lose. Many see one function of schools as that of a value-inculcating institution. *See, e.g., id.* at 278 (Brennan, J., dissenting) ("The public school conveys to our young the information and the tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the 'fundamental values necessary to the maintenance of a democratic political system . . . .'") (citing Ambach v. Norwick, 441 U.S. 68, 77 (1969)). As such, the school administrator should be allowed to shape and mold the minds of students. *See, e.g., id.* at 273 ("This standard [*Kuhlmeier*] is consistent with our oft-expressed view that the education of our Nation's youth is primarily the responsibility of

reality of fewer students' rights is the justification the Court advances for allowing this new reality.

New Jersey v. T.L.O.[62] introduced an explicit balancing test for evaluating students' constitutional rights. In *T.L.O.*, an assistant vice principal searched a fourteen-year-old high school girl's purse because he suspected that she had been smoking in the rest room.[63] The search was initially intended to secure evidence that would show that T.L.O. had been smoking, and that she was lying to the assistant vice principal when she denied doing so.[64] The search went beyond this, however, and the assistant vice principal discovered cigarette rolling papers, a "small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing."[65] T.L.O. was suspended from school for three days for smoking in the rest room[66] and the state brought delinquency charges against her.[67]

The Court, unlike in previous cases in which it upheld students' constitutional rights, concluded that while schools must "accommodate the privacy interests of schoolchildren[, because of] . . . the substantial need of teachers and administrators . . . [to have the] freedom to maintain order in the schools [, the Constitution] does not require strict adherence to the requirement that searches be based on probable cause . . . ."[68] The Court enunciated a reasonableness test to define the new constitutional baseline:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold

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parents, teachers, and state and local school officials, and not of federal judges."). While all of this might be true, it nevertheless ignores the dictate of *Tinker*, which re-iterated the notion from *Barnette* that the Constitution represents a baseline for students' rights that must be respected. The present situation also ignores the test in *T.L.O.*, which requires, at a minimum, a balancing of interests.

62. 469 U.S. 325 (1985).

63. *Id.* at 328.

64. *Id.*

65. *Id.* The substantial amount of money was "$40.98 in single dollar bills and change." State *ex rel.* T.L.O., 428 A.2d 1327, 1330 (N.J. Juv. & Domestic Rel. Ct. 1980). While one might concede that forty singles is unusual, it is this type of language, *i.e.*, "substantial quantity of money," that lends credence to the notion that adults use hyberbole to support their points. *See* Geimer, *supra* note 38.

66. *T.L.O.*, 469 U.S. at 329 n.1.

67. *Id.* at 329.

68. *Id.* at 341.

> inquiry: first, one must consider "whether the . . . action was justified at its inception[.]" . . . [S]econd, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[69]

The Court's willingness to re-examine the constitutional baseline and its formulation of the two interests balanced in *T.L.O.* represent a change in the conception of students' rights. On the one hand, the Court says that there must be an "*accommodation* of the privacy interests of school*children*,"[70] but on the other it says that this must be balanced against a "*substantial need* of teachers and administrators for freedom to *maintain order* in the schools."[71] The Court further notes that it has previously "recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and [it] ha[s] respected the value of preserving the informality of the student-teacher relationship."[72]

The *T.L.O* articulation of the baseline of students' constitutional rights is a far cry from *Barnette* (a "fixed star in our constitutional constellation")[73] and *Tinker* ("[S]tudents . . . [do not] shed their constitutional rights . . . at the schoolhouse gate.").[74] Arguably, the *T.L.O.* language could be interpreted as a reclassification of students' rights from a constitutional baseline to one of an accommodating grant. While the Court insists that students retain constitutional protections, if students' rights are merely accommodated, but are not based on a constitutional grounding, school administrators could easily argue that what has been given can be taken away.

The change from *Barnette*, *Tinker*, and *Pico* to *T.L.O.* is most evident in the newfound reliance on "flexibility" in determining the constitutional baseline of students' rights. In *Barnette*, the Court was unwilling to be flexible in light of World War II, and refused to mandate forced salutation of the flag. The *Tinker* Court similarly was un-

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69. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). This is a very broad standard. As commentators have pointed out, this is troubling in light of the Court's uncertainty as to the applicability of an individualized suspicion requirement. *See* Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 925-46 (1988) (discussing the need for an individualized suspicion requirement and examining other potential dangers of requiring only a generalized suspicion).

70. *T.L.O.*, 469 U.S. at 341 (emphasis added).

71. *Id.* (emphasis added).

72. *Id.* at 339-40 (citing Goss v. Lopez, 419 U.S. 565, 582-83 (1975)).

73. 319 U.S. 624, 642 (1943) (footnote omitted).

74. 393 U.S. 503, 506 (1966).

willing to yield in light of the Vietnam Conflict and allow censorship of expression. Furthermore, the *Pico* Court was unwilling to accede to the conservative tide sweeping across the country during the early 1980s and permit suppression of ideas based on political ideology. Why should such flexibility be embraced now?

Part of the reason behind the Court's holding in *T.L.O.* was a conflict among the Court's concerns for maintaining order in a chaotic world, upholding students' constitutional rights, and calling for relaxed procedural and substantive safeguards in administering the public schools. After highlighting problems in public schools, the Court concluded that informal measures were appropriate to combat this hostile environment.[75] It believed that the accompanying relaxation of student constitutional protections was minimal because the school administrators were acting in their students' best interests.[76] Note, however, that if informality were the solution, our schools should already be showing improvement because most courts prior to *T.L.O.* either had adopted a "reasonableness" approach to the Fourth Amendment or had held that the Fourth Amendment was inapplicable in the school setting.[77] If anything, the Court's formulation of reasonableness actually adds formality to the school search proceedings in many states.

Justice Blackmun may have captured best the bottom line in *T.L.O.*:

> [B]ecause drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel. . . .[78]
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> . . . .
>
> . . . [T]eacher[s,] ha[ving] neither the training nor the day-to-day experience in the complexities of probable cause that a law

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75. *See T.L.O.*, 469 U.S. at 339-40.

76. *See id.* at 349-50 (Powell, J., concurring) ("Rarely does this type of adversarial relationship [similar to police and criminals] exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.") (footnote omitted).

77. *See id.* at 332 n.2 (discussing the three approaches to Fourth Amendment jurisprudence relating to schools prior to *T.L.O.*).

78. *Id.* at 352-53 (Blackmun, J., concurring). Justice White, writing for the Court, commented similarly, stating, "By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 343.

> enforcement officer possesses, . . . [are] ill-equipped to make a quick judgment about the existence of probable cause.[79]

Is not Justice Blackmun implicitly saying that it is simply too complicated to embrace student concerns, and that deference to school administrators is easier to administer and therefore worthy of constitutional approval? The problem with this interpretation is the message it sends to students. While the Court cites the language in *Barnette* discussing the importance of protecting students' rights,[80] *T.L.O.* does not result in respect for students' rights.

While *T.L.O.* introduced a balancing test for weighing students' Fourth Amendment constitutional rights, the Court's rhetoric became even more pronounced in *Bethel School District No. 403 v. Fraser*,[81] a case involving a high school student who delivered a nominating speech before about six hundred of his peers at a school assembly for a fellow student who was running for student office.[82] In characterizing the speech, the Court stated that "[d]uring the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[83] After Fraser's speech, he "was . . . *informed* that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises."[84] Interestingly enough, while the school was attempting to silence Matthew Fraser, his fellow students elected him to give the commencement address at graduation,

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79. *Id.* at 353 (Blackmun, J., concurring). *But cf.* Floyd G. Delon & Greg L. Gettings, *The Post-*T.L.O. *Status of Search and Seizure Policies and Practices in Public Schools*, 45 EDUC. L. REP. 461 (1988) (discussing the results of a survey conducted of high school principals in which a majority of respondents indicated that they were familiar with *T.L.O.* and the legal standard enunciated).

80. *See id.* at 334. The Court cites to the *Barnette* language quoted in the text accompanying note 29.

81. 478 U.S. 675 (1986).

82. *Id.* at 677.

83. *Id.* at 677-78. It was left to Justice Brennan, who concurred in the judgment, to tell us what Fraser actually said:

> 'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> 'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> 'Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> 'So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.'

Id. at 687 (Brennan, J., concurring) (citing Appellant's Brief at 47).

84. *Id.* at 678 (emphasis added).

which he eventually delivered.[85] Justice Stevens noted this twist of events in his dissent:

> This respondent was an outstanding young man with a fine academic record. The fact that he was chosen by the student body to speak at the school's commencement exercises demonstrates that he was respected by his peers. . . . It indicates that he was probably in a better position to determine whether an audience composed of 600 of his contemporaries would be offended by the use of a four-letter word—or a sexual metaphor—than is a group of judges who are at least two generations and 3,000 miles away from the scene of the crime.[86]

The Court, however, concluded emphatically that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[87] This standard endorses nearly total deference to school administrators and embraces the reasonable educator as the test of permissible school administrator action. In a footnote, Justice Stevens chided the majority for not giving enough credit to the intelligence and ability of a high school audience to understand a message and implicitly argued that the Court was not giving sufficient weight to the "reasonable student."[88] Justice Stevens stated,

> In its opinion today, the Court describes respondent as a "confused boy," and repeatedly characterizes his audience of high school students as "children." When a more orthodox message is being conveyed to a similar audience, four Members of today's majority would treat high school students like college students rather than like children.[89]

The Court attempts to justify its actions by discussing the "role and purpose of the American public school system,"[90] but unsatisfactorily describes how this has changed sufficiently to alter the test of students' protected rights:

> [P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as

85. *Id.* at 679.
86. *Id.* at 692 (Stevens, J., dissenting) (footnote omitted).
87. *Id.* at 683.
88. *Id.* at 692 n.2 (Stevens, J., dissenting).
89. *Id.* (citation omitted) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) (dissenting opinions)).
90. *Id.* at 681.

> values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.[91]
>
> . . . .
>
> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.[92]

But what has changed since *Barnette*? The *Barnette* Court would probably have fully agreed with the *Fraser* Court's statement up until the word "surely." It also might have agreed with the prohibition on vulgarity and offensive language. But "vulgarity" and "offensive" are conclusions, not constitutional tests. Contrary to *Fraser*, however, the *Barnette* Court rejected the notion that a school or the State could enforce an orthodoxy on its students.[93] Was Fraser's sexual innuendo sufficiently more serious than World War II to change the Court's analysis of students' First Amendment rights? Was the alleged potential harm to adolescent females[94] more serious than the survival of our Nation? Something else is going on: a shift in deference to "reasonable" educators.

The *Fraser* Court justified its deference to school administrators by patronizingly asserting what students think without allowing the students to speak for themselves. The Court postulated that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person."[95] The Court states that "[b]y glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."[96] The Court also suggested that "[t]he speech *could well* be seriously damaging to its less mature audience, many of whom were only [fourteen] years old and on the threshold of awareness of human sexuality."[97]

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91. *Id.* (citing CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)). For similar rhetoric, see Desmond Lee, *Introduction* to PLATO, THE REPUBLIC 11, 38 (Desmond Lee trans., 2d ed. rev. 1974) ("Plato was as concerned to train the character as the mind, and throughout the account of the secondary stage of education he is insistent that its object is moral training as much as intellectual . . . .").

92. *Fraser*, 478 U.S. at 683.

93. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

94. *See* text accompanying notes 95-99.

95. *Fraser*, 478 U.S. at 683. Arguably the speech could not have been too offensive to many students, given that Fraser ultimately delivered a commencement speech after being elected as a write-in candidate by his peers. *Id.* at 679.

96. *Id.* at 683 (citing Appellant's Brief at 77-81). It is interesting that the Court should cite to the Appellant's brief to find a potential harm to justify intrusion on students' constitutional rights. If the Court allows the school to both define the harm and the remedy, students will be left with no rights at all.

97. *Id.* (emphasis added).

However, the Court could not document any harm to the students attending the assembly.[98] Justice Brennan, discussing the lack of evidence, states in his concurrence:

> The Court speculates that the speech was "insulting" to female students, and "seriously damaging" to 14-year-olds, so that school officials could legitimately suppress such expression in order to protect these groups. There is no evidence in the record that any students, male or female, found the speech "insulting." . . . Indeed, to my mind, respondent's speech was no more "obscene," "lewd," or "sexually explicit" than the bulk of programs currently appearing on prime time television or in the local cinema.[99]

The result in *Fraser* is likely reflective of what reasonable educators think. The questions no one seems to be asking, however, are: (1) Is this reflective of reasonable students? and (2) Does it matter? If *Barnette*, *Tinker*, and *Pico* are taken seriously, these questions do matter. If Matthew Fraser's classmates are taken seriously in their vote for him as graduation speaker, this censorial result does not represent their views either. Matthew Fraser learned the lesson firsthand that under the reasonable educator standard, the school wins and the student loses.

Hazelwood School District v. Kuhlmeier[100] is the final case in this line and represents the greatest deference to the reasonable educator. *Kuhlmeier* "concern[ed] the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."[101] *Kuhlmeier* has been more succinctly, and perhaps more accurately, described as a case "upholding censorship of a school-sponsored student newspaper."[102] One of the stories [ultimately editorially-controlled out of publication] "described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students

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98. *See id.* at 689 (Brennan, J., concurring).

99. *Id.* at 689 n.2 (Brennan, J., concurring). It is interesting that Justice Brennan refers to the arts. As discussed in the context of the television show *Beverly Hills, 90210*, *infra* Part IV, sex and sexuality are exactly what many youths are aware of and interested in.

100. 484 U.S. 260 (1988).

101. *Id.* at 262. Note the use by Justice White of the euphemism "editorial control," rather than the more precise and exact term "censorship," which is ultimately at issue in this case. *See id.* at 278 (Brennan, J., dissenting) (concluding that the principal in this case "violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose").

102. Bush *ex rel.* Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562, 565 (D. Minn. 1990).

at the school."[103] One justification for the principal's exercising such editorial control was that "[h]e . . . believed that the articles' references to sexual activity and birth control were inappropriate for some of the younger students."[104]

The Court enunciated the following standard in *Kuhlmeier*: "[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."[105] Applying this standard, the Court concluded,

> In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.[106]

It is difficult to quibble with the Court over whether Principal Reynolds acted as a reasonable educator would have acted in this situation. Or is it? Is there any evidence of actual harm? Is the potentiality of any such harm now sufficient to censor student speech?[107] As with *Fraser*, the issue of teenage sexuality is very real, and one which students are talking about or acting out. It is ironic, however, that the Court in *Kuhlmeier* should cite issues of student privacy to justify cen-

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103. *Kuhlmeier*, 484 U.S. at 263.

104. *Id.*

105. *Id.* at 273.

106. *Id.* at 276.

107. The concept of potentiality was classically stated by Justice Douglas, in the context of economic regulation, in Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Justice Douglas discussed what the "legislature might conclude," or what the "legislature might think," *id.* at 490, without offering any actual evidence of legislative intent. This conjecture was enough to sustain economic regulations having a rational basis. Is this the level of protection students can now expect?

sorship when, in *T.L.O.*, the privacy rights of students are discounted.[108]

Furthermore, what message is being sent to students when they are told that school administrators can act in furtherance of any "legitimate pedagogical concerns?"[109] Do they understand what that means? Does anyone? Government and school administrators are not benevolent dictators. They must be limited by some guiding principle recognizing students' constitutional rights in light of a balance between the reasonable educator and the reasonable student.

III. THE "REAL WORLD" (AS DEFINED AND (MIS)INTERPRETED BY THE COURTS)

Evidence that the reasonable educator is indeed the standard today, and more importantly, that the bottom line in most cases is that courts will sustain a school's action out of deference to school administrators, is found in the lower courts' interpretation and application of the legal rules of *T.L.O.*, *Fraser*, and *Kuhlmeier*.[110] Schools have taken *T.L.O.*'s reasonableness standard and the related concepts of reasonableness in *Fraser* and *Kuhlmeier*, and have liberally applied them to myriad fact patterns.[111] Although a few courts have reversed school administrator's actions,[112] the vast majority of courts defer to school administrators,[113] resulting in the constitutional baseline being nearly meaningless.

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108. 469 U.S. 325, 357-82 (1985).

109. *Kuhlmeier*, 484 U.S. at 273.

110. Early commentators were unsure how *Fraser* and *Kuhlmeier* would play out in the lower courts. *See, e.g.*, C. Thomas Dienes and Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 395 (1989) ("How *Fraser* and [*Kuhlmeier*'s] hands-off policy will play in the educational marketplace and in the lower courts remains to be seen."). This is not a problem today. *See infra* notes 111-42 and accompanying text.

111. *See* Stuart L. Leviton, *The Fourth Amendment in Texas Public High Schools: Friend or Foe? A Question of Perspective*, 6 STATE BAR (TEXAS) SECTION REPORT: JUVENILE LAW 5, 12 (Dec. 1992) (reviewing the results of a survey of Texas public high school principals related to school searches, and relating the comment of one high school principal: "With the crisis today in schools regarding weapons and drugs—I—like many principals—take reasonable cause to the bank and interpret it liberally to ensure the safety of our students.").

112. *See, e.g.*, Slotterback *ex rel.* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991) (reversing limitations on the right to distribute nonschool materials on school property); *In re* Appeal in Pima County Juvenile Action No. 80484-1, 733 P.2d 316 (Ariz. Ct. App. 1987) (reversing a delinquency adjudication because the principal did not have reasonable suspicion to conduct the search); *In re* Dumas, 515 A.2d 984 (Pa. Super. Ct. 1986) (suppressing evidence because a search was too expansive).

113. *See infra* notes 114-42 and accompanying text.

Cases decided subsequent to *T.L.O.*, *Fraser*, and *Kuhlmeier* involve restrictions on student press[114] and student expression. The expression cases can be categorized loosely as follows: pure speech restrictions,[115] protection of student "whistle blowers,"[116] enforcement of dress codes,[117] restrictions on artistic productions,[118] control of student elections,[119] and restrictions on school symbol selection.[120] Once the Court allowed the baseline to be determined by mere reasonableness, school administrators and lower courts seized on this new flexible standard and applied it to restrict student rights in a variety of contexts. While the Court still insists that students possess constitutional rights, it is difficult to see what those rights are.

A second line of cases relies on *T.L.O.* and involves Fourth Amendment search issues. These cases include searches of all sorts of student possessions, including students' lockers,[121] auto-

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114. *See, e.g.*, Leeb v. DeLong, 243 Cal. Rptr. 494 (Ct. App. 1988) (citing *Kuhlmeier*) (upholding the right of a school to censor a student newspaper on the grounds that the material in question may be defamatory).

115. *See, e.g.*, Nelson v. Moline Sch. Dist. No. 40, 725 F. Supp. 965 (C.D. Ill. 1989) (citing *T.L.O.*) (upholding a general policy of prior approval by the principal of the distribution of nonschool materials by students on school grounds based on time, place and manner restrictions, but striking down specific regulations that prohibit the distribution of religious or political literature); Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1392 (D. Minn. 1987) (citing *T.L.O.*) (granting the defendants motion for summary judgment in this § 1983 action, holding that the student's First Amendment rights were not violated when students were suspended for distributing an unofficial school newspaper, a suspension justified by school officials on the grounds "that distribution of Tour de Farce materially disrupted school activities, that the publication contain[ed] vulgar and indecent language, and that the publication advocated violence against teachers."). *But see Slotterback*, 766 F. Supp. at 299 (citing *T.L.O.*) (striking down in part regulations limiting a student's right to distribute nonschool materials on school property).

116. *See* Newsome v. Batavia Local Sch. Dist., 842 F.2d 920 (6th Cir. 1988) (citing *T.L.O.*) (upholding the dismissal of a complaint, holding that a student's due process rights were not violated, even though he was denied, *inter alia*, the right to know the identity of his student accusers and cross-examine school administrators who investigated the alleged drug-trafficking incident that led to his expulsion).

117. *See* Olesen v. Board of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987) (citing *Fraser*) (upholding the constitutionality of a school anti-gang rule that prohibited the wearing of earrings by male students).

118. *See* Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986) (citing *Fraser*, *Kuhlmeier*) (upholding the school board's right to prevent students from putting on a production of *Runaways*).

119. *See, e.g.*, Bull v. Dardanelle Pub. Sch. Dist. No. 15, 745 F. Supp. 1455, 1460 (E.D. Ark. 1990) (citing *Kuhlmeier*) (dismissing a student complaint challenging the constitutionality of the student council elections in which he was kept off the ballot because of "legitimate pedagogical concerns").

120. *See* Crosby *ex rel.* Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988) (citing *Kuhlmeier*) (upholding the right of a principal to ban the use of the "Johnny Reb" symbol).

121. *See, e.g.*, R.D.L. v. State, 499 So. 2d 31 (Fla. 2d DCA 1986) (citing *T.L.O.*) (upholding a search initiated because a student was suspected of stealing a school clock, but in which over $3,000 worth of stolen school lunch tickets were discovered); *In re* S.C. v. State, 583 So. 2d 188

mobiles,[122] "fanny packs,"[123] clothing,[124] book bags,[125] purses,[126] and the students themselves.[127] Strip searches[128] and drug

(Miss. 1991) (citing *T.L.O.*) (upholding a search discovering handguns). *But see In re* Dumas, 515 A.2d 984 (Pa. Super. Ct. 1986) (citing *T.L.O.*) (affirming the suppression of evidence of marijuana possession, holding that while the initial search for cigarettes was warranted, once the assistant principal obtained the cigarettes, it was unreasonable to continue the search that led to the discovery of the marijuana). Note that the court in *In re* Dumas came to the opposite result of the Court in *T.L.O. See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

122. *See, e.g.*, State v. Slattery, 787 P.2d 933 (Wash. Ct. App. 1990) (citing *T.L.O.*) (upholding a search for marijuana inside a locked briefcase located in an automobile, which followed two other searches including one of the student's pockets, which turned up $230 and a pager, and one of the student's locker, which turned up nothing incriminating).

123. *See In re* Dubois, 821 P.2d 1124, 1126 (Or. Ct. App. 1991) (citing *T.L.O.*) (upholding a search of a student's fanny pack for a gun because the student supervisor had "more than reasonable suspicion" to conduct the search).

124. *See, e.g.*, Berry v. State, 561 N.E.2d 832, 835, 840 (Ind. Ct. App. 1990) (citing *T.L.O.*) (upholding a search of a student's jacket that turned up two one-dollar bills and three cassette cases, one of which contained eight marijuana cigarettes. The student was convicted of attempted dealing in marijuana on school property, received a five-year sentence, which was enhanced by three additional years because of aggravating factors (two juvenile offenses and one adult offense)); *In re* Devon T., 584 A.2d 1287, 1289 (Md. Ct. Spec. App. 1991) (citing *T.L.O.*) (affirming a search of a student's pockets that resulted in the discovery of heroin, the search being conducted in the presence of an assistant principal and with a security guard directing the student). *But see In re* Appeal in Pima County Juvenile Action No. 80484-1, 733 P.2d 316, 317 (Ariz. Ct. App. 1987) (citing *T.L.O.*) (reversing a delinquency adjudication for possession of cocaine, noting that "the principal in this case had no personal knowledge regarding the minor's conduct and had received no specific reports which give rise to a reasonable suspicion that the minor's pockets would contain cocaine").

125. *See* Coffman v. State, 782 S.W.2d 249 (Tex. Ct. App. 1989) (citing *T.L.O.*) (upholding a search for a weapon).

126. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985). *But see* T.J. v. State, 538 So. 2d 1320, 1322 (Fla. 2d DCA 1989) (citing *T.L.O.*) (reversing a conviction for possession of cocaine by a fifteen-year-old eighth grader, holding that the search for a weapon in the student's purse did not justify "examin[ing] the plastic bag in a side pocket which clearly contained no weapon," and further stating that "[w]hile school safety may readily justify a basic search for weapons, the student's interest in privacy should preclude a scavenger hunt after the basic search has produced no weapons").

127. *See, e.g.*, *In re* Alexander B., 270 Cal. Rptr. 342, 342-43 (Ct. App. 1990) (citing *T.L.O.*) (upholding a search that resulted in the discovery of what has been alternatively described as a "dirk," "dagger," and "machete knife"); *In re* Frederick B., 237 Cal. Rptr. 338, 340-41 (Ct. App. 1987) (citing *T.L.O.*) (A security guard discovered a pistol in the front of Frederick's waistband while in the process of bodily restraining him. Frederick was then wrestled to the ground, handcuffed, and taken to the dean's office and searched. In addition to a loaded firearm, "Frederick was found to be carrying a number of baggies containing a white substance, $27 in cash, and a half-smoked hand-rolled butt of a cigarette."). *But see In re* William G., 709 P.2d 1287 (Cal. 1985) (citing *T.L.O.*) (reversing a lower court decision upholding a search of a student and his calculator case, which contained marijuana, because mere "furtive gestures" do not generate sufficient suspicion to rise to the required level of reasonableness). Interestingly, Chief Justice Bird concurred in the judgment in *William G.*, but dissented from the analysis and argued for the retention of the probable cause standard, as Justice Brennan had argued in *T.L.O. Id.* at 1298-99 (Bird, C.J., concurring in part and dissenting in part).

128. *See, e.g.*, Williams *ex rel.* Williams v. Ellington, 936 F.2d 881, 884 (6th Cir. 1991) (citing *T.L.O.*) (rejecting a § 1983 claim, upholding a search and seizure policy that is "facially

testing[129] are sometimes allowed.

While the facts of many of the above cases are related to issues addressed in *T.L.O.*, *Fraser*, and *Kuhlmeier*, the applicable tests from these Supreme Court cases have been extracted and applied to cases that involve facts not quite so related. Examples include those cases that involve student discipline,[130] detention,[131] student confessions,[132] off-campus field trips,[133] restrictions on off-campus recrea-

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valid," and concluding that the search in this case "was performed in accordance with this constitutionally valid strip search policy"). Note that Justice Stevens in *T.L.O.* specifically expressed reservations about the permissibility of strip searches. *See T.L.O.*, 469 U.S. at 382 n.25 (Stevens, J., concurring in part and dissenting in part) ("One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse.").

129. *See* Schaill *ex rel.* Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988) (citing *T.L.O.*) (upholding a student athlete drug testing program on the grounds of reasonableness under the Fourth Amendment and that procedural challenges built into the program satisfy due process concerns). *But see* Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759 (S.D. Tex. 1989) (citing *T.L.O.*) (striking down a school policy of drug testing students engaged in extra-curricular activities without an individualized suspicion requirement); Odenheim *ex rel.* Odenheim v. Carlstadt-E. Rutherford Regional Sch. Dist., 510 A.2d 709, 713 (N.J. Super. Ct. Ch. Div. 1985) (citing *T.L.O.*) (holding that the school's drug testing policy "violates [the student's] rights to be free of unreasonable search and seizure, violates [their] rights to due process and violates [their] legitimate expectation of privacy and personal security").

Note that the Court in *T.L.O.* reserved judgment on whether individualized suspicion is required. *See* New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985) ("We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities."). Note further that some commentators have called for an individualized suspicion requirement. *See* Gardner, *supra* note 69.

130. *See, e.g.*, Wise v. Pea Ridge Sch. Dist., 855 F.2d 560 (8th Cir. 1988) (citing *Kuhlmeier*) (upholding the use of corporal punishment and in-school suspension, and finding no substantive due process violations); Brands v. Sheldon Community Sch., 671 F. Supp. 627, 629 (N.D. Iowa 1987) (citing *Fraser*) (upholding the suspension of a student wrestler from the wrestling team because he engaged in conduct that was "detrimental to the best interests of the Sheldon Community School District," (allegedly engaging in off-campus sexual activity between several male students and a female student)); Boster v. Philpot, 645 F. Supp. 798 (D. Kan. 1986) (citing *Fraser*) (granting the defendant's motion for summary judgment, holding that the students' due process rights had not been violated when the students were suspended for three days because of their admitted vandalism of school property). *But see* State v. Reyes, 700 P.2d 1155 (Wash. 1985) (en banc) (citing *Fraser*) (striking down a statute prohibiting insulting or abusing a teacher because of overbreadth and as being void for vagueness).

131. *See, e.g.*, Edwards *ex rel.* Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989) (citing *T.L.O.*) (affirming a summary judgment in favor of the vice principal and the school district in this § 1983 action, allowing the detention of a student for twenty minutes while investigating bomb threats); *In re* Shannon B., 505 N.Y.S.2d 179 (N.Y. App. Div. 1986) (citing *T.L.O.*) (upholding a detention pursuant to truancy laws).

132. The only case on this point actually excluded the confession. *See* State v. M.A.L., 765 P.2d 787 (Okla. Crim. App. 1988) (citing *T.L.O.*) (upholding the exclusion of a confession of a fourteen-year-old who was being investigated in connection with school burglaries because of violations of state law).

133. *See* Webb v. McCullough, 828 F.2d 1151, 1154 (6th Cir. 1987) (citing *T.L.O.*). The *Webb* court held that (1) summary judgment should not have been granted in this § 1983 case

tion,[134] restrictions on the distribution of nonschool materials,[135] restrictions on the use of school facilities,[136] and commingling search responsibilities between school and police officials.[137] At least one court has condoned the disclosure to school officials of evidence ob-

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with respect to the reasonableness of the principal's search, in *T.L.O.* terms, of the student's hotel room because it involves issues of material fact; (2) summary judgment should be affirmed with respect to the search on the grounds that the search could be deemed reasonable under the notion of *in loco parentis*; and (3) whether the principal violated the student's constitutional rights when he broke through a locked bathroom door, knocking the student against the wall, then "grab[bing] [the student] from the floor, thr[owing] her against the wall, and slapp[ing] her" involved disputed facts and should be decided by a trier of fact, thereby precluding summary judgment on this point. *Id.* Note how quickly courts are willing to re-invigorate the lesser standard of *in loco parentis*, even though the Supreme Court specifically rejected that standard in *T.L.O.* *See* New Jersey v. T.L.O., 469 U.S. at 336-37.

134. *See* Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990) (citing *Kuhlmeier*) (upholding a school restriction prohibiting students from attending parties where alcohol is served).

135. *See, e.g.*, Bystrom *ex rel.* Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14, 822 F.2d 747, 750 (8th Cir. 1987) (citing *Kuhlmeier*) (upholding the right of a school to prior review of student distributed nonschool materials, and finding the rule, as applied, not impermissibly vague given the desired distribution of an underground newspaper described as "pervasively indecent or vulgar"). *But see* Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) (striking down as overly broad a content-based prior restraint rule requiring submission and approval of any materials distributed at a high school); Slotterback *ex rel.* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991) (citing *Kuhlmeier*) (striking down in part regulations limiting a student's right to distribute nonschool materials on school property); Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189 (D. Colo. 1989) (citing *Fraser*, *Kuhlmeier*) (striking down an outright ban on distribution of materials advocating a particular religious or political view, but denying a motion for summary judgment because material facts remained undetermined as to whether the distribution of the materials involved in this case was disruptive).

136. *See, e.g.*, Clark v. Dallas Indep. Sch. Dist., 671 F. Supp. 1119 (N.D. Tex. 1987) (upholding a school's policy of not allowing student groups to use school facilities for religious purposes), *order amended*, 701 F. Supp. 594 (N.D. Tex. 1988), *appeal dismissed*, 880 F.2d 411 (5th Cir. 1989) (citing *Fraser*). *But see, e.g.*, Board of Educ. of the Westside Community Sch. v. Mergens *ex rel.* Mergens, 496 U.S. 226 (1990) (citing *Kuhlmeier*) (upholding the rights of students to use school facilities for a Christian club).

137. *See, e.g.*, Cason v. Cook, 810 F.2d 188 (8th Cir. 1987), *cert. denied*, 482 U.S. 930 (1987) (citing *T.L.O.*) (affirming a directed verdict for defendants in this § 1983 case, holding that the search of the student was reasonable even though a police liaison official was present during the search. The court held that since the search was initiated by school officials, this was sufficient to meet the reasonableness standard); Martens *ex rel.* Martens v. District No. 220 Bd. of Educ., 620 F. Supp. 29, 31 (N.D. Ill. 1985) (citing *T.L.O.*) (granting the defendant's summary judgment motion in a suit based on a search of a student who was told by a sheriff's deputy "that based on his experience it would be better to cooperate with school officials," whereupon the student complied with a request to empty his pockets and a pipe with marijuana residue was found). *But see In re* F.P., 528 So. 2d 1253 (Fla. 1st DCA 1988) (citing *T.L.O.*) (reversing a lower court decision allowing a "school official exception" to the probable cause standard for searches and seizures when the school official acted at the request of the police).

Note that the Court in *T.L.O.* reserved judgment on the issue raised in *Martens*. *See* New Jersey v. T.L.O., 469 U.S. at 341 n.7 (1985) ("This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies . . . .").

tained by undercover police engaged in sting activities in public schools.[138]

Whether it be student press or expression, a search issue, or some other student right, some of these cases would probably turn out the same regardless of the standard applied.[139] However, it is questionable whether it should be sufficient to cite "legitimate pedagogical reasons" for prohibiting a student from participating in a student ballot.[140] Under the *Kuhlmeier* test, and in light of the Court's deference to school administration, it is sufficient.[141] Nevertheless, at a minimum, a court should explore the student interest at stake and how a reasonable student would act before condoning such actions.

While many of these cases are disturbing, most of them contain some reasoning underlying their decisions, even if the reasoning is ultimately unsatisfactory. The Florida Third District Court of Appeal, however, represents an extreme example. It liked *T.L.O.* so much that between August 20, 1985, and January 7, 1986, it issued three *per curiam* decisions affirming lower courts that relied upon, *inter alia*, *T.L.O.*, without further explanation.[142] This is perhaps the greatest danger of allowing "flexibility": it precludes student reliance on any absolute level of constitutionally protected rights and allows courts to not even bother with balancing competing interests.

School administrators are continuously challenged to find ways to instill more socially-acceptable values in our youth. This recitation of cases proves the point. Arguably, if school administrators were doing anything less, they would not be doing their jobs. Nevertheless, many of these lower court cases are inconsistent with the notion that the Constitution is a baseline that preserves and protects students' rights. These decisions also undermine the authority of *Barnette*, *Tinker*, and *Pico*, which should be taken seriously because: (1) the value of respecting students' constitutional rights first articulated in *Barnette* continues to be articulated by the Court through *Kuhlmeier*; and (2) the Court has failed to provide an adequate justification for shifting from what was previously a very respectful view of students' con-

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138. *See* Legaux v. Zimmerman, Civ. A. No. 86-0354, 1987 WL 20114 (E.D. La. 1987) (citing *T.L.O.*) (dismissing a student's § 1983 suit against sheriff's officials for invasion of privacy resulting from an undercover officer's observing the student smoking marijuana, his subsequent arrest for possession and distribution of marijuana, and the disclosure of this information by the sheriff's department to school officials, leading to the expulsion of the student).

139. *See, e.g.*, Coffman v. State, 782 S.W.2d 249 (Tex. Ct. App. 1989).

140. *See supra* note 119 and accompanying text.

141. *See supra* note 105 and accompanying text.

142. *See* T.G. v. State, 481 So. 2d 101 (Fla. 3d DCA 1986) (per curiam); W.A. v. State, 478 So. 2d 890 (Fla. 3d DCA 1985) (per curiam); D.C. v. State, 474 So. 2d 16 (Fla. 3d DCA 1985) (per curiam).

stitutional rights toward a view that is deferential to the authority of school administrators.

IV. STUDENTS CRY OUT: THE MEDIA AND THE ARTS AS PROXIES FOR THE REAL "REAL WORLD"

The rhetoric courts use concerning students does not match the reality of what students are facing and dealing with on a daily basis. The best proof of this would be to talk to students directly and find out if their feelings match the courts' assertions. Unfortunately, while students are occasionally heard from,[143] broad access to students is limited,[144] and alternative outlets for student opinion often face resistance.[145] Not allowing students to speak for themselves results in inaccurate characterizations by others, especially the courts, of what students are saying, thinking, and doing.[146]

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143. *See, e.g.*, Felicia R. Lee, *Running Schools and Homework Assignments*, N.Y. TIMES, Sept. 9, 1992, at B3 (profiling a student representative on the New York City Board of Education); Karen S. Peterson, *USA Today's Teen Panel*, USA TODAY, July 24, 1992, at 8D (profiling fifteen teenagers and seeking their comments on a variety of issues facing teenagers today).

144. One example of limited access is the policy of the Texas Association of Student Councils not to release the names of student council presidents in order to protect them. While this might be a concern, it illustrates the difficulty, even for those pursuing academic interests, in gaining access to student opinion. *See* Letter from Eddie G. Bull, Assistant Executive Director, Texas Association of Student Councils, to Stuart L. Leviton (July 6, 1993) (on file with the *Florida State University Law Review*).

145. *See* Zeke MacCormack, *7 Students Punished for Newsletter*, AUSTIN AM.-STATESMAN, May 22, 1993, at B1 (discussing the suspension of students for distributing an unauthorized newsletter on school property and quoting a student who stated that when he argued before the principal that he was exercising his constitutional rights, the principal responded that "we [students] forfeit all rights when we enter the school"); Barbara Kate Repa, *Reports of the First Amendment Have Been Greatly Exaggerated*, STUDENT LAWYER, Dec. 1992, at 36 (discussing the suspension of two students for reciting the following Mark Twain quotation, reprinted in *A Teachers' Treasury of Quotations*, over the school public address system as the "Inspirational Thought For the Day": "In the first place, God created idiots. This was for practice. Then he made school boards."); James S. Hirsch, *Underground High School Papers Thrive as Teen-Agers Rebel Against Censorship*, WALL ST. J., June 8, 1992, at B1 (discussing the frustration of students in both getting information and communicating with one another, and citing instances when students have started underground newspapers and have been suspended from school for critical comments regarding schools and school officials); *supra* notes 114-15 (reviewing cases that restrict student publications); *supra* note 135 (reviewing cases discussing distributional restrictions on nonschool materials). *But see*, Tim Lott, *School Columnist Cuts Trustees Down to Size*, AUSTIN AM.-STATESMAN, May 11, 1993, at B1 (profiling an outspoken high school newspaper columnist who, although critical of school board officials, is allowed to voice his opinion); Kimberly Garcia, *Bridging the Gap*, AUSTIN AM.-STATESMAN, May 1, 1993, at B1 (discussing a symposium attended by students and city leaders, and quoting one city council member as saying, "I never dreamed in my wildest dreams that there'd be this much [student] involvement"); Rosalinda Guerrero, *Students Require Information, Support From Schools*, AUSTIN AM.-STATESMAN, April 27, 1993, at A9 (taking the opportunity as a guest columnist to express the concerns and views of a high school senior).

146. *See* Roe, *supra* note 59, at 1344 n.364 ("[S]tudents have considerably greater capacity for meaningful thought than historically or presently ascribed to them by the Court, so that the value accorded to student speech rights should be increased.").

A more accurate or realistic view of students can be obtained by reviewing various media accounts discussing issues facing teenagers today. The arts can also be used as a proxy for student opinion, although, concededly, this may be stretching it a bit.[147] Even though the arts are often created by adults and may simply be creations of the imagination, the consumers of this art are often students, which must indicate that they relate to it on some level.[148]

Even if one is doubtful as to the utility of reviewing reality through the eyes of the media and the arts, one should not forget the purpose of this exercise. The purpose is not to articulate with precision exactly what students believe, but rather to demonstrate that notions of a reasonable educator and a reasonable student, while not mutually exclusive, are not the same. A review of what students are watching, reading, and listening to gives further insight into what students are thinking and feeling.

One reporter has commented, "Crank up adolescent frustration to the breaking point, and it can come back three ways: as cynicism, as morbid fantasy and as spite laced with insecurity."[149] Unfortunately, while this assessment might be correct for some youth, for many others there are less abstract, more serious, and potentially more dangerous issues. The following is a discussion of four major issues facing students and youth today: (1) sex; (2) drugs; (3) violence; and (4) a general notion of despair.[150]

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147. It might only be stretching it for adults. *USA Today* ran a story under a glossy picture captioned "What's Pop Culture Teaching Our Kids?" USA TODAY, Mar. 16, 1992, at D1. Parents are concerned about what they perceive as the "negative images" of "racist hate in rap music, sexist violence in videos, [and] sexual irresponsibility on TV." Anita Manning, *Parents Fear Reign of Sex and Violence*, USA TODAY, March 16, 1992, at B1-B2. However, students perceive television much differently. One student, summarizing the role of television, states,

> Kids like TV that shows realistic situations . . . . They portray what's going on and they're just gutsy enough to do it, and that's what shocks parents . . . . But that's what goes on in life, that's what goes on in peoples' houses. Students like that, they like seeing what goes on between guys and girls.

Id.

148. *People* magazine ran a cover story on the past fifty years of teen idols. *Whole Lot of Faintin' Goin' On*, PEOPLE, July 27, 1992, at 43. The article explained the relevance and importance of teen idols:

> Like video games and the atomic bomb, teen idols are one of the defining inventions of our time. . . .
>
> What do teenagers want in a teen idol? A glimpse of heaven without adult supervision. They may not be philosophers, but adolescents still have a philosopher's yearning for the ideal. . . .
>
> . . . .
>
> These idols help us find our way too. They take our earliest notions of passion, love, devotion, and cast them on a wide screen. . . .

Id.

149. Jon Pareles, *A Battle of 2 Headliner Bands*, N.Y. TIMES, July 20, 1992, at C1.

150. *See* Laura Sessions Stepp, *Youthful Optimism Has Turned to Pessimism*, AUSTIN AM.-

A. *Reality Check Number 1: Sex*

School administrators have a preoccupation with the topic of sex.[151] As such, this fixation deserves special attention. The reality is that whether society likes it or not, students are sexually aware,[152] and many are sexually active.[153] A recent survey by the federal Centers for Disease Control[154] reports that in the aggregate, fifty-four percent of high school students have engaged in sexual activity.[155] There also is evidence that more and more students become sexually active each day.[156]

Paralleling the rise in youth sexual activity is the concern and fear of sexually-related health problems. These considerations include teen pregnancy,[157] sexually transmitted diseases (STDs),[158] and AIDS.[159] In

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STATESMAN, Feb. 12, 1993, at C1 ("If there is one group of people in need of . . . hope, it's today's adolescents. Recent surveys reveal that a majority of Americans ages 12 to 17, about 20 million youths, are increasingly pessimistic about this country's future and, to a lesser extent, their own."). *Cf.* Hirsch, *supra* note 145 (discussing the growth of alternative outlets for student opinion, and quoting one student's description of the shortcomings of her high school's newspaper: "There's no drugs, there's no sex, kids don't get pregnant, and everyone gets good grades.").

151. Note that notions of sex, sexuality, and sexual autonomy were relevant in *Fraser* and *Kuhlmeier*. *See supra* notes 81-109 and accompanying text.

152. *Seventeen* magazine has done several articles to assist its mostly adolescent female readership in better understanding sex, sexuality and the implications of sexual activity. *See, e.g.*, Debra Kent, *Sex & Your Body: The No of the '90s—Sexual Decision-Making in a New Age*, SEVENTEEN, Jan. 1991, at 32-35 (interviewing teenage girls who are abstaining from sexual activity, and discussing the major health risks of pregnancy, AIDS, STDs and future infertility); Debra Kent, *Sex & Your Body: Talking to Your Parents about Sex*, SEVENTEEN, Apr. 1990, at 100-05 [hereinafter Kent, *Talking to Your Parents*] (giving advice to young women on how to talk to their parents about sex); Kathy McCoy, *Quiz: Are You Ready to Have Sex?*, SEVENTEEN, Jan. 1989, at 12 (attempting to present questions young women should ask in determining whether they are ready to have sex).

153. *See infra* notes 154-56 and accompanying text.

154. *See 54% in High School Say They've Had Sex*, DALLAS MORNING NEWS, Jan. 4, 1992, at 1A [hereinafter *54% in High School*]. Note that while this report attempts to present objective information on the sexual activity of youth, other attempts have been blocked by special interests. *See, e.g., id.* at 9A ("In July, federal Department of Health and Human Services officials postponed plans for a larger and more detailed survey of teen sex habits. That study came under fire from conservatives who called it wasteful and intrusive, citing questions about homosexual behavior, among others.").

155. *See 54% in High School*, *supra* note 154. Breaking down the aggregate figure, the report says that 40% of ninth-graders reported having had sex, 48% of tenth-graders, 57% of eleventh-graders, and by the twelfth grade, fully 72% reported already having had sex. *Id.*

156. *See* Manning, *supra* note 147, at B1 (noting that "[e]very day, 8,441 teens become sexually active"). *But see* Karen S. Peterson, *Virginity May be Gaining a New Cachet*, USA TODAY, July 24, 1992, at D1-D2 (noting that there are early signs of a renewed teen interest in either remaining virgins, returning to abstinence if previously sexually active, or delaying sexual activity).

157. *See* Peterson, *supra* note 156, at D2 (noting that youth fear pregnancy the most when contemplating sexual activity).

fact, AIDS affecting youth has become such a major concern that *Newsweek* ran a cover story on the issue.[160]

Condom manufacturers, recognizing the rise in teenage sexuality, have actually started specifically targeting the teenage market.[161] While not everyone is enthusiastic about an advertising campaign aimed at youths fourteen and older,[162] this campaign does seem to be a market-driven response to the realities of the day.

Marketers are not the only ones to recognize that students are interested in sex. The arts also address this issue as one of many that affect teenagers. One television program that has become popular with the young is *Beverly Hills, 90210*.[163] The show, which focuses on teenagers in Beverly Hills, "has become more than a hit series; it is a social phenomenon of worldwide proportions."[164] The show has "manage[d] to tap into real concerns of contemporary teens: dating, parents, friends, sex."[165] Dylan McKay, a central character in the show, "has become a touchstone for the American public: he's Everyteen, a youngster who, growing up quite cognizant of the frightening age in which he lives—AIDS, drugs, family, and now urban violence—retains not only a cool resolve but also a cooler integrity."[166]

Many students, frustrated with a lack of free and open outlets to explore issues relevant to their lives, are turning to shows like *Beverly*

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158. *See, 54% in High School, supra* note 154, at 9A (noting that one out of every twenty-five responding students said that they had contracted an STD); *see also* Kent, *Talking to Your Parents, supra* note 152.

159. *See* Peterson, *supra* note 156, at D2. One student commented, "You can be rid of a pregnancy. You can't get rid of AIDS. . . . That is what is keeping most of us away from sex." *Id.*

160. *See* Barbara Kantrowitz et al., *Teenagers and AIDS*, NEWSWEEK, Aug. 3, 1992, at 45-49.

161. *See Company Targets Teens with New Brand of Condom*, AUSTIN AM.-STATESMAN, Nov. 28, 1991, at E10 [hereinafter *Condom*] (discussing a condom manufacturer's repackaging of its condoms using a "marketing mix aimed at teens—a $3 price, a compact six-condom package with neon graphics, free condom key chains or rub-off tattoo kits inside and advertising on MTV").

162. *Id.* (noting that some feel the "Safe Play Condoms for Young Lovers" will encourage teens to have sex). A better educated youth, however, should at least have a greater chance of preventing some of the serious health repercussions unprotected sex can lead to, should he or she choose to take precautions. At least one study has found that education can work. *See, 54% in High School, supra* note 154 (discussing a survey by Girls Inc. which found that teen pregnancy fell 50 percent once teens were educated).

163. *See Zip Code Heaven*, PEOPLE, July 27, 1992, at 102 (noting that *Beverly Hills, 90210* "is watched by more teens than any other series on TV").

164. Kevin Sessums, *Wild About Perry*, VANITY FAIR, July 1992, at 96. *See id.* at 151 (discussing the popularity of the show in the United States and noting that new episodes shown during the summer of 1991 attracted 69 percent of the female teenage audience).

165. Richard Zoglin, *Revenge of the Androids*, TIME, July 20, 1992, at 78.

166. Sessums, *supra* note 164, at 96.

Hills, 90210 as an alternative means of exploring matters such as sex.[167] This show is important because it provides insight into the subjects our students are interested in. The arts also demonstrate that, despite the Court's rhetoric,[168] students are not so naive, or so innocent, that they are unable to handle issues, such as sex, that they face daily. Luke Perry, who plays Dylan McKay, has stated, "I try to reiterate to these people writing the show that these kids ain't stupid. They see. They know. 'Don't be afraid to talk to them about real issues on a real level, because they are fucking way ahead of you.'"[169] While this might not be the most eloquent articulation of an approach to relating to youth, it is brutally honest.

This discussion of sex could not be complete without mentioning Madonna. In a retrospective on teen idols, *People* magazine described Madonna as follows: "For millions of teenagers, Madonna was the girl of their disobedient dreams. She had power; they had none. She was free, while they still needed Mom's permission to stay out past 10."[170] Her media coverage ranges from the expected—*Rolling Stone*[171]—to such unexpected sources as the *Economist*,[172] *National Review*,[173] and *The Progressive*.[174] Without passing judgment on the merits of these articles, it cannot be denied that Madonna nonetheless demands attention from most quarters of society. She is indeed an icon,[175] and understanding her may aid in the understanding of high school students today.

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167. *Id.* at 152. A network executive, discussing the show, stated,

> I think that the kids in some cases look to it to begin a dialogue with their parents about things. If you look at the demographics of who is watching, it's not just teens. It's teens going all the way up into the mid-to late forties. So that says to me that it's teens probably with their parents. It probably becomes one of the few times during the week where they stimulate a discussion. We know that from the mail we get—this program is something that the family shares together.

Id.

168. *See, e.g.*, *supra* notes 95-99 and accompanying text (discussing the rhetoric of *Fraser*).

169. Sessums, *supra* note 164, at 149.

170. *Madonna*, PEOPLE, July 27, 1992, at 46.

171. *See* Carrie Fisher, *True Confessions: The Rolling Stone Interview With Madonna*, ROLLING STONE, June 13, 1991, at 35 (part 1 of a 2-part interview) (hereinafter Fisher, *Part I*); Carrie Fisher, *True Confessions: The Rolling Stone Interview With Madonna*, ROLLING STONE, June 27, 1991, at 45 (part 2 of a 2-part interview) (hereinafter Fisher, *Part II*).

172. *See Madonna: Dominatrix of Discourse*, ECONOMIST, July 27, 1991, at 82 (describing Madonna as a "musical opportunist").

173. *See* Joseph Sobran, *Single Sex and the Girl*, NAT'L REV., Aug. 12, 1991, at 32 (profiling Madonna, disapproving of Madonna's use of sexual themes, and concluding that Madonna mocks "Christian values").

174. *See* Ruth Conniff, *Politics in a Post-Feminist Age*, THE PROGRESSIVE, July 1991, at 17 (contrasting Madonna as post-feminist woman with "real women" who must still struggle with low wages and a lack of control over their own destinies).

175. The label "icon" has been used to describe Madonna more than once. *See* Fisher, *Part I*, *supra* note 171, at 35; *Madonna: Dominatrix of Discourse*, *supra* note 172, at 82.

While Madonna has certainly produced her fair share of fluff,[176] some of her songs seem to go right to the heart of what the teenagers of today are feeling and thinking. An example is "Papa Don't Preach."[177] The song has been described as an anti-abortion anthem.[178] More importantly, it is a plea by a young girl for understanding. The lyrics are:

> Papa I know you're going to be upset
> 'Cause I was always your little girl
> But you should know by now
> I'm not a baby
> You always taught me right from wrong
> I need your help, daddy please be strong
> I may be young at heart
> But I know what I'm saying
> The one you warned me all about
> The one you said I could do without
> We're in an awful mess
> And I don't mean maybe—please
> Papa don't preach, I'm in trouble deep
> Papa don't preach, I've been losing sleep
> But I made up my mind, I'm keeping my baby
> I'm gonna keep my baby, mmm . . .
> He says that he's going to marry me
> We can raise a little family
> Maybe we'll be all right
> It's a sacrifice
> But my friends keep telling me to give it up
> Saying I'm too young, I ought to live it up
> What I need right now is some good advice, please . . . .[179]

The notion of Madonna as social commentator may offend some people. However, given the amount of publicity surrounding Madonna, it seems appropriate to look at her music, not just her hype. Seemingly, at least some of her popularity can be attributed to her music. Confronted with "Papa Don't Preach," one may either employ a *Kuhlmeier*-type naivete and conclude that discussions of pregnancy are inappropriate in the high school setting, or one may recognize that high school students are indeed sexually active.[180]

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176. *See, e.g.*, MADONNA, *Material Girl*, *on* LIKE A VIRGIN (Sire Records 1984); MADONNA, *Lucky Star*, *on* MADONNA (Sire Records (1983); MADONNA, *Where's the Party*, *on* TRUE BLUE (Sire Records 1986).

177. MADONNA, *Papa Don't Preach*, *on* TRUE BLUE (Sire Records 1986).

178. *See Madonna: Dominatrix of Discourse*, *supra* note 172.

179. MADONNA, *Papa Don't Preach*, *on* TRUE BLUE (Sire Records 1986).

180. *See supra* notes 151-56 and accompanying text.

The point of this reality check is not so much to pass judgment on teenage sexuality; rather, it is to provide evidence that when the Court discusses the innocence and naivete of youth, or the inability of our youth to address issues of sexuality, these assertions are not supported by facts. It is perhaps the Court which is unable to understand, and the schools which are not adequately able to address, this pressing social issue.

B. Reality Check Number 2: All the Rest

On a broader level, many of our youth are in a precarious situation.[181] One study found that over the past thirty years, the number of teenage suicides and homicides has increased almost three-fold on a per capita basis.[182] The study further reports that the number of unwed mothers has doubled between 1960 and 1988,[183] and that, currently, one in four children are living in poverty.[184]

Drugs also afflict our students. Recent surveys present conflicting findings with respect to the trend in high school student drug use.[185] Even under the rosier scenario, at least twenty-nine percent of high school seniors report using drugs.[186] One article cited drugs, along with sex and AIDS, as the "triple threat" facing teenagers today, and noted the correlation between the use of alcohol or other drugs and teenage pregnancies.[187]

The schools, which should be a refuge to which students can turn, are failing to address these concerns. During the 1980s, people questioned the efficacy of our public schools.[188] One commentator notes

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181. *See generally, Experts Say Status of Kids Worsened in Last 30 Years*, DALLAS MORNING NEWS, Jan. 3, 1992, at 1A [hereinafter *Kids Status*] ("In a disturbing measure of the effect of economic and social change, a new study says that the status of children in the United States has declined by almost every measure during the past 30 years.").

182. *See id.* at 13A (The study found that the suicide rate for youths between the ages of fifteen and nineteen increased from 3.5 per 100,000 youths in 1960 to 11.3 per 100,000 youths in 1988, and that homicide figures for the same group over the same time frame rose from 4.0 per 100,000 to 11.7 per 100,000.).

183. *See id.*

184. *See id.*

185. *See High School Drug Use Declines*, ORLANDO SENTINEL TRIBUNE, Jan. 28, 1992, at A4 (finding that drug use among high school seniors was down from 33% in 1990 to 29% in 1991). *But see* Doug Isenberg, *Teen Drug Use Up, Reversing Trend*, ATLANTA CONST., Oct. 20, 1992, at E1 (discussing a more recent survey that indicates a reversal in a three-year trend of declining drug use among teenagers).

186. *See High School Drug Use Declines, supra* note 185, at A4.

187. *See* Bob Dart, *Drugs, Sex, AIDS: Symposium Warns Teens of "Triple Threat,"* AUSTIN AM.-STATESMAN, Dec. 6, 1992, at A20.

188. *See, e.g.*, MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 816 (3d ed. 1992) (noting that *Nation at Risk: The Imperative for Educational Reform* was the first in a series of reports addressing the "crisis in American education").

that "[t]he major reform effort . . . has focused not on enhancing quality but on reversing what the National Commission on Excellence in Education termed 'a rising tide of mediocrity that threatens our future as a nation and a people.'"[189] Unfortunately, while much discussion on this issue continues today, it is unclear whether any true advances have been made.[190]

The schools are not only educationally unsound, their campuses are violent as well. Gone are the days when teenagers were involved in "innocent" fun, such as gum chewing.[191] Today, students either have, or have access to, weapons.[192] Moreover, today's students are not afraid to use them. Students are committing homicides,[193] conspiring to commit homicides,[194] and facilitating drug deals.[195] Under these

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189. *Id.*

190. *See, e.g.*, William Tucker, *School Choice and Reforms for the Future*, WALL ST. J., Dec. 4, 1991, at A14 ("After increasing education spending by 33% over the past decade, Americans realize they have very little to show for it."); *Review & Outlook: Education Dinosaurs*, WALL ST. J., Jan. 21, 1992, at A20 (noting that the past "decade of 'reform' has produced only lower SAT scores . . . .").

191. *See, e.g.*, Newsome v. Batavia Local Sch. Dist., 842 F.2d 920 (6th Cir. 1988).

> Today's public schools face severe challenges in maintaining the order and discipline necessary for the impartation of knowledge. A recent study conducted by the Fullerton, California, Police Department and the California Department of Education, for instance, shows that, while schoolteachers in the 1940's listed talking, chewing gum, and running in the hallways as the primary disciplinary problems they encountered, today's schoolteachers are more concerned with drug abuse, rape, robbery, assault, burglary, arson, and bombings.

Id. at 924-25 (citing Ezra Bowen, *Getting Tough*, TIME, Feb. 1, 1988, at 54).

192. *See* Rod Nordland, *Deadly Lessons*, NEWSWEEK, Mar. 9, 1992, at 22 (quoting a fifteen-year-old New York City student who stated, "If you had the money, you could get yourself a 'tool' [gun] in 15 minutes. I would say, out of 100 kids, 90 got guns or can get them."); Tom Morganthau et al., *It's Not Just New York*, NEWSWEEK, Mar. 9, 1992, at 25 ("According to the federal Centers for Disease Control, one student in five reports carrying a weapon of some type and about one student in 20, or 5.3 percent, reports carrying a gun.").

193. *See, e.g.*, *Accidental Shooting Kills 1, Wounds 1 at L.A. High School*, AUSTIN AM.-STATESMAN, Jan. 22, 1993, at A4; Zeke MacCormack, *1 Dead, 1 Wounded in Shooting Blamed on 2 Killeen [Texas] Teen-agers*, AUSTIN AM.-STATESMAN, Jan. 23, 1992, at B2 (discussing an after-school shooting that was thought to have been prompted by a fight at school between two female students); Robert D. McFadden, *Student Shot to Death in a High School in Brooklyn*, N.Y. TIMES, Nov. 26, 1991, at A12.

> As two teenage boys fought with fists, a third youth drew a gun and opened fire in the crowded hallway of a Brooklyn high school today, and the wild shots killed a 16-year-old bystander and critically wounded a teacher who was approaching to intervene. One law-enforcement official said the fistfight that preceded the shootings . . . apparently stemmed from a dispute over a book bag. Another investigator said the youth began firing when he saw that his friend was losing the fight.

Id.

194. *See Teens Plead Guilty to Conspiracy to Kill Fellow Student in California*, AUSTIN AM.-STATESMAN, Nov. 26, 1991, at A4 (describing how two thirteen-year-olds and a fourteen-year-old pleaded guilty to a conspiracy to kill a fifteen-year-old described as a "bully").

195. *See, e.g.*, Berry v. State, 561 N.E.2d 832 (Ind. Ct. App. 1990) (student convicted of selling marijuana at school); New Jersey v. T.L.O., 469 U.S. 325 (1985).

conditions, school administrators could make, and judging by lower court decisions have made, cases for a wide variety of actions, each justified as "reasonable."

For lack of a better place to turn, many teenagers look to each other for support. Numerous media accounts depict this phenomenon. One newspaper article chronicled the life of some Hollywood, California, teenagers dubbed the "Trolls" and their harsh lifestyle.[196] Another story analyzed the rise of gang activity, not by young men, but by young women in search of protection.[197] Courts do not seem to address these situations in their rhetoric. Courts and, more importantly, school administrators do not listen to these cries for help.

Students not only attempt to express their dissatisfaction with the system through their own actions and words, but they also express themselves vicariously through the arts that they consume. Tracy Chapman[198] sings of radical change,[199] escapism,[200] and asks the most difficult, lingering question, "Why?"[201] Pink Floyd's *The Wall*,[202] still popular with today's youth,[203] presents another artistic expression of youthful disillusion. Both the classic refrain from *Another Brick in*

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196. Sonia L. Nazario, *Playing House: Troubled Teen-agers Create a Fragile Family Beneath a Busy Street*, WALL ST. J., Jan. 21, 1992, at A1. The opening paragraph of the article presents a stark look at the existence of some youths.

> Five teen-agers crouch over a candle in a dark, fetid cavern under a busy roadway. Around them, the dirt floor seems to move as rats look for food. As the teen-agers pass around a half-gallon bottle of Riesling, they talk about their latest sexual scores. This is the place the teens call, simply, the Hole. "This is my home," reads a graffito scrawled on a concrete wall.

Id.

197. *See* Felicia R. Lee, *Violence, Loneliness Drive More Girls into Gangs, Experts Say*, AUSTIN AM.-STATESMAN, Nov. 28, 1991, at E14 (noting that the motivation to join gangs apparently stems from a need to gain protection from the violence around them).

198. Tracy Chapman was introduced at a Farm Aid benefit concert "as the most important 'poet and dreamer of her day.'" Karen Schoemer, *Tracy Chapman Struggles to Live up to Expectations*, AUSTIN AM.-STATESMAN, May 4, 1992, at B9.

199. *See* TRACY CHAPMAN, *Talkin' Bout a Revolution*, *on* TRACY CHAPMAN (SBK Records 1988) ("finally the tables are starting to turn"). The album, *Tracy Chapman*, has been described as one that "spoke volumes in whispers and minute details." Schoemer, *supra* note 198.

200. *See* TRACY CHAPMAN, *Fast Car*, *on* TRACY CHAPMAN (SBK Records 1988) ("You got a fast car/I want a ticket to anywhere/Maybe we make a deal/Maybe together we can get somewhere/Anyplace is better/Starting from zero got nothing to lose/Maybe we'll make something/But me myself I got nothing to prove").

201. *See* TRACY CHAPMAN, *Why?*, *on* TRACY CHAPMAN (SBK Records 1988).

202. PINK FLOYD, THE WALL (Columbia Records 1979).

203. *The Wall* was number 18 on the *Billboard* "Top Pop Catalog Albums" chart during the week of August 29, 1992. *Top Pop Catalog Albums*, BILLBOARD, Aug. 29, 1992, at 49. This chart contains "albums [of] older titles which have previously appeared on the Billboard 200 Top Albums chart and are registering significant sales." *Id.*

the Wall, Part 2,[204] "We don't need no education,"[205] and the sense of betrayal in *Mother*,[206] illustrate the disbelief and distrust youth have toward institutions designed to inculcate correct values in them.[207]

The popularity of movies such as *Dead Poet's Society*,[208] an extreme example of youthful despair in which the youthful protagonist, in classic Shakespearean tragedy form, commits suicide to escape the stifling control of his father, and *Footloose*,[209] a movie and accompanying soundtrack which depicts teenagers overcoming frustration through a communal grant of empowerment, are further examples of the arts reflecting the desires and needs of the young.

Sex, drugs, violence, and despair are very serious issues facing our students today. The Supreme Court and lower courts do not adequately or accurately incorporate these issues in their discussions of students. The rhetoric used by courts simply does not match the reality facing students, which implies that the current reasonableness test for students' constitutional rights is unjustified and should be replaced with a protected sphere of students' rights based on the principles of *Barnette*, *Tinker*, and *Pico*.[210]

Some might argue that the issues raised in this Article justify more stringent control of students, not less; however, there is independent support for promoting students' rights as an educational matter. Pro-

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204. PINK FLOYD, *Another Brick in the Wall, Part 2*, *on* THE WALL (Columbia Records 1979).

205. *Id.*

206. PINK FLOYD, *Mother*, *on* THE WALL (Columbia Records 1979) ("Hush now baby don't you cry/Mama's gonna make all of your/Nightmares come true/Mama's gonna put all of her fears into you/Mama's gonna keep you right here/Under her wing/She won't let you fly but she might let you sing/Mama will keep baby cozy and warm/. . ./Of course Mam'll help build the wall").

207. There is at least one case in which a teacher was discharged for showing the movie version of this album. *See* Fowler v. Board of Educ. of Lincoln County, 819 F.2d 657 (6th Cir. 1987).

208. DEAD POET'S SOCIETY (Touchstone Pictures 1989). *See* Mary McHugh, *Hits and Misses of Seasons Past*, N.Y. TIMES, Sept. 6, 1992, § 2, at 15 (DEAD POET'S SOCIETY grossed $94 million). The movie has been described as a "critically acclaimed film . . . which inspires teachers to teach and students to learn . . . . The film was applauded by the British House of Commons for 'celebrating the wonder of poetry, literature and language [, and] . . . the importance of courage and integrity, non-conformism and free thought.'" *Sixth Annual Kohl Award to Honor Teachers*, PR NEWSWIRE, Mar. 29, 1990, *available in*, LEXIS, Nexis Library, Omni File. One library also has set up screenings of the movie for teenagers. *See Children in Spotlight at Auburn Kidsday*, SEATTLE TIMES, June 25, 1992, at F3.

209. FOOTLOOSE (Paramount Pictures 1984). At the time of its release, *Footloose* was described as "hugely popular." Vincent Canby, *Film View: Musicals Move Ahead While Looking Back*, N.Y. TIMES, Apr. 8, 1984, § 2, at 19.

210. *See supra* section II.A.

moting students' rights may: (1) further "conceptual development";[211] (2) foster debate on diverse issues;[212] (3) increase the chances that students will "experience the positive power of the law";[213] and (4) further respect for human dignity.[214] These examples lend support to the premise that students should have rights because of their value to the educational process.

Beyond the educational justification is an equally plausible interpretation of reality that lends support to legal recognition of students' constitutional rights. Because of the seriousness of this issue, and due to the temptation to discount students' rights, or to balance away students' rights under the guise of reasonableness, the Court must return to the principles of *Barnette*, *Tinker*, and *Pico* or the discussions of students' rights will be rendered meaningless. Instead of reducing constitutional protection as the seriousness of the issue increases, the opposite must be done. The serious issues present the greatest need for constitutional protections.

A final observation on reality and a comment on the benefits of respecting students' rights relate to combining the educational mission with the law. The *Tinker* Court discussed the importance of respect.[215] Students cannot realistically be expected to respect anyone—themselves, other students, school administrators, or adults in general—if school administrators do not demonstrate the importance of the concept by respecting the students. The law and its positive effects will not be recognized or respected if school administrators continuously resort to "the law" to justify suppression of student activities. If a student's dignity is not respected, it should come as no surprise if the student refuses to respect the dignity of others. To ensure the success of the educational mission, the law must support students by providing the necessary counterbalancing force needed to foster a more balanced relationship between students and school administrators, so that respect can be realistically promoted between both groups.[216]

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211. Roe, *supra* note 59, at 1276 ("[A]n understanding of the work of the schools as conceptual development necessitates a high degree of tolerance for student speech under the protection of the [F]irst [A]mendment.").

212. *See* Lee Gordon, Note, *Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education*, 36 N.Y.L. SCH. L. REV. 397, 400 (1991).

213. Geimer, *supra* note 38, at 973.

214. *See* Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293 (1988).

215. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969).

216. *See* Dienes and Connolly, *supra* note 110, at 394 ("Students, teachers, and parents have *substantive* constitutional rights that the courts are obligated to protect. . . . While judges may properly give deference to administrative decisions when deference to administrative expertise is called for [this] must not be exalted to the point that substantive judicial review becomes a meaningless ritual.").

V. A PROPOSED BALANCED RELATIONSHIP

To achieve a balanced relationship, school administrators must begin respecting students and include students in the decisions that affect the students' lives. This newfound sensitivity might seem simplistic and perhaps even naive. It is, in fact, based in part on an ideal world. In an ideal world there would be a sphere of protected rights that are not subject to balancing, reasonableness, or any other test. Even in such a world, however, the game would likely change from a balancing act to a debate on how large the sphere of rights should be.

The principle that should be strived for in a balanced relationship was roughly articulated in *Arnold v. Carpenter*,[217] which dealt with a student dress code. The majority, in upholding a male student's right to wear long hair, stated,

> It is understandable why some judges find students' "long hair" claims constitutionally insubstantial. Measured against today's great constitutional issues (capital punishment, abortion, school segregation) the question of whether a student may or may not have constitutional protection in selection of his hair dress appears *de minimis*. Perhaps even judges who sustain the right are nagged with impatience and doubt when faced with student claims. But we look down across a gap of a generation or two, from the Olympian heights of what we consider the great issues. For the high school student claimant, however, the right to wear "long hair" is an issue vital to him and we have seen what he is willing to sacrifice for his claim. It is settled that the students have constitutional rights of freedom and there appears to be no reason why the values of freedom are less precious in a younger generation than in an older.[218]

It is easy to see that school administrators may believe each is reasonable in desiring a dress code,[219] and that students might disagree with school administrators on how the dress code should be written. *Ar-*

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217. 459 F.2d 939 (7th Cir. 1972).

218. *Id.* at 941-42 n.5. Justice Stevens, then a Seventh Circuit judge, dissented in this case. It is interesting that he makes a similar plea for acceptance and respect for student views in *Fraser*. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 692 n.2 (1986). This controversy over student hair length, and the sacrifices students are willing to make, was recently revisited. *See* Toungate *ex rel* Toungate v. Bastrop Indep. Sch. Dist., 842 S.W.2d 823 (Tex. Ct. App. 1992) (involving a third-grade student's fight to wear a "thin ponytail five or six inches below his collar," and discussing the student's subsequent in-school suspension. *Id.* at 826).

219. One principal attempted to implement a dress code banning certain colors and logos in response to gangs. *See Baytown School's Dress Code Forbids 'Gang' Colors*, AUSTIN AM.-STATESMAN, Mar. 29, 1992, at B10.

nold is particularly interesting because students were actually involved in the formulation of the dress code that Carpenter challenged.[220] In siding with Carpenter, the Court preserved a sphere of protected rights, even though the students and school administrators that wrote the policy were acting reasonably in requiring alternate behavior.

Because it is unlikely that a claimant will find a court this sympathetic today,[221] a more explicit solution to balancing student and school interests is necessary. A possible solution includes a three-step analysis that will both respect the constitutional rights of students and allow school administrators to carry out their educational mission. The three steps are: (1) determine the reasonableness of the school administrator's actions in light of a reasonable educator standard; (2) if necessary, determine the reasonableness of the student's conduct in light of a reasonable student standard; and (3) if necessary, balance the interests of the school administrator with the interests of the student to determine whether the student ought to be allowed to act, or whether the school administrator ought to be allowed to restrict the student's actions.

Step one requires the fact finder to determine whether the school administrator's actions, in some absolute sense, are reasonable in light of a reasonable educator standard.[222] The question that must be asked is: Would a reasonable educator act in the manner in which the actual school administrator acted in light of all of the circumstances? If the answer is no, the inquiry ends. If the school administrator's actions are found to be unreasonable, even under the deferential reasoning of *Kuhlmeier*,[223] the school administrator's actions cannot stand. If, however, the school administrator's actions are deemed reasonable, it will be necessary to proceed to step two.

This second step inquires into the reasonableness of the student's conduct in light of a reasonable student standard.[224] The step two question is: Would a reasonable student conduct himself or herself in the manner in which the actual student conducted himself or herself in light of all of the circumstances? As with step one, if the student's

220. One issue associated with advocating student empowerment is what happens if students vote to suppress students' rights. A group of Washington state students voted on an initiative to ban homosexual students from serving on the student council. *See Gay Activists Assail Oregon Vote*, AUSTIN AM.-STATESMAN, Mar. 29, 1992, at B10. While the initiative failed, this highlights the need on occasion, as the *Arnold* court demonstrated, for protecting substantive rights irrespective of the majority will. While students should be encouraged to express their views, and these views should be considered, the views cannot be definitive on the issue.

221. *See supra* notes 110-42 and accompanying text.

222. See *supra* note 6 for a definition of "reasonable educator."

223. 484 U.S. 260 (1988).

224. See *supra* note 9 for a definition of "reasonable student."

conduct is found to be unreasonable, the analysis ends and sanctions against the student should stand. If, however, the student is found to have conducted himself or herself reasonably, then it will be necessary to proceed to step three.

Step three is the most difficult step. Two reasonable people—the student and the school administrator—are in opposition to one another. Each has behaved as his or her peers would act. The question remains: Who should prevail? This is where a true balancing of interests is required. The approach most protective of students would require courts to use a heightened level of scrutiny of the school administrator's actions analogous to that used by courts evaluating limitations on suspect classes in Equal Protection cases.[225] I realize, however, that this is unrealistic. Therefore, a mid-level judicial scrutiny, something approaching what one commentator describes as rational basis with a bite,[226] is more likely to be accepted by courts.[227]

This mid-level scrutiny should produce a greater sphere of protected students' rights than that found today. Hopefully, this level of scrutiny would not increase the number of judicial challenges to school authority. Rather, if the Supreme Court were to adopt this higher standard of review, it would be sending a message to school administrators to re-evaluate their actions and to take the interests of students more seriously when determining whether to implement student restrictions.[228]

A bright line test for step three is seemingly impossible. The issue of students' rights is not one that is susceptible to absolutes. Given the inevitable conflicts between students' desires and the educational mis-

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225. *See, e.g.*, Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967).

226. *See* Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972) (recommending a new level of scrutiny for equal protection cases, and noting that this new level of scrutiny "would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture.").

227. This idea has been suggested before. *See* Dienes and Connolly, *supra* note 110, at 389-92 (proposing a "weighed balancing" of interests as an alternative to formalistic judicial decision making). However, this proposed approach covers a broader range of student interests, and more explicitly recognizes the interests to be balanced.

228. *See id.* at 385. ("Even though judicial action seldom provides definitive answers to conflicts, the threat of judicial intervention reshapes the dispute and becomes part of the give and take of the dialogue."); *see also* Roe, *supra* note 59, at 1331:

> Review of restrictions of student speech is particularly necessary because schools are charged with teaching respect for democratic values, including [F]irst [A]mendment values. Therefore, courts have a responsibility to see that [F]irst [A]mendment values are maintained when school boards evaluate the educational suitability of student speech because such evaluations may threaten the very values that schools have a duty to teach.

Id. (footnote omitted).

sion, the circumstances of a given case necessarily will determine who prevails. Admittedly, there will be few cases in which a fact finder will conclude that under no circumstances could he or she find that the school administrator or the student would be reasonable in acting in the manner he or she acted. Cases which come immediately to mind that might qualify include strip searches, drug testing, and weapons.

Slightly more difficult cases will be those in which the fact finder must decide whether the actions of students or administrators are reasonable in particular circumstances. The important point here is that even if one finds the action of the school administrator is reasonable, this should be only the beginning of the inquiry, not the end. A court should be required to inquire further into the reasonableness of the student's conduct or interest and expressly articulate what the offending conduct or interest is and why it is reasonable or unreasonable. At a minimum, such an articulation subjects the court's opinion to scrutiny by appellate courts, commentators, and the general public. If any of these groups is dissatisfied, appropriate remedial steps can be taken. While this is less than the ideal unyielding baseline of students' rights, it is far better than some of the conclusory court opinions that do not bother to evaluate the student interest at all.[229]

A requirement that a court "gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalizations created by perfunctory judicial hypothesizing"[230] should be imposed. Assuming the student's interest is reasonable, a court should further be required to balance it in light of *Tinker*'s material and substantial interference standard.[231]

Students and school administrators will disagree over what are proper limits over speech, press, and privacy rights. Indeed, one student might disagree with another student, and educators will disagree among themselves. The critical idea is that both students' and school administrators' interests be taken into account. Under today's scheme, this balancing of interests is not occurring. Under the proposal set forth here, school administrators and courts will be required to articulate the relevant interests of schools and students and explain why one outweighs the other.

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229. Such a disinterest in students' rights is exactly what occurred in *Fraser* and *Kuhlmeier*. In *Fraser*, the Court based much of its reasoning on the potential harm to the younger students and then concluded that the school board should make the ultimate determination of what constitutes inappropriate speech. *See* 478 U.S. 675, 684-85 (1985). In *Kuhlmeier*, the Court concluded that as long as actions of the administrators were reasonably related to legitimate pedagogical concerns they would be deferred to. *See* 484 U.S. 260, 273 (1987).

230. Gunther, *supra* note 226, at 21.

231. *Tinker*, 393 U.S. at 509.

VI. CONCLUSION

This Article attempts to present the status quo and a new vision of the future with respect to students' rights. The status quo encompasses a legal standard that demands mere "reasonableness" when evaluating students' constitutional rights, and as a result, the Supreme Court has sanctioned an approach that gives great deference to school administrators. The status quo also encompasses an activist school administrator community that takes the Supreme Court's sword and wields it wherever and whenever it can to force students to conform to its notions of orthodoxy.

The status quo must take notice of students who are disillusioned, angry, bitter, and rebellious. Students today generally face despair and must confront the issues of sex, drugs, and violence at an earlier age than previous generations.

While parents and schools must inculcate youth with certain values, school administrators should include students in the selection of the values to be instilled. The silencing movement has not silenced students, and other puritanical and totalitarian methods have not stopped students from acting on their desires. Only by embracing a student-inclusive view and creating an environment where both students and school administrators mutually respect each other, listen to each other, and try to incorporate ideas espoused by each other, can we hope to move toward a society that equally values students' rights and educators' goals.