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Section of
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Taking Stock of Student Rights
Forty Years after *Tinker*

By Stephen J. Wermiel

Next February marks the fortieth anniversary of the decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the high watermark in U.S. Supreme Court recognition of the rights of students in school. It is an appropriate time to take stock of the rights of students and the issues they face in school.

Let's start on a positive note. Our Human Rights Hero for this issue is Mary Beth Tinker who, as a thirteen-year-old girl, wore a black armband to school to protest the Vietnam War and was suspended. Her courage led to the landmark *Tinker* decision. We honor her in this issue and hear from her about how she is still fighting for the rights of students after nearly forty years.

She has been extremely generous for many years with the time she devotes to speaking to student groups throughout the country about their rights. For example, in my own program, the Marshall-Brennan Constitutional Literacy Project at American University Washington College of Law, she is always very willing and excited to visit some of the fourteen regular constitutional law classes in Washington, D.C. public high schools that are taught by forty-six law students.

The rest of the story is not as rosy. When the Supreme Court in 1988 gave school officials more leeway to control school newspapers and student speech, Justice William J. Brennan Jr. wrote in dissent, "The young men and women . . . expected a civics lesson, but not the one the Court teaches them today." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 291 (1988). When it comes to student expression, the civics lesson has not gotten any better. Articles in this issue discuss how school officials have won court battles that continue to expand school control over student free expression, even when it does not take place at school. The most recent was the Supreme Court's ruling that a student's banner declaring "Bong Hits 4 Jesus" was not protected by the First Amendment, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

The rights of students face numerous other challenges as well, and this issue of *Human Rights* examines several areas of conflict. One important and multifaceted topic is the way students are treated depending on who they are. In different articles, we explore issues facing students because they are female or because they are gay or because they are members of a racial or ethnic minority or are poor. Each of these group characteristics brings with it a set of challenges to the rights of students and to their ability to function on an equal footing in school. We also examine our failure as a nation to make a serious commitment not just to equal educational opportunity but to educational quality for all. On some controversies, the articles examine only students in secondary schools; on others, college students are also part of the focus.

At the college level, we also update the debate between student privacy and campus security that was taking place well before the Virginia Tech tragedy but that has been in sharper focus ever since the 2007 shooting rampage in which a gunman killed thirty-two people. The concerns remain difficult ones: How should we enhance safety and security on campus, and how should we continue to protect the academic and medical records of students?

By discussing these matters, we hope to promote a critical examination of just what the civics lesson should be about the rights of American students.

Stephen J. Wermiel is co-chair of the Human Rights *editorial board.*

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Student Speech The Enduring Greatness of *Tinker*

By Jamin B. Raskin

The Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), did for the ideal of freedom in America's public schools what *Brown v. Board of Education*, 347 U.S. 483 (1954), did for the ideal of equality. It made a core value of the Bill of Rights spring to life for young people facing unjust policies and authoritarian treatment at the hands of adult officials in local school systems.

In his remarkable opinion for the majority, Justice Abe Fortas upheld thirteen-year-old Mary Beth Tinker's First Amendment right to wear a black antiwar armband to school by declaring censorship of student expression invalid unless a school can demonstrate that it causes "material disruption" of the educational process. To be sure, this powerful libertarian doctrine has been eroded (much like the egalitarian vision of *Brown*) by the sharp undertow of the Burger, Rehnquist, and Roberts Courts, but it still shines imperishably bright from the last century as a beacon not only for student rights but for constitutional democracy in public settings generally. It expresses the idea that every social institution must respect freedom of speech unless the exercise of that freedom would thwart the very purpose of having the institution in the first place.

The Fixed Star of *West Virginia v. Barnette*

For a justice who served only four years on the Court, Fortas struck a historic blow for freedom in public schools, but he did not write on an empty blackboard. Even before *Tinker* gave students the right to speak their conscience, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), had given them the right not to have to speak *against* conscience.

The Barnette children were Jehovah's Witnesses who refused for religious reasons to pledge allegiance to the flag at school. It took unknown courage for them to sit it out in small town West Virginia in the middle of World War II. The Supreme Court in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), had recently rejected a First Amendment attack on the pledge salute, and Witnesses across the country were facing official reprisals and vigilante harassment for their refusal to join in.

But Justice Robert Jackson came to their aid, writing the Supreme Court's first great student rights decision. "We set up government by consent of the governed," he wrote, "and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." 319 U.S. at 641. Then came these immortal words: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, 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." *Id*. at 642.

Mary Beth Tinker and Her Black Armband

Yet as great as *Barnette* was, it was *Tinker* that proclaimed the right of America's children to speak out at school. After all, the Jehovah's Witnesses were religionists minding their own business, who wanted only to be left alone. But angelic-looking Mary Beth Tinker was an outspoken American rebel from the heartland, a precocious free spirit challenging, in wartime no less, the authority of the president, the military-industrial complex, and her school principal, who had gotten wind of her protest and hastily promulgated a rule banning black armbands. But Mary Beth, joined by her brother John and their friend Chris Eckhardt, insisted on expressing solidarity for Senator Robert Kennedy's call for a Christmas truce in Vietnam. Defiant, she wore her black armband to school on December 16, 1965, making it to third period before she was sent down the hall. She refused to remove it and was suspended. Her family received death threats and had red paint splashed on their front door. But the Tinkers hung tough and, with the American Civil Liberties Union, took their case all the way to the Supreme Court.

At stake in *Tinker*, according to the school district, was nothing less than every school principal's power to maintain order against the anarchy threatened by children having political speech rights at school.

But Fortas rejected arguments that students have no First Amendment rights. "It can hardly be argued," he wrote, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506.

In tracing the contours of this freedom, Fortas found that schools can never censor out of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 509. Rather, a school seeking to censor must show that a student's speech will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *id*., which means "material[ ] disrupt[ion] of classwork, substantial disorder or invasion of the rights of others." *Id*. at 513.

Needless to say, Mary Beth's principal asserted that her black armband

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was "disruptive." But Fortas found that, under the First Amendment, schools may not equate dissent with disruption. "In our system," he wrote, "state-operated schools may not be enclaves of totalitarianism," and "students may not be regarded as close-circuited recipients of only that which the state chooses to communicate. They may not be confined to the expression of views that are officially approved." *Id*. at 511. Rather, a school must have a compelling reason for silencing students, and "undifferentiated fear or apprehension of disturbance" can never be "enough to overcome the right to freedom of expression." *Id*. at 508.

The Court's sweeping analysis advanced not only a theory of democratic rights but a democratic theory of education. Mary Beth was not to be the "close-circuited" recipient of information drilled into her mind by the school board. As a student, she must be an active participant in the learning process. Each student has something precious to offer the rest of the class and "intercommunication among the students" is not only "inevitable" but "an important part of the educational process." Indeed, the free exchange of thoughts and feelings among students "is not confined to the supervised and ordained discussion which takes place in the classroom," but spills over to the whole school day, including athletic, extracurricular, and informal events. *Id*. at 512.

This rendering of school in a democracy closely resembles the thinking of John Dewey, who argued that students learn equally from the "formal" curriculum and the "informal" curriculum generated in the interstices of the school days, where banter, jokes, talk of current events, laughter, gossip, interaction with teachers, and the full play of social life acquaint students with cultural values and political ideas.

Far from disrupting the educational process, Mary Beth's silent protest enriched it. A good teacher would simply have noted the armband and moved on or picked up on it to teach about everything from war powers to post-World War II American foreign policy to free speech itself. But there was surely no reason to fear it because there is no reason to fear blurring the boundaries between school and the outside world. The boundaries are porous and, as Dewey put it, "learning in school should be continuous with that out of school." JOHN DEWEY, DEMOCRACY AND EDUCATION 410 (1916). Rather than punishing Mary Beth's activism, the school ought to have welcomed it. Her principal lacked the proper sense of democratic improvisation in the learning process.

As great as *Barnette* was, it was *Tinker* that proclaimed the right of America's children to speak out at school.

The Proliferating Exceptions to *Tinker*

In following decades, the spirit of *Tinker* helped move the Court to forbid the removal of books from school libraries for political reasons (*Board of Education v. Pico*, 457 U.S. 853 (1982)) and to protect the free speech rights of religious groups obtaining equal access to school facilities after hours (*Good News Club v. Milford Central School*, 533 U.S. 98 (2001)). It also began to shift attitudes about student speech in lower courts and many school systems and prompted some states, like Massachusetts, to codify the *Tinker* standard in state law.

But the Court's hard turn to the right over the years caused it to reverse course in significant ways. It has carved out meaty exceptions to the *Tinker* rule, authorizing school censorship in the case of "lewd and indecent" student speech (*Bethel School District v. Fraser*, 478 U.S. 675 (1986)), in the context of any "school-sponsored" student speech in newspapers, yearbooks, assemblies, theater productions, and other outlets that "the public might reasonably perceive to bear the imprimatur of the school" (*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988)), and most recently in the case of student speech that might be "reasonably viewed as promoting illegal drug use" (*Morse v. Frederick*, 127 S. Ct. 2618 (2007)).

The reasoning of the majority decisions in these cases is embarrassingly literal-minded. In *Fraser*, the Court drew up the lewd and indecent speech exception to uphold suspension and other discipline of a mischievous student at Bethel High School in Pierce County, Washington, who gave a nominating speech for a fellow student running for student government based on—surprise, surprise!—a sophomoric sexual metaphor. He said, "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm," etc.

Surely the teacher supervising might have rolled his or her eyes and spoken disapprovingly of wasting the opportunity on such a vacuous statement. But suspension—for what? Are not Shakespeare's plays—*The Taming of the Shrew* and *Twelfth Night* come quickly to mind—filled with sexual metaphors, sneaky double entendres, and bawdy insinuations? Of course, the teenaged culprit was not Shakespeare, but surely a nimble principal could have told Fraser publically to channel his rudimentary comic instincts into literature rather than politics, where such speeches do not fare very well. This would have been a fair, stern, and educationally meaningful intervention.

But the principal ordered, and the Court affirmed, Fraser's suspension and other punishment. If the Court had to go in that direction, Justice William Brennan, in his concurring opinion, offered the right way to justify it. There was no reason to carve out a separate category for lewd and indecent speech, he argued, since Fraser's

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speech had actually "substantially disrupted" the school's pedagogical mission to teach mature public advocacy. *Tinker* should have been applied, not shoved aside.

All in all, the *Fraser* case is not too big a deal, but heavy frontal damage was inflicted on Tinker in *Hazelwood*. There, Principal Robert Reynolds censored two articles written by students for their school newspaper and approved by the teacher of the journalism class. One article concerned the impact of parental divorce on students and the other was about the problem of teen pregnancy as seen through the experiences of three pregnant students. Under *Tinker* and *Fraser*, the articles were plainly protected speech and neither disruptive nor lewd or indecent. Indeed, they were written in a mature and thoughtful way about serious problems much on the minds of the student body. But the principal thought that the discussions of sex and birth control in the latter story were "inappropriate for some of the younger students" and that the former story was unbalanced and might invite controversy.

The Court majority found that, while *Tinker* governs the voluntary independent speech of students, greater latitude must be granted to educators to exercise "editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. It promptly found Reynold's censorship of the newspaper articles reasonable and not based on viewpoint discrimination. This decision prepares young journalists to be not only edited by editors but squelched by puritans in power.

The dissenting justices—William Brennan, Thurgood Marshall, and Harry Blackmun—rallied around the forsaken virtues of *Tinker*, observing that the school's journalism class had itself committed to publishing all articles that do not "materially and substantially interfere with the requirements of appropriate discipline." *Id.* at 278. It is indeed interesting to note how many schools after *Tinker* quickly embraced its intuitive free speech formula.) The dissenters insisted that mere political disagreement between students and administration should never be sufficient grounds for censoring speech in a school publication. After all, principals do not own their schools and school publications belong to the school community itself, which is governed as a state actor by the First Amendment.

Of course, educators can require students to learn the contents of a course, but this truism is "the essence of the *Tinker* test, not an excuse to abandon it," as the dissenters insisted. *Id*. at 283. They agreed that high schools do not have to publish student articles that are "ungrammatical, poorly written, inadequately researched, biased or prejudiced," *id*., but pointed out that "we need not abandon *Tinker* to reach that conclusion, we need only apply it." *Id*. at 283-84. What is crucial is that school officials cannot act as political "'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position." *Id*. at 285. If the school found fault with the articles about teen pregnancy and the meaning of divorce for kids, it had every right simply to print an institutional disclaimer or publish opposing views.

Even when *Tinker* was riding high, its sweeping message did not penetrate all public schools and its spirit was often honored in the breach.

After *Hazelwood*, the Court's 2007 decision in *Frederick* seems depressingly predictable, as the Court again exfoliated vast acres of free expression to kill the mosquito of adolescent humor. The student culprit in the case, Joseph Frederick, was a high school senior in Juneau, Alaska, who used the occasion of the Olympic torch relay to make a bid for national television coverage by unfurling a banner bearing the phrase "Bong Hits 4 Jesus." The majority upheld his ten-day suspension based on a new doctrine withdrawing First Amendment protection from speech advocating illegal drug use.

It is tempting to dismiss the importance of a case based on such frivolous facts, but Stevens's lucid and passionate dissenting opinion points out the dramatic change effected by the majority. The new exception to *Tinker* discards the Court's prior commitment to maintaining official viewpoint neutrality at school by approving "stark" efforts to suppress one side of the national debate about drugs. Furthermore, the Court dropped *Tinker*'s understanding that a censoring school must show an *imminent* substantial disruption. Frederick's "nonsense message" posed no threat of any kind, much less a threat of immediate substantial disruption. The likely effect of his silly and surreal slogan was—nothing at all. As Stevens memorably put it: "Most students . . . do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it." 127 S. Ct. at 2649.

The broader consequence, Stevens observed, is a severe chill placed on student speech questioning the war on drugs. This is a chill we can ill afford, he pointed out, as free debate was the catalyst for changing the disastrous policies of the Vietnam War and—even more on point—Prohibition. Given the mounting costs and casualties of drug prohibition, Stevens warned against "silencing opponents of the war on drugs," and stated that, in "the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment." *Id*. at 2651. Here

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Stevens identified the freedom to dissent at school with the freedom to dissent in the society at large.

A New Birth of Student Freedom?

The various blows against *Tinker* have led to accelerating censorship of school newspapers, yearbooks, magazines, and theatrical productions around the country, as well as stepped up discipline of students who inject "inappropriate" language into the school environment. Many administrators now view themselves like (most) private shopping mall owners, who get to control who says what and when on their premises. Of course, even when *Tinker* was riding high, its sweeping message did not penetrate all public schools and its spirit was often honored in the breach. Constitutional literacy exists at alarmingly low levels in the country, and precious few students know what their rights are, much less how to fight for them or where to go for help. (Despite *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Wiseman*, 505 U.S. 577 (1992), and other cases rejecting official prayer in school contexts, I still frequently meet students who have been asked to pray together at school, on the football field, or at graduation.)

Yet *Tinker* is still good law. Its enemies have managed to place it in a straitjacket but failed to give it the guillotine. Of course, there are still those calling for its head. In his startling concurring opinion in *Morse*, Justice Clarence Thomas tried to refute the idea that students have any First Amendment rights at all and cited approvingly cases from the nineteenth and twentieth centuries in which courts upheld severe discipline, including corporal punishment, of students for speaking against their masters, including a California appeals decision affirming expulsion of a student for criticizing unsafe conditions at his school that added up to what he saw as a significant fire hazard.

The irony, of course, is that while *Tinker*—like *Brown*—stands as a towering symbol of constitutional ideals rather than a complete statement of how the world actually works, the reasoning of the case seems ever more visionary and relevant. All across the country schools are struggling with the proper treatment of student groups protesting or supporting the Iraq war and groups defending or opposing the rights of lesbian-gay-bisexual-transgender students. Moreover, the advent of the Internet means that a whole new generation of issues has grown up around official efforts to punish off-campus student speech on websites that gossip about student life or disparage school officials or teachers. In these cases, which have not made it to the Supreme Court yet, the lower courts seem clear that the only speech on students' private websites punishable by schools is that which threatens actual harm to other members of the community or otherwise substantially disrupts the educational process. *Tinker* thus not only makes school internally safe for democratic freedom but provides the surest guidance to school officials on how to proceed in disentangling fair criticism and personal opinion uttered off campus from those true threats made to members of the learning community.

Handled properly, the Internet age could usher in a new birth of student freedom of expression. Given that websites are radically free and off limits to official control in all but the most extreme cases, shrewd officials might think twice before using their handy *Hazelwood-Fraser-Morse* powers at school to censor student expression and drive it off campus into the wild world of cybertalk, where teachers have no sway at all. It will benefit everyone if educators resist the urge to censor and instead engage students in serious intellectual and political dialogue at school, test their youthful dogmas and probe their provisional certainties, tease out their valuable and provocative insights, and help them trim away that which is unfair, sleazy, or irresponsible. This is the path of true education, which is to say the path of true freedom. It is a path many schools have already chosen. It is the path of *Tinker*.

Jamin B. Raskin is a professor of constitutional law at American University's Washington College of Law and a state senator in Maryland. He cofounded the Marshall-Brennan Constitutional Literacy Project, which has sent hundreds of law students into public high schools across America to teach about the Constitution. He is the author of We the Students *(3d ed. 2008) and* Overruling Democracy: The Supreme Court versus the American People *(2003).*

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A Conversation with Mary Beth Tinker

Mary Beth Tinker, our Human Rights Hero for this issue, was recently interviewed by Stephen J. Wermiel, co-chair of the *Human Rights* editorial board. For background on Ms. Tinker, see the Human Rights Hero column on the back cover.

Human Rights: What's the state of student free speech or student rights more broadly as we approach the fortieth anniversary of *Tinker?*

Mary Beth Tinker: They are in about the same state as students' well-being overall, whether you're talking about health issues or educational quality or housing or access to clean air and water, which are not very good right now. And I'm speaking as a nurse who has worked primarily with young people.

For one thing, No Child Left Behind has not been helpful in teaching students about their rights or helping them to model democratic behavior. Curriculum directed toward standardized tests in math and science may "train" young people in certain skills, particularly test-taking skills, but are lacking in other areas. So, despite the valiant efforts of history and government teachers across the country, it is no wonder that we are seeing woefully poor indicators of students' knowledge of the First Amendment, for example.

Some states see rising test scores as success, but many of us who work with youths are skeptical. Critical thinking and creativity, which are so important to participatory democracy, have been sacrificed.

HR: How do you feel about the *Tinker* case itself after forty years?

MBT: The *Tinker* ruling said that students had the right to free speech and other First Amendment rights unless their speech was "substantially disruptive" or intruded on the rights of others. So that was a foundation, because it's not a very high standard.

Since then, school districts have claimed that various activities are disruptive or intrude on the rights of others. The ruling leaves a lot of leeway for principals and school boards to attempt to censor students, and they often succeed.

Regardless, of course, I am happy that the Warren court ruled in favor of students' rights. In a democracy, the people who are affected by decisions are supposed to be the ones who have the right to speak on their own behalf, and this should include young people. Today, I see so many examples of young people standing up for their own interests.

For example, students in Ohio recently developed the Ohio Youth Agenda, a collaboration of youths across the state advocating for improvement in schools, counseling, and education funding. Students in Maryland were featured in the *Washington Post* recently, picketing against a new polluting freeway near their school. Another Maryland girl, Sarah Boltuck, succeeded in getting state legislation passed that will allow seventeen-year-olds to register to vote if they will turn eighteen by the time of the election. Twenty thousand youths are affected.

At a school in Florida, students had to fight for the right to wear rainbow clothing and bring stickers to school. They eventually won. Alondra Jones, in California, challenged unfair funding of her school and changed the school funding system for the whole state. And these are just a few examples that come to mind.

HR: Over the forty years, though, other cases have eroded the protection that *Tinker* established. How do you feel about that?

MBT: Free speech rights of students have been curtailed, certainly, but the erosion is not limited to students. And besides Court rulings like *Hazelwood*, *Morse v. Frederick*, or the recent *Jacobs* ruling in Nevada, students' free speech rights have been curtailed in other ways. For example, I understand that about 40 percent of high school newspapers have been eliminated in the last ten to fifteen years.

HR: In the fortieth anniversary year of *Tinker* next year, what are you celebrating?

MBT: I will be celebrating the spirit of young people and their creative energy in standing up for their rights against all odds, and their humor and concern, which are so needed in this current period. And I will be celebrating a Supreme Court that stood with young people to affirm their rights.

HR: And what should students of the country think about or celebrate?

MBT: I urge students to celebrate their right to speak out by becoming engaged in issues that are important to their lives, and to exercise their First Amendment rights and, indeed, all their rights.

HR: You've spent a lot of time speaking to student groups and accepting the mantle of a spokesperson for student rights since the *Tinker* decision. How do you see that role?

MBT: My parents put their beliefs into action, and they were examples to me. My father was a Methodist minister, and my parents later became Quakers. They spent their lives working for peace and justice. Over the years, I also met others and heard their stories about standing up for what they believed in. These people motivated and inspired me. So that is how I see my role with young people, to educate and inspire them. Besides teaching them basic civics, I tell them real sto-

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ries about people, mostly young people, from the past and present, who have changed the world.

For example, I may tell them about Barbara Johns, who was sixteen in 1951 when she called an assembly at her school in Virginia, rallying students for better conditions at their school. She later became a plaintiff in the *Brown* case. Or I tell them about the childrens' march of 1904, where child factory workers presented Teddy Roosevelt with a demand to end their sweatshop conditions. These are just examples of the many true stories that I choose from.

And then I tell them about young people today who are involved in various issues, like the ones I talked about earlier, and others.

HR: Are you hopeful that young people will continue to stand up for their rights, that the courts and the country will become more appreciative of the rights of students again?

MBT: Yes. I see examples all over the country of students who are standing up for what they believe in, whether it's for peace, clean air, clean water, uniform policies, religious freedom, animal rights, gay rights, Darfur. There are so many issues students care about.

I hear about students who, themselves, wear different, meaningful symbols—whether it's T-shirts, armbands, or buttons. Some are involved in the political process, working for different candidates that support young people's issues. All of that's very heartening to me.

HR: How about the role of lawyers, courts, and law in defending student rights? What do you think has happened over the last decades?

MBT: Young people cannot make progress without the support and alliance of adults, whether they're lawyers or nurses, like myself, or parents or community partners. And so young people need to have supporters in the community who advocate for them also and who help them to advocate for themselves. That's the way I see the role of lawyers.

Adults can use their skills and talents to promote young people and teenagers, who need these skills more than ever in today's world. Because the condition of young people today is not good. There are so many indicators, whether health indicators or indicators of educational success—for example, graduation rates, college rates. I just heard statistics that around 50 percent of Washington, D.C. high school students are graduating. I understand that only around 9 percent of those high school students are completing a four-year college degree program.

Economic opportunities for young people are not good, and so many children go without health insurance. The Children's Health Insurance Program has been under attack. So many areas exist where young people really need advocates, especially legal advocates, and people with all kinds of skills and talents.

HR: One of the great messages of *Tinker* was not to fear protest—that school officials should accept protest as an essential part of democracy and even of education. Have we lost sight of that message?

MBT: Well, I think the political climate in the country discourages young people from speaking up. Protest is only one of those ways that students might want to speak up. And I think it's a big mistake in a democracy to discourage people from being involved in the democratic process, in whatever form that may take.

Throughout history a lot of our progress has been the result of people who were considered dissidents in their time; without encouraging a climate where free speech and dissidents' voices flourish, we won't benefit as much as we could as a society. And we'll be held back in our own development and in relationship to other societies that are encouraging these kinds of expressions.

HR: And what's your feeling about the Supreme Court's most recent decision—the *Bong Hits* case?

MBT: That case, where Joseph Frederick unfurled a banner saying "Bong Hits 4 Jesus," was about more than just the so-called frivolous message. When I spoke to him on the telephone before the case was argued at the Supreme Court, he told me how he came to put that on his banner. He said he did that because he had been studying the First Amendment and the Bill of Rights in school, and he wanted to test and see if he really had First Amendment rights or if it was just something that he had learned in school books.

So he wanted to put something on his banner, and if he had just said "Hooray for the Olympic torch," which was going by, he wouldn't have been able to test his rights. So he sure did pick something that would get the attention of the school and others: "Bong Hits 4 Jesus." But his real message was that students should have First Amendment rights. And that is a serious message.

I'm sorry to see that the Court has once again limited the rights of students, not only in terms of the content of the message, but also the school's jurisdiction seems to have been extended because Joseph was standing across the street from the school and there was some question about whether it was actually a school-sponsored event. That's a big issue being debated now in our country—how far does the school's jurisdiction reach? And this ruling seems to have extended that.

HR: Yes, we will have to watch and see how far the reach of school officials continues to expand. Thank you for taking the time to answer our questions, and thank you very much for your continued dedication to the rights of students.

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Student Journalism Confronts a New Generation of Legal Challenges

By Frank D. LoMonte

While public school administrators now largely understand that the First Amendment prohibits them from forcing student journalists to withhold or revise disfavored editorial content, that understanding has merely made censorship less overt—not, regrettably, less frequent.

Censorship 2.0 involves pressure indirectly applied: changes to the governance structure of the student newspaper, reassignment (or outright firing) of the faculty adviser, or crippling cuts to the publication budget. These tactics may be subtler than leaning over the student editor's shoulder and pressing the delete key, but they are no less effective.

Fortunately, the law is catching up with the creativity of its would-be evaders. Courts are—with some notable exceptions—recognizing that retaliation by schools and colleges in response to protected speech violates the First Amendment even if the retaliation is indirect.

Courts Grapple with Scope of Student Rights

The Supreme Court's 1988 ruling in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), reaffirmed that, even at the high school level, what students say in school newspapers is protected by the First Amendment. The only question is what showing school administrators must make to justify overriding students' interest in free speech. (Most courts and commentators believe *Kuhlmeier* has no application at the college level, where the state always must establish a compelling interest to legitimize censorship.)

Kuhlmeier coined a two-tiered analysis, applying rigorous scrutiny where student newspapers operate as public forums but relaxed scrutiny where the forum is—through policy or practice—nonpublic.

The First Amendment outlaws not merely the most overt and noxious of censorship, the prior restraint, but also after-the-fact retaliation that is sufficiently severe as to chill a speaker's willingness to engage in future lawful speech. The form that retaliation can take appears to be limited only by the imagination of school administrators.

In a July 2007 ruling, *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007), the Second Circuit found that officials of New York's College of Staten Island violated the First Amendment rights of student editors by nullifying a student government election in response to what administrators contended was the unfair use of the paper to endorse one party's slate of candidates.

In a ruling issued the same month, *Lane v. Simon*, 495 F.3d 1182 (10th Cir. 2007), the Tenth Circuit declined to decide whether students' free speech rights were violated when Kansas State University officials removed their veteran newspaper adviser, claiming dissatisfaction with the "quality" of the publication. Instead of reaching the constitutional issue, the Tenth Circuit merely vacated the district court's finding that no First Amendment violation occurred, ruling that the students' claims became moot when, during the appeal process, they graduated.

Students Find Refuge in State Law

In part because of the uncertain reception their claims will receive in federal court, advocates for student speech rights increasingly are looking to states for relief.

Last year, Oregon became the seventh state to enact a "student free press" statute, declaring that high school and college editors are the ultimate gatekeepers of content in student publications. This assures that students' editorial decisions receive the fullest First Amendment protection recognized in *Kuhlmeier*. A similar initiative, however, stalled in the Washington legislature for the second straight year in the face of opposition from school administrators.

California, the earliest to adopt such a statute, remains the leader in safeguarding the rights of student journalists and is on the verge of enacting the nation's strongest antiretaliation statute explicitly protecting the rights of journalism teachers who speak in defense of what their students publish.

Since 1978, California statutes have outlawed censorship by public schools unless students' speech is "obscene, libelous or slanderous… [or] so incites students as to create a clear and present danger" of unlawful or substantially disruptive acts.

Applying that protective statute, California's First Appellate District found in May 2007 that a student author's rights were violated when the school principal and superintendent publicly denounced the student's anti-immigration opinion column, declaring that the column was unprotected speech and never should have been published. By sending the message that "future speech similar to [the column] would not be tolerated," the court held, the officials intimidated the author—and future authors—into refraining from expressing similar viewpoints. *Smith v. Novato Unified School District*, 150 Cal. App. 4th 1439, 1462, 59 Cal. Rptr. 3d 508, 524 (Cal. Ct. App. 2007).

Online Cases Present Ominous Trend

Despite gains made in some state courts and legislatures, this is an anxious time for student journalism. In addition to economic pressures that are causing many high schools to scale back journalism offerings and prompting some collegiate publications to abandon print editions, judicial retrenchment in the protection afforded to online speech casts a long shadow over the ability of students to speak freely even outside of the school day.

In a handful of recent cases, high school administrators have convinced courts that school disciplinary authority

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Student Privacy versus Campus Security

An Overstated Conflict

By Daniel Silverman

Some commentators viewed the April 2007 shootings that killed thirty-two people at Virginia Polytechnic Institute and State University (Virginia Tech) as illustrative of a direct conflict between student privacy and campus security. Their claim was that privacy protection laws had prevented various Virginia Tech employees who had been concerned about Seung-Hui Cho, the Virginia Tech shooter—including professors, residence life staff members, counselors, and campus police officers—from sharing information with each other. Further, these commentators argue that this inability to pass on information potentially diminished the Virginia Tech administration's ability to prevent the shootings.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the U.S. Supreme Court recognized a constitutional right to privacy. Because an important goal of higher education is to prepare students to take their place as citizens and to participate in civic life, it is important that students experience constitutional freedoms as part of their education. Privacy in particular is important because it promotes the development of autonomy, another goal of higher education.

While tension certainly exists between the values of student privacy and campus security, characterizing them as directly in conflict would be inaccurate. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, the major statute governing student privacy, protects against disclosure of student records but also provides plenty of opportunities for information sharing in situations where campus security may be implicated. In addition, an argument that student privacy and campus security are in direct conflict rests on the implicit assumption that campuses are unsafe because, if campuses were safe, there would be no need to worry about student privacy threatening campus security. But this assumption is false: campuses are, for the most part, safe.

Understanding FERPA and Related Laws

FERPA is the federal statute that limits the disclosure of education records for all college students. In 1974, when Senator James Buckley introduced the bill on the Senate floor, he could not have predicted that it would become central to the debate about a balance between the privacy of college students and campus security. Testimony from the *Congressional Record* in 1974 suggests that the primary goal of the act was to ensure that students (and their parents) in K-12 schools had access to their school records. Buckley and other supporters of the bill felt family access to school records was especially important in light of the tendency for schools to subject their students to invasive surveys about their home lives and then disclose the results of those surveys to the government and other agencies. The *Congressional Record* offers no evidence that the drafters of the law were at all concerned about the disclosing of educational records by one school employee to another. Nothing from the *Congressional Record* suggests that any of the bill's supporters were interested in the issue of the protection or access to educational records at colleges and universities.

Nevertheless, since this inconspicuous birth, FERPA has become an important topic in the field of higher education law. Although not the subject of much litigation (possibly because it does not provide a right of private action), and virtually unknown to practitioners outside the field, college and university lawyers devote substantial resources to creating and maintaining student records policies that comply with this confusing statute.

FERPA prohibits the disclosure of "education records," a broad term that includes both academic records, such as grades and course schedules, and nonacademic records, such as financial and student discipline records. However, FERPA lists exceptions to this prohibition that allow schools to disclose educational records without the consent of the student. For example, FERPA includes a "health and safety" exception that allows for the disclosure of education records to appropriate parties—which could include administrators, professors, students, or parents—if knowledge of the information is necessary to protect the health and safety of the student or others on campus. A reasonable, good faith judgment that the party receiving the disclosure is appropriate must motivate a disclosure under this provision, and the provision generally allows disclosures only to a limited number of recipients.

In addition, FERPA permits disclosure of education records from one "school official" to another as long as the recipient of the information has a "legitimate educational interest" in it. The statute and accompanying regulations allow institutions broad discretion in defining these terms. "School officials" can refer to almost any school employee, even nonpermanent ones. It can even include students serving on committees and contractors acting on behalf of institutions. A "legitimate educational interest" does not have to be academic. Anything relevant to a school official's job may be a legiti-

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mate educational interest. Therefore, schools can craft records policies allowing for robust information sharing between any campus employees whose jobs relate in some way to campus safety.

Other FERPA exceptions provide further opportunities for disclosure to parents. If a student is under the age of twenty-one, the school may notify parents of violations of the school's alcohol policy. If a student of any age has been claimed by a parent as a dependent for tax purposes on the parent's most recent federal income tax return, the school also may disclose education records without the student's consent.

Although FERPA defines education records broadly, schools may disclose potentially relevant information that the act does not cover. FERPA does not cover any records that either commissioned police officers or noncommissioned campus security forces create. The records must have been generated, at least in part, for law enforcement purposes and only remain outside FERPA to the extent that the law enforcement agency maintains them. If a campus police officer were to disclose a report on a student to, say, the dean of students, then the dean's copy of the record would become an education record and FERPA would apply to any further disclosures by the dean.

FERPA also does not cover personal observations about a student as long as the person making the observations expresses the observations verbally. For example, a professor could call a colleague and express concern about a student's lack of participation in class. However, if either the professor making or receiving the observation were to write it down, this written document would then likely become an education record and FERPA protections would apply. The personal knowledge itself would remain unrestricted, even though there is a record.

In short, FERPA does not block information sharing in the context of campus security. The many exceptions to the law provide a number of opportunities for campus employees to share information about a student who worries them. From a practical perspective, though, this confusing and frequently misunderstood law poses a challenge for campus employees to implement. Such employees are not the only ones who have found the law difficult to understand; a congressional attempt to modify the law also demonstrated a misunderstanding of it.

In May 2007, a bill to amend FERPA was introduced. The well-intentioned bill, called the Mental Health Security for America's Families in Education Act of 2007, H.R. 2220, would have added an additional provision to FERPA regarding the disclosure of information to parents about students who, for mental health reasons, may be a danger to their own health and safety or to the health and safety of others on campus. This superfluous amendment makes disclosure even more difficult for schools than the current law because, under the amendment, the school could only disclose if the student was a tax dependent and if a "licensed mental health professional" had provided written certification that the student posed a significant risk of harm to others and that the disclosure to the parents would help to alleviate that risk. Because of this higher disclosure burden, it is unlikely that it would have served to expand FERPA's existing provisions. It would not have been a harmless statute, however, because it would have added to the complexity of FERPA compliance, which is one way that FERPA *can* clash with campus security. The bill never got out of subcommittee, but a slightly modified and equally superfluous version of it appears in the Higher Education Opportunity Act, Pub. L. No. 110-315, which Congress approved in July.

Although FERPA is the major statute governing student privacy, other laws on the subject also exist. At the federal level, one provision in the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d et seq., may provide some additional protection for students' medical records in some contexts, but that is currently unclear. Medical professionals on campus also face patient-doctor confidentiality provisions and codes of professional ethics that address privacy of medical records. According to Robert Ellis Smith's *Compilation of State and Federal Privacy Laws*, approximately forty-eight states have their own medical privacy laws and approximately thirty-five have student record privacy laws. The interaction between FERPA, HIPAA, and state confidentiality laws is complicated and unsettled. For example, many state confidentiality laws only allow the disclosure of medical records when the threat to the patient or others' health is more serious or imminent than the relatively low "health and safety" hurdle that FERPA provides. However, FERPA is more relevant to a discussion of student privacy rights and campus safety because it governs a greater percentage of relevant campus employees than HIPAA or the state medical privacy laws do.

All in all, student privacy law does not pose a significant obstacle to campus security.

Assessing Campus Safety

All in all, student privacy law does not pose a significant obstacle to campus security. Another problem with the characterization of a direct conflict between privacy and campus security is that it rests on the false assumption that campuses are unsafe. In fact, campuses generally are safe. As nationally renowned criminologist James Alan Fox noted in *USA Today* on August 28, 2007, and in *The Chronicle of Higher Education* on February 29, 2008, statistics show that college students are one hundred times more likely to die from suicide or alcohol than they are from a shooting on campus. The data showed that of those shootings that occurred on campuses, most were the result of common criminal activity, as in the case of a botched drug deal. Few were mass shootings in which both the shooter and

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his or her victims were members of the campus community and in which the shooter seemed to pick victims randomly. Fox noted that in most metropolitan areas a college student's chances of death by homicide are lower on campus.

Fox also argues that overpublicizing campus shootings can inspire others to attempt such shootings and unnecessarily raise the anxiety level of students. Furthermore, some common steps that colleges and universities have taken to increase campus safety are unlikely to be effective. Because many campus shootings occur in one area and occur quickly, campus lockdown procedures, for example, do little to prevent or mitigate the damages from a campus shooting. Colleges and universities might increase physical security with the heightened use of campus security guards, metal detectors, and more restrictive policies for off-campus guests. Yet these measures detract from the freedom that many college students want from their college experience. If campus safety were a widespread problem, perhaps a trade-off between safety and freedom would make sense. But given that campuses are basically safe, such a trade-off becomes less reasonable.

What Conclusions Can Be Drawn?

If the shootings at Virginia Tech do not illustrate a direct conflict between student privacy and campus security, what do they show? First, they show that Virginia Tech was profoundly unlucky. Virginia Governor Tim Kaine commissioned a detailed investigation and report on the shootings. The report in part analyzed Cho's time at Virginia Tech and his many interactions with a variety of administrators, counselors, and professors who had expressed concern about him. Overall, it seems accurate to characterize their actions as diligent, caring, and professional. Several creative writing professors, for example, met with him regularly and suggested that he take further advantage of campus counseling services. Students with mental illness and behavioral problems are not unusual on campuses. Cho exhibited some warning signs, but many other students displaying similar tendencies have not engaged in mass shootings. In fact, according to the governor's report, two mental health professionals who evaluated Cho just two days apart in December 2005 disagreed on whether he presented a danger to himself. The tragic shootings were an utterly unpredictable event.

Second, the Virginia Tech shootings and the commentary thereafter demonstrated how difficult FERPA is to administer. Well-meaning and hardworking administrators at Virginia Tech may not have realized that FERPA allows so much leeway to share information in cases where campus safety may be implicated. FERPA has confused administrators at campuses across the country, but it is not the only complicated law facing campuses. In the future, when pondering the merits of further regulation of colleges, Congress and relevant agencies should consider the difficulty such institutions face in implementing complex laws, particularly when Congress neglects to provide funding for them.

Third, the shootings call attention to a more general fear of litigation that affects administrators at many campuses. Even if information sharing could have violated FERPA at Virginia Tech, administrators need to recognize that all lawsuits are not equally damaging to a school. FERPA provides no private right of action. If the Department of Education finds that a school violates FERPA, it can decrease federal funding or even terminate it, though that is more a theoretical than a real threat. In fact, it has never happened. Even if the department were to cut off the funding it provides to a given school, the school could still receive federal funding from other sources. Wrongful death suits, on the other hand, are a more immediate and likely result of such a horrific event.

Finally, the shootings raise fundamental questions about the legal relationship between a college and its students. Higher education law in earlier times developed according to the principle of in loco parentis. Under this framework, colleges and students approximated a parent-child relationship. Students expected their college to protect them and, in return, colleges placed certain restrictions on their students. Starting in the 1960s, this balance began to shift as students saw themselves as full-fledged adults and no longer wanted to cede control to campus administrators. The principles of contract law, through which the student and school contracted with each other for educational services, began to replace in loco parentis across the field of higher education law. Some responses to the Virginia Tech shootings may indicate a desire to revert to earlier attitudes.

Those who blame Virginia Tech administrators for not preventing the shootings demonstrate a belief that colleges and universities should do more to protect their students. It is less clear if advocates of that position are willing to recognize the trade-off between student security and student freedom. Even though no direct conflict exists between student privacy and campus security, a general trade-off exists between freedom and safety. If students want maximum freedom, they need to accept increased risk to their safety. If students want increased protection, they have to be willing to accept limits on their freedom. Different students will answer this question differently, and individual colleges may differ on the particular mix of freedom and protection provided to students. When students fail to recognize this give and take, they are likely to be dissatisfied with whatever particular mix their school offers.

Another factor influencing this shift is the growing demographic of so-called helicopter parents who remain heavily involved in their children's daily lives, even during their college careers. Neither the traditional doctrine of in loco parentis nor the 1960s-influenced contract relationship between school and student fit exactly with the helicopter parents' conception of the student-school relationship. Similar to the in loco parentis doctrine, the helicopter parenting model categorizes college students as something less than independent adults but assumes that the student's actual parent, as well as the college, should fill in the gap. This helicopter parenting

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Abstinence-only Education

Violating Students' Rights to Health Information

By Leslie M. Kantor

Access to accurate information that is needed to protect one's health is an important human right. Medically accurate information is critical to preventing and treating health conditions, and few would dispute that people should have the knowledge they need to avoid risks and make wise decisions about their bodies and health care. Further, schools are expected to provide factual information about the topics they cover, including health education. However, providing critical health information to adolescents in the area of sex education has become a significant challenge. The policies of the United States and increasing amounts of federal funding have required "abstinence-only" education that restricts discussion of topics such as birth control and sexually transmitted disease prevention and mandates that schools and other youth service providers convey the message that abstinence until marriage is the expected standard of human sexual activity. (See the box on page 14 for the list of federal requirements for abstinence programs.)

Prohibiting the discussion of certain topics has resulted in students learning less than students in the past about topics such as pregnancy prevention and sexually transmitted disease prevention at a time when more than 750,000 adolescents experience an unintended pregnancy and one in four sexually active teens acquires a sexually transmitted disease annually. Guttmacher Institute, In Brief: Facts on American Teen's Sexual and Reproductive Health, www.guttmacher.org/pubs/fb_ATSRH.html. In addition, abstinence-only programs convey a large number of ideological messages about gender, sexual orientation, and family structure that further impinge on the rights of particular groups of students. When states censor or distort information for political purposes, "people become the instruments or tools of state policies that deprive them of the knowledge and information necessary to make and implement decisions about their reproduction and to express their sexuality safely. It thus involves state control over some of the most basic elements of what it means to be human." L.P. Freedman, *Censorship and Manipulation of Reproductive Health Information*, *in* THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION 1 (S. Coliver, ed., 1995).

Background

Battles over the appropriate content of sex education in schools date back to the 1960s, when efforts were first made to include family life education in public school curricula. J.M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES (2002). Groups such as the Christian Crusade heavily resisted such efforts and created materials with titles like *Is the School House the Proper Place to Teach Raw Sex?* to make their case. The struggle over whether sex education belonged in public schools was a straightforward yes-or-no debate. Then, in the early 1980s, conservatives in Congress passed Title XX of the Public Health Service Act, the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z *et seq*., which was framed as a counterpart to the nation's Title X family planning program, established by the Family Planning Services & Population Research Act of 1970, 42 U.S.C. § 300 *et seq*., that provides contraceptive services to poor women. AFLA appropriated $10.9 million for programs that emphasized chastity and adoption, and provided some moneys for services to pregnant and parenting teens. AFLA mandated that to qualify for funding, programs had to involve religious groups. IRVINE, *supra*. Thus, much of this funding went to crisis pregnancy centers and other religiously affiliated groups. This led to an initial lawsuit, *Kendrick v. Bowen,* 657 F. Supp. 1547 (D.D.C.1987), in the D.C. federal district court charging that the program advanced religion and violated the wall between church and state. The U.S. Supreme Court overturned the district court, finding no facial unconstitutionality, but remanded the case to determine whether the methods by which it was administered made the program unconstitutional. *Bowen v. Kendrick*, 487 U.S. 589 (1988). Next, a civil action was filed to enjoin AFLA as a violation of the Establishment Clause of the First Amendment. The suit was settled when Bill Clinton was elected president. Later generations of programs would better conceal the explicit religious nature of the messages, but many would argue that the values espoused still have clear roots in Christian religious teachings.

Though the inclusion of religious messages or the implementation of programs in religious settings were the main legal grounds for challenging abstinence-only programs, numerous additional concerns were raised by public health professionals, parents, teachers, and other youth advocates. These included the fact that information about birth control was limited to discussing failure rates; that many programs included outright misinformation about topics such as contraception, condoms, and abortion; and that stereotypes about girls and boys were presented as fact. Many of these concerns were detailed in a report by the House Committee on Govern-

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ment Reform. U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENT REFORM—MINORITY STAFF, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS (Dec. 2004), http://oversight.house.gov/documents/20041201102153-50247.pdf. Specifically, the report notes that eleven of the thirteen programs they examined contained errors and distortions, that programs contain false and misleading information about the effectiveness of contraceptives, that abstinence-only curricula blur religion and science, and that programs treat stereotypes about girls and boys as scientific fact.

The number of young people reporting that they had received formal instruction about birth control in either a school or a community-based program declined substantially between 1995 and 2002.

Funding for abstinence-only programs greatly expanded when welfare reform was passed in 1996. Section 510 of the Social Security Act, 42 U.S.C. § 710, established the various requirements outlined in the box on page 14 and an appropriation of $50 million from the federal government that also required a match from states receiving funds, which brought the total moneys to $88 million. In 2000, a third federal program was created for abstinence-only education: the Community-Based Abstinence Education (CBAE) program provided grants directly from the U.S. Department of Health and Human Services to community- and faith-based programs, bypassing the state health departments that had responsibility for overseeing Section 510 funds. The CBAE program was promoted by social conservatives who felt that state health departments were not rigidly adhering to the eight-point definition of abstinence education and were supporting programs that did not address every element in the statutory abstinence-only definition. C. Dailard, *Administration Tightens Rules for Abstinence Education Grants*, 8 GUTTMACHER REPORT ON PUBLIC POLICY 13 (Nov. 2005). By 2005, more than 800 programs were funded via the three main federal funding streams for abstinence education, and numerous states have passed laws that require that abstinence be emphasized in schools and other publicly funded programs. C. TRENHOLM ET AL., IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS: FINAL REPORT (Mathematica Policy Research, Inc. 2007); GOVERNMENT ACCOUNTABILITY OFFICE, ABSTINENCE EDUCATION: EFFORTS TO ASSESS THE ACCURACY AND EFFECTIVENESS OF FEDERALLY FUNDED PROGRAMS (GAO Report No. 07-87 2006). However, numerous states have begun to reject abstinence funding as the evidence builds that these programs do not work, as discussed in more depth below**.** In addition, states are beginning to pass laws that require medical accuracy in sex education programs. In 2007, Colorado, Iowa, and Washington all passed such laws. NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES (17th ed. 2007).

Human Rights and Ethical Concerns

Abstinence-only programs violate numerous human rights and ethical principles as these programs both prevent young people from receiving critical, perhaps life-saving, information and put teachers and health educators in the ethically challenging position of withholding scientific knowledge. Leslie Kantor et al., *Abstinence-Only Policies and Programs: An Overview,* 5 J. SEXUALITY RES. & SOC. POL'Y 6 (Sept. 2008); J. Santelli et al., *Abstinence-Only Education Policies and Programs: A Position Paper of the Society for Adolescent Medicine*, 38 J. ADOLESCENT HEALTH 83 (2006).

Access to accurate health information as a basic human right was described in the program of action at the 1994 International Conference on Population and Development. *See* UNITED NATIONS, REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT (1994), www.un.org/popin/icpd/conference/offeng/poa.html. This meeting and the resulting publications focused on reproductive issues and the application of human rights to the arena of sexual and reproductive health, including such issues as the rights of couples to make free choices about childbearing, access to reproductive health care, and equality between men and women. To achieve these goals, access to reproductive information is essential for women, men, and adolescents:

> The response of societies to the reproductive health needs of adolescents should be based on information that helps them attain a level of maturity required to make responsible decisions. In particular, information and services should be made available to adolescents to help them understand their sexuality and protect them from unwanted pregnancies, sexually transmitted diseases and subsequent risk of infertility. This should be combined with the education of young men to respect women's self-determination and to share responsibility with women in matters of sexuality and reproduction.

Id. at ¶ 7.41.

Similar ethical notions are found in later international statements that address HIV/AIDS and children and adolescents. For example, in 2003 the UN Committee on the Rights of the Child emphasized that

> [c]onsistent with the obligations of States parties in relation to health and information . . . , children should have the right to access adequate information related to HIV/AIDS

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> prevention and care, through formal channels (e.g. through educational opportunities and child-targeted media) as well as informal channels.

UNITED NATIONS, COMMITTEE ON THE RIGHTS OF THE CHILD, HIV/AIDS AND THE RIGHTS OF THE CHILD, General Comment No. 3, at ¶ 13.

Likewise, this UN document addressed the obligations of governments:

> The Committee wishes to emphasize that effective HIV/AIDS prevention requires States to refrain from censoring, withholding, or intentionally misrepresenting health-related information, including sexual education and information. . . . State parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality.

Id.

Under these international agreements, governments have an obligation to provide accurate information to adolescents in government-funded health education. U.S. government-funded abstinence-only programs violate these principles because they withhold the knowledge needed to make informed choices. Under the U.S. federal government's funding requirements, abstinence-only programs are required to withhold or distort information on contraception by failing to include information on birth control or focusing on failure rates, which are generally exaggerated in such programs. U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENT REFORM, *supra,* at 8-12; J. Santelli et al., *supra,* at 79. In addition, federally supported abstinence-only education curricula often promote scientifically questionable information. By limiting classroom discussion on specific topics, the federal requirements place health educators and other public health professionals in an ethical dilemma, compelling them to withhold or manipulate potentially life-saving information. Government restrictions on medically accurate and important information should not be tolerated in schools. Several prominent national groups have raised both health and human rights concerns about abstinence-only education, including the Society for Adolescent Medicine, the American Public Health Association, and the American Academy of Pediatrics. (See http://oversight.house.gov/story.asp?ID=1888 for statements by these organizations made as part of the Congressional Committee on Government Reform's hearings on domestic abstinence-only programs, held Wednesday, April 23, 2008.)

Abstinence-only programs have particular implications for certain groups of young people. For example, the programs posit marriage as the only appropriate context for sexual behavior, leaving gay and lesbian students in most states with the message that expressing their sexuality is unacceptable. Numerous gender stereotypes throughout the curricula reinforce ideas about how young women and men should act; these are ideological rather than educational and may marginalize those students that do not adhere to rigid gender stereotypes. For example, one abstinence-only program asserts that "Women gauge their happiness and judge their success by their relationships. Men's happiness and success hinge on their accomplishments." U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON GOVERNMENT REFORM, *supra,* at 16. Another funded curriculum notes: "The father gives the bride to the groom because he is the one man who has had the responsibility for protecting her throughout her life. He is now giving his daughter to the only other man who will take over this protective role." Students are also given messages that directly relate to sexuality and are incorrect, such as "[w]hile a man needs little or no preparation for sex, a woman often needs hours of emotional and mental preparation." *Id*. at 18.

Abstinence-only programs tend to completely overlook the issue of sexual abuse and make blanket statements about any sexual behavior prior to marriage, perhaps leading to particular upset for those that have had involuntary experiences. And two-parent families are held up as far superior to any other family structures, ignoring the fact that many classrooms and community programs include young people from a broad array of family backgrounds. JULIE KAY, SEX, LIES AND STEREOTYPES: HOW ABSTINENCE-ONLY PROGRAMS HARM WOMEN AND GIRLS 12-14 (Legal Momentum 2008). Schools are generally forbidden from disparaging groups of people in their official curricula and yet abstinence-only programs have been adopted in many schools and communities.

The Definition of Abstinence-only Education under the Social Security Act

Under Section 510, 42 U.S.C. § 710, abstinence education is defined as an educational or motivational program that

(A) has as its exclusive purpose teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
(B) teaches abstinence from sexual activity outside marriage as the expected standard for all school-age children;
(C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
(D) teaches that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity;
(E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects;
(F) teaches that bearing children out of wedlock is likely to have harmful consequences for the child, the child's parents, and society;
(G) teaches young people how to reject sexual advances and how alcohol and drug use increase vulnerability to sexual advances; and
(H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

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The Negative Influence of Abstinence-only Education

Abstinence-only education has restricted young people's access to information. The number of young people reporting that they had received formal instruction about birth control in either a school or a community-based program declined substantially between 1995 and 2002. Among males, 81 percent reported in 1995 that they had learned about birth control, compared to 66 percent in 2002. Among females, 87 percent reported in 1995 that they had received instruction about contraception, compared to 70 percent in 2002. L.D. Lindberg et al., *Changes in Formal Sex Education: 1995-2002*. 38 PERSP. ON SEXUAL & REPROD. HEALTH 182 (2006). In 2002, only 62 percent of females and 54 percent of males reported that they had received any instruction about birth control before their first sexual experience. *Id*.

Reports by adolescents mirror reports from teachers. In 1999, 77 percent of teachers reported that information about birth control was taught in their schools, compared to 92 percent in 1988. J. E. Darroch et al., *Changing Emphases in Sexuality Education in U.S. Public Secondary Schools, 1988-1999*, 32 FAM. PLAN. PERSPS. 204, 207 (2000). The topics of abortion and sexual orientation were also less likely to be discussed in 1999 compared to 1988. By 1999, abstinence was more likely to be taught than topics such as how to use a condom, the implications of teen parenthood, sexual abuse, and where to go for birth control. *Id*.

Not surprisingly, instruction about abstinence has been increasing. In 1999, 95 percent of teachers reported that their schools taught about abstinence, compared with 89 percent in 1988. Furthermore, one in four secondary teachers were telling students in 1999 that abstinence was the only way to prevent pregnancy and sexually transmitted diseases; in 1988, only one in fifty gave that message. In 1999, 26 percent of teachers reported that information their students needed was not included in their curriculum and 22 percent of teachers reported that their ability to answer students' questions was curtailed. *Id*. at 210.

What Works to Protect Young People's Health

Numerous studies have been conducted on comprehensive sex education programs that include information about abstinence as well as contraception, sexually transmitted disease prevention, and numerous other topics. These program evaluations show that many school and community-based programs help adolescents to wait until they are older to begin having sex, to use condoms and birth control when they do have sex, and to limit the number of partners or frequency of sexual activity. DOUGLAS KIRBY, EMERGING ANSWERS 2007: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEEN PREGNANCY AND SEXUALLY TRANSMITTED DISEASES (National Campaign to Prevent Teen and Unintended Pregnancy 2007), *available at* http://www.thenationalcampaign.org/EA2007/EA2007_Full.pdf; Douglas Kirby, *The Impact of Abstinence and Comprehensive Sex and STD/HIV Education Programs on Adolescent Sexual Behavior,* 5 J. SEXUALITY RES. & SOC. POL'Y 18 (Sept. 2008).

In contrast, the studies that have been done on abstinence-only programs do not show that they help young people to change their behavior. The largest and most well-done study of abstinence-only programs thus far did not show that young people in the abstinence-only programs were any less likely to begin having sexual intercourse than those that did not receive abstinence education . TRENHOLM ET AL., *supra*. In other words, comprehensive sex education programs have actually been more effective in helping young people to abstain from sexual behavior than abstinence-only programs.

Furthermore, high-quality sex education includes both information and skills that young people need in order to experience lifelong health and wellness. Programs that make a difference utilize sound pedagogical approaches and help adolescents to develop their decision-making, negotiation, and communication skills. Indeed, programs that work to ensure that young people adopt healthy behaviors share seventeen basic characteristics that are outlined in the 2007 report by Kirby referenced above, at page 22.

Current Policy and Recommendations

Federal funding for abstinence-only programs has increased markedly since 1996, with support from both houses of Congress and the Bush administration. Between the three funding streams (AFLA, Section 510, and the CBAE), $175 million is appropriated annually by the federal government for abstinence-only programs. However, in April 2008, the House Committee on Oversight and Government Reform held hearings to examine domestic funding for abstinence-only programs, and there is some hope that a change in administrations will lead to a shift away from funding for programs that limit or distort information, place teachers in an ethical quandary, and violate basic human rights principles. In addition, only twenty-eight states are now applying for funding via the Section 510 program, and Arizona and Iowa plan to discontinue their receipt of funds beginning October 1, 2008. Kevin Freking, *States Turn Down Abstinence Education Grants*, AP, June 24, 2008. However, many states still have abstinence-only programs in operation as schools and community-based organizations can apply directly for the CBAE funds. Still, the trend away from applying for moneys illustrates that communities and policy makers want to move away from this restrictive and unproven approach. Many people remain unaware of the proliferation of abstinence-only programs and the federal requirements. The articulation of human rights concerns alongside health arguments could bring additional advocates to this issue and illuminate further reasons why these policies and programs are harmful and misguided.

Leslie M. Kantor is a nationally recognized expert on effective sex education,

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The Need to Address Equal Educational Opportunities for Women and Girls

By Ariela Migdal, Emily J. Martin, Mie Lewis, and Lenora M. Lapidus

While all students are vulnerable to assaults on their rights, girls and women face a distinct set of challenges. This article examines three trends illustrating obstacles to an equal education for girls and women. The first section addresses the current popularity of sex-segregated programs in public schools, in which boys and girls are taught differently in curricula based on gender stereotypes that traditionally have been used to limit girls' opportunities. The next section discusses the growing use of a federal educational equity statute as a tool to combat colleges' inadequate response to sexual violence on campus. Finally, the last section exposes the inadequate and unequal education provided to society's most marginalized girls—those imprisoned in youth correctional facilities.

The New Push for Sex-segregated Schools

> Our society is not based on your gender, and the schools are supposed to prepare us for when we enter the real world. How does separating students by sex prepare us for society when society is not segregated that way?

Nikki Anthony, 9th grade, Coming to Washington to Talk about Equality (posted May 20, 2008), http://blog.aclu.org/2008/05/30/coming-to-washington-to-talk-about-equality.

Today, more and more public school districts separate girls from boys. According to the National Association for Single-Sex Public Education (NASSPE), a leading proponent of sex-segregated programs, while only four sex-segregated public schools existed in the country a decade ago, today there are approximately four hundred. A sex segregation movement is successfully pushing to increase this number, recently amending laws in Michigan, Wisconsin, Delaware, and Florida to foster the creation of sex-segregated programs in public schools. This trend is accelerating in the wake of the federal Department of Education's (DOE) 2006 revision of a long-standing regulation to permit sex-segregated classes in coeducational schools receiving federal funding.

An increasingly popular rationale for separating boys and girls in school is the notion that boys' and girls' brains are so different that they cannot both succeed in the same classroom. Two influential proponents of this theory are the writers Leonard Sax and Michael Gurian. Sax is a psychologist and the director of NASSPE; Gurian is a counselor and corporate consultant with a graduate degree in creative writing, as well as founder of the Gurian Institute, which conducts trainings on brain differences between the sexes. Both Sax and the Gurian Institute are in the business of training teachers from public school districts across the country. Many of those teaching single-sex classes rely on their theories and methods.

While Sax and Gurian concede that not all boys or all girls are the same, they attempt to prove that, as the title of one of Gurian's books proclaims, *Boys and Girls Learn Differently!*, and they argue that teachers should treat boys and girls differently as a result. For example, Sax claims that teachers should smile at girls and look them in the eye but must not look boys directly in the eye or smile at them. LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 86 (2005). He claims that boys do well under stress, while girls do badly. As a result, according to Sax, girls should never be given time limits on tests and should be encouraged to take their shoes off in class because this helps them relax and think. *Id.* at 88-92. Sax also claims that girls will do better in school if they are allowed to bring blankets from home to cuddle in during class time. *See* Carol E. Tracy & Terry Fromson, *Single-Sex Schools Don't Work*, PHILA. DAILY NEWS, at 21 (Feb. 3, 2006) (describing Leonard Sax training for public school teachers in Philadelphia). Sax argues that any boy who likes to read, does not enjoy contact sports, and does not have a lot of close male friends should be firmly disciplined, required to spend time with "normal males," and made to play sports. SAX, *supra*, at 218-28. Gurian propounds similar theories, including that boys are better than girls in math because their bodies receive daily surges of testosterone, while girls have equivalent mathematics skills only during the few days in their menstrual cycle when they have an estrogen surge. MICHAEL GURIAN, THE BOYS AND GIRLS LEARN DIFFERENTLY ACTION GUIDE FOR TEACHERS 100 (2003).

These theories have a real world impact in schools. David Chadwell, a member of the board of directors of NASSPE, directs the Office of Single-Gender Initiatives in the South Carolina Department of Education. South Carolina has more sex-segregated schools and classes than any other state in the country, a trend Chadwell encourages by publicizing sample lesson plans emphasizing physical activity, competition, and technology

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in classes for boys and friendship, team building, decorating assignments and projects, and stress reduction in classes for girls.

Most proponents of single-sex education argue that segregation leads to greater academic achievement. Yet no compelling, consistent evidence supports this conclusion. Some studies find that students in coeducational schools do better than students in single-sex schools. Other studies find the opposite. The bulk of studies show no difference between the two in terms of student achievement. In fact, in 2005 the DOE published an extensive review of existing studies and characterized the data as "equivocal." U.S. DEP'T OF EDUCATION, SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING: A SYSTEMATIC REVIEW at x (2005). In other words, it found no clear evidence showing that, in general, students are more likely to succeed in single-sex schools. *Id.*

Few cases have yet challenged sex segregation in public elementary and secondary schools, probably because, until recently, such segregation was rare in the thirty-six years since the passage of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, the federal law prohibiting sex discrimination in federally funded education. With narrow exceptions for activities such as father-son activities and beauty pageants, Title IX states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). For more than thirty years, DOE regulations implementing Title IX had interpreted the statute to prohibit coeducational schools from segregating students by sex in almost all circumstances, with exceptions for sex education and contact sports. 34 C.F.R. § 106.34 (2005). (Because Title IX includes an exception for admissions to elementary and secondary schools, 20 U.S.C.A. § 1681(a)(1) (2007), it generally has not been understood to prohibit single-sex *schools*, as opposed to classrooms, although the Equal Protection Clause limits school districts' ability to create such programs. In addition, current Title IX regulations require that—with some important exceptions for charter schools—if a district operates a single-sex school, it must provide a substantially equal educational opportunity to the excluded sex. 34 C.F.R. § 106.34(c).)

In 2006, however, the DOE revised its Title IX regulations to permit coeducational schools to offer sex-segregated classes. 34 C.F.R. § 106.34 (2007); *see also* 71 Fed. Reg. 62,530 (Oct. 25, 2006). The new regulations allow a school to create sex-segregated classes or extracurricular activities either to provide "diverse" educational options to students or to address what the school has judged to be students' particular educational needs. 34 C.F.R. § 106.34(b)(i). The regulations make clear, however, that participation in a sex-segregated class must be completely voluntary and explain that participation is not completely voluntary unless a "substantially equal" coeducational class is offered in the same subject. *Id.* § 106.34(b)(iii), (iv).

The DOE's regulatory change, however, does not affect other laws limiting sex segregation in public schools. First, other federal agencies funding educational programs and activities have regulations prohibiting sex-segregated classes; thus, for example, school districts that receive U.S. Department of Agriculture funding for school lunch programs are presumably bound by its regulations prohibiting sex segregation. 7 C.F.R. § 15a.34. Second, the U.S. Supreme Court has made clear that at least some single-sex programs violate the Equal Protection Clause of the U.S. Constitution, striking down both the Virginia Military Institute's men-only policy and Mississippi University for Women's women-only policy as unconstitutionally discriminatory. *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). The Court warned that public schools attempting to justify sex-segregated programs shoulder a heavy burden of persuasion and made clear that generalizations about average differences in the pedagogical needs of women and men do not justify excluding members of one sex from a unique educational opportunity. *Virginia*, 518 U.S. at 525, 533. Third, the federal Equal Educational Opportunities Act prohibits assigning students to single-sex schools. 20 U.S.C.A. § 1703(c) (2007).

Based on conflicts between the 2006 DOE regulations and the requirements of Title IX and the Constitution, the American Civil Liberties Union has recently challenged the validity of these regulations in federal court; the legality of the regulations likely will be litigated in coming months. Despite the continuing uncertainty of the legal status of single-sex programs in public schools, many school districts nationwide have read the new Title IX regulations as a green light to segregate. As a result, more and more programs are being crafted throughout the country based on the notion that boys and girls require very different kinds of education—a theory that by definition will introduce sharp sex-based inequalities to the public schools.

Sexual Assault on Campus

> During the mediation, [University of Washington student] S.S. expressed her desire that Alexander [a football player who allegedly raped her] be suspended from participation in several football games. Alexander denied S.S.'s rape allegation and threatened that he would leave the UW if he were suspended from any football games. Tuite [an athletics administrator] refused to consider suspending Alexander, stating that the media "would ask why he was not playing."

S.S. v. Alexander, 177 P.3d 724 (Wash. App. 2008).

Title IX has long been known as the federal law that guarantees equal access for girls and women in education, including equal opportunity to participate in athletics and higher education. In the past decade, however, Title IX has also become known as a tool for guaranteeing equal access to education in another way: by holding schools and colleges accountable for discrimination against female students who are sexually ha-

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rassed or assaulted. When Tiffany Williams, a student at the University of Georgia, was gang-raped by campus football and basketball players, she became more than a rape victim. Williams, who dropped out of the university after the rape, brought a Title IX lawsuit against her former school. She alleged that the university's basketball coach, athletic director, and president recruited and admitted one of the men despite knowing that he had been kicked out of other schools because of sexual harassment, and that the university had failed to train its students on its sexual assault policies. The U.S. Court of Appeals for the Eleventh Circuit agreed that Williams had stated a claim that the University of Georgia and its athletics association were deliberately indifferent to the alleged discrimination. *Williams v. Board of Regents of the University of Georgia*, 477 F.3d 1282 (11th Cir. 2007).

Such lawsuits have become increasingly common since the Supreme Court held that schools receiving federal funding can be held liable for discrimination arising out of teacher-student or student-student sexual harassment. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), the Court held that schools receiving federal funding may be held liable for a teacher's sexual harassment of a student where the school knows of the harassment and responds to it with deliberate indifference. The next year, in *Davis v. Monroe County Board of Educ*ation, 526 U.S. 629 (1999), the Court held that schools receiving federal funding may be liable for damages for student-on-student sexual harassment if the victim can show that the school acted "with deliberate indifference to known acts of harassment in its programs or activities." *Id*. at 633. The harassment must be severe enough to effectively bar the victim's access to equal education. These protections emerge from Title IX's guarantee that no person may be "subjected to discrimination under any educational program or activity receiving federal" funds on the basis of sex. 20 U.S.C. § 1681(a).

Since *Gebser* and *Davis*, many cases have highlighted the problems that victims of sexual violence face when they come forward. In one case, a former University of Washington student alleging that she was raped by a well-known football player claimed that athletics administrators at the university responded to her complaints by suggesting that she leave her job as an assistant equipment manager with the football team. *S.S. v. Alexander*, *supra*. A state court found that the victim had provided enough evidence for a jury to hear her Title IX claims. Other cases similarly emphasize colleges' responsibility to respond to victims and put effective policies and response measures in place, rather than sweeping sexual violence under the rug and turning a blind eye to sexual harassment and assault. *See, e.g., Simpson v. University of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007) (sending to jury the question of whether the university was deliberately indifferent to a risk of sexual assault in its football recruiting program).

The message for schools and universities is clear: campus rape can violate victims' federally guaranteed rights to equal access to education. Human rights organizations have recognized that sexual violence violates women's right to be free from sex discrimination under such human rights conventions as the International Covenant on Civil and Political Rights (ICCPR) (ratified by the United States in 1992), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (ratified by the United States in 1994) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (signed by the United States in 1980 but not yet ratified), as well as the American Declaration on the Rights and Duties of Man (adopted in 1948). Now, appeals courts around the country are increasingly willing to hold colleges accountable under domestic law for failures to ensure that female students are not subject to discrimination in the form of sexual violence or harassment. While Title IX does not require schools to prevent every incident of sexual violence committed by a student or faculty member, it does require schools to avoid denying and covering up sexual violence where it occurs.

Girls in Conflict with the Law

> School was a setup. They teach you all this kindergarten or easy work. You'll come back in the world and not be able to survive in regular schools. Part of school was crochet! Come on, we're fourteen, fifteen, sixteen years old, that should not be part of our curriculum. I think it was every day, a significant amount of time was crochet, beading, or making blankets to sell.
>
> American Civil Liberties Union & Human Rights Watch, Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls 82 (2006) (excerpt from an interview with a formerly incarcerated teenage girl).

Girls represent a small but growing proportion of children entering the juvenile justice system. A disproportionate number of these girls are African American and Latina; most are poor. Along with difficult family lives and gaps in the social safety net, the failure of schools in many communities to nurture girls' intellectual development is one factor responsible for girls' delinquency. This failure is especially significant in light of research suggesting that, for girls in particular, academic engagement can mitigate the effects of abuses like sexual assault, leading to less aggressive and antisocial behavior, and therefore to a lower likelihood of juvenile justice involvement.

International human rights instruments, including the Convention on the Rights of the Child (CRC) (signed by the United States in 1995 but not yet ratified), art. 3 ¶ 3 & art. 37, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (adopted in 1985 by General Assembly Resolution 40/33), contain numerous provisions protecting girls in the juvenile justice system. The standards regulate the adjudicative process for youths, as well as conditions of confinement in youth prisons. With respect to education, human rights norms guarantee incarcerated children the right

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to services, including education and vocational training, with the goal of helping them achieve "socially constructive and productive roles in society." Beijing Rules, ¶¶ 26.1, 26.2. Human rights standards, such as those established by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (adopted in 1990 by General Assembly Resolution 45/113), ¶ 77, also stress the provision of quality education in youth prisons so that children may continue to pursue their education without difficulty upon release. Other multilateral international agreements such as the International Covenant on Civil and Political Rights (ratified by the United States in 1992); CRC, CERD, CEDAW, and the American Declaration on the Rights and Duties of Man, for example, also contain multiple provisions prohibiting discrimination based on sex more generally.

Nevertheless, once enmeshed in the juvenile justice system, both girls and boys suffer violations of these basic rights. Among the problems facing children regardless of gender are interruptions in schooling during court processing and incarceration. Once locked up, children are starved of basic educational resources. Budgetary constraints can make books, computers, and other tools scarce, and the remote, rural location of many youth prisons leaves teaching vacancies unfilled. In addition, incarcerated children are often steered away from high school coursework and toward the General Education Diploma because juvenile justice agencies find general education preparation easier and less expensive to administer than a high school curriculum. Children's schooling is also sacrificed to exaggerated security concerns; for example, children may be barred from taking school materials out of classrooms or having more than a small number of books in their cells.

In addition to these shared deprivations, girls bear an extra, gender-linked burden of educational deprivation. Because the number of girls locked up is much smaller than the number of boys, the girls confined within a single building or wing of a youth prison are often of different ages, grade levels, and degrees of educational aptitude. A single custody unit may confine an intellectually precocious sixteen-year-old who aspires to attend college alongside a twelve-year-old who can barely read. Because there are not enough girls at the same educational level, such girls, despite their widely divergent academic needs, may be crowded into a single classroom. In such circumstances, the single classroom teacher often takes a "lowest common denominator" approach to instruction, frustrating older and more academically talented girls. Or educational staff may abandon classroom instruction, whether entirely or in part, in favor of self-directed study. When this happens, girls are denied the human connection crucial to learning. Moreover, many incarcerated girls are unprepared to pursue self-study and, when left sitting alone with a book or worksheet, learn little or nothing. CUSTODY AND CONTROL, *supra at* 81-82.

Vocational and career training for girls in prison is seldom adequate.

Although the future economic independence of incarcerated girls depends on their ability to find and keep a job, vocational and career training for girls in prison is seldom adequate. Many youth prisons provide little or no such training. In those that do, the range and quality of the training offered to incarcerated girls embody archaic gender stereotypes and do not measure up to the training offered to boys. Courses commonly offered to girls include cooking, hairdressing, and clerical work, or even crocheting and other economically valueless crafts. Boys, in contrast, may be offered classes in automobile repair, building trades such as carpentry and plumbing, and other fields that are both stereotypically male and far more lucrative than traditionally female vocations. The juvenile justice system thereby helps perpetuate the cycle of economic dependence and vulnerability suffered by women and girls, especially those from economically and racially marginalized communities.

Conclusion

The trend toward sex-segregated educational programs and the inadequate educational programs for girls in the juvenile justice system are two examples of ways in which girls are deprived of equal educational opportunities, in part because of pernicious and outdated gender stereotypes about what and how it is appropriate for girls to learn. Similarly, girls and women continue to be deprived of educational opportunities as a result of sexual violence and institutionalindifference to that violence on the part of schools—an indifference that is, itself, rooted in stereotypes about the seriousness of sexual harassment and violence. Gender biases in all three scenarios operate to deprive girls and women of the equal educational opportunities to which they are entitled under both domestic law and internationally recognized human rights norms.

Ariela Migdal is a staff attorney at the Women's Rights Project of the ACLU whose work includes litigation and advocacy for educational equity, particularly concerning sexual harassment and violence in schools. Emily J. Martin is the deputy director of the Women's Rights Project of the ACLU and is lead counsel in a case challenging the validity of the 2006 DOE sex segregation regulations and their implementation in one Kentucky school district. Mie Lewis is a staff attorney at the

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The Speech Divide GLBT Students Struggle for Visibility and Safety

By Sarah Warbelow

Gay, lesbian, bisexual, and transgender (GLBT) persons, as a minority group comprising approximately 5 percent of the secondary student population, face significant challenges at school. As GLBT students seek to be recognized as a vital part of the academic community, their freedom of speech can be threatened by schools' efforts to minimize their visibility. They are also subject to harassment and intolerance, and often lack protection from speech and behaviors that render the school environment hostile.

Harassment

Despite growing acceptance for the GLBT community and a proliferation of gay-straight alliances (GSAs) in high schools, harassment continues to be a major concern for GLBT students in secondary education. A recent study conducted by Harris Interactive for the Gay, Lesbian and Straight Education Network (GLSEN) found "9 out of 10 secondary school principals report that their students have been harassed because of how masculine or feminine they are or because they are or are perceived to be gay, lesbian or bisexual." GLSEN, THE PRINCIPAL'S PERSPECTIVE: SCHOOL SAFETY, BULLYING AND HARRASSMENT (May 2008), http://www.glsen.org/binarydata/GLSEN_ATTACHMENTS/file/000/001/1167-2.pdf. Unfortunately, students' legal right to have a school experience free from harassment may turn on whether the harassment was sexual in nature or if the state or local government has a policy prohibiting discrimination on the basis of sexual orientation or gender identity.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 prohibits discrimination in educational programs on the basis of sex, but in most instances Title IX has been interpreted as not applying to sexual orientation. However, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the U.S. Supreme Court found same sex-sexual harassment to be illegal under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Because Title VII sexual harassment cases are generally interpreted to apply to Title IX cases, the Department of Education Office of Civil Rights explicitly stated in their guidance that same-sex sexual harassment is prohibited under Title IX. However, if the harassment is not sexual in nature, Title IX does not apply.

If a school district ignores pervasive derogatory comments directed toward female students—such as "girls are dumb in math"—it may be liable under Title IX. However, school officials may routinely ignore epithets such as "fag" without fear of liability. Almost all of the cases finding that GLBT students have a right to be free from nonsexual forms of harassment are based on state or local nondiscrimination statutes that include sexual orientation. The closely watched case of *L.W. v. Toms River Regional School Board of Education*, 189 N.J. 381 (2007), in which a student was subjected almost daily to sexual orientation epithets, was decided in the student's favor by the New Jersey Supreme Court because that state has a statute that allows the court to recognize the harassment on perceived sexual orientation and to hold the school to a stricter standard than Title IX.

Gay-straight Alliances

GSAs have rapidly proliferated across the country since the first was established in 1988. Today, more than 3,000 middle schools, high schools, and colleges have GSAs, which are clubs that work to provide a safe environment for GLBT students with support from their heterosexual allies. Students have a limited right to form GSAs at public schools and have them recognized by the administration as part of their First Amendment right of freedom of speech.

Under the federal Equal Access Act, 52 U.S.C. § 4071, as interpreted by the courts, schools must allow students to form GSAs whenever they permit other noncurricular groups to meet during noninstructional hours. A club is classified as curricular as long as it is sufficiently related to official school curriculum. In practice, this means a club may be determined curricular at one school but noncurricular at another. In *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, 81 F. Supp. 2d 1166 (D. Utah 1999), the court concluded that an Odyssey of the Mind Club was curricular because the staff advisor taught the same thinking skills in his classroom, but the court left open the possibility of a different outcome in other schools. Furthermore, although school boards may choose to permit only curricular clubs to form in order to minimize controversial subjects, they may not do so with discriminatory intent.

Freedom of Speech

Schools may limit speech and expression and that creates a dangerous situation. Problems often arise not because of actual speech but because administrators lack a true understanding of a GSA's purpose. In *East High*, students wanted to form what they referred to as a Rainbow Club that would explore GLBT history, role models, and current events. The application to form the group was denied on the ground that the "proposed subject matter is 'sexual orientation,' a topic 'that is not a curricular subject taught at East High School.'" *Id*. at 1175. In general, clubs relating to sports, games, politics, advocacy, and religion are considered noncurricular.

Freedom of speech has created conflicts in schools between some religious students and GLBT students. Both groups want to be able to express their own viewpoints even if others consider them harassment. Numerous cases have established a limited right of free

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The Need for Equal Opportunity and a Right to Quality Education

By Paul Weckstein and Stephen J. Wermiel

The promise of rights in school is a hollow one for the many students throughout the United States who are denied equal educational opportunity because of their race or economic status. Still other students, regardless of race, are stuck at legally branded failing schools where rights like free speech have little meaning and where imposition of penalties substitutes for commitment to a program of quality education. This article examines some aspects of this denial of equal educational opportunity and of the struggle for educational quality.

When the nation in 2004 marked the fiftieth anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954), a principle focus was the resegregation of schools throughout the country. "We are celebrating a victory over segregation at a time when schools across the nation are becoming increasingly segregated," noted the executive summary of a report published at that time. GARY ORFIELD & CHUNGMEI LEE, *BROWN* AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE (Jan. 2004), *available at* www.civilrightsproject.ucla.edu/research/reseg04/resegregation04.php. One hopeful development the report mentioned was the efforts of some school systems to engage in voluntary, race-based efforts to overcome the effects of resegregation.

Yet, over a year ago the U.S. Supreme Court dealt a serious blow to just those voluntary efforts by school systems to reduce racial inequalities through race-conscious pupil assignment plans. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), the Court rejected plans used by the Seattle and Louisville school systems, ruling that officials in both cities failed to meet the "heavy burden" of justifying the need to use race in placing individual students. Chief Justice John Roberts said the use of race to assign students was not properly explained by Seattle or Louisville officials on either of two possibly justifiable grounds: remedying past discrimination or trying to achieve diversity in the classroom.

Considering Income versus Race

The ruling posed a new challenge to school systems that want to engage in self-help to try to provide equal educational opportunity to students. Trying to bring students together by race without being able to use race to accomplish the goal will be far more difficult. However, important strategizing has begun for developing income-based, rather than race-based, voluntary desegregation efforts.

An income-based approach has the potential to bring about progress, perhaps even to work on racial disparities. A recent report by the NAACP Legal Defense Fund and the Civil Rights Project of the University of California–Los Angeles said, "Racial segregation is inextricably linked to segregation by poverty, and the racial differences in students' exposure to poverty are striking." ANURIMA BHARGAVA ET AL., STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 14 (2008), *available at* www.naacpldf.org/issues.aspx?issue=1. It continues, "About half of all Black and Latino students attend schools in which three-quarters or more students are poor. Only 5% of white students attend such schools." *Id.*

How can school systems make progress on race by focusing on poverty? The Legal Defense Fund and Civil Rights Project report urges school districts to approach plans to achieve diversity by considering eligibility for free lunch, parental income, geographic area, academic ability, parental education background, family status, and housing situation.

In addition, much of the focus after the Supreme Court's ruling has centered on options identified in the concurring opinion of Justice Anthony Kennedy. He provided the fifth vote for some parts of Roberts's ruling, but he also said school systems "may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Parents Involved*, 127 S. Ct. at 2792. Kennedy's opinion is influential because any plan he approved to achieve diversity would likely gain majority support from Justices John Stevens, David Souter, Ruth Ginsburg, and Stephen Breyer.

No Child Left Behind: Promises and Problems

What other factors contribute to the absence of equal educational opportunity in the country? A major contributing factor is the insufficient attention paid to educational quality. Much of the debate over educational opportunity today centers on the No Child Left Behind Act (NCLB). In the absence of a clearly delineated right to quality education, the nation's school systems are undertaking, with varying degrees of success,

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a variety of educational reforms aimed at improving schools, raising overall achievement, and closing achievement gaps for disadvantaged and other particular groups of students. These reforms employ both top-down strategies for holding schools accountable for their students' achievement and bottom-up strategies for building the capacity of schools and their staffs. By far the single overall strategy getting the greatest attention over the last several years has been NCLB, which is the latest revision of President Lyndon Johnson's original Elementary and Secondary Education Act of 1965. Title I of that act is the largest federal education program, providing about $14 billion annually for improvement of academic programs, with the money directed to schools with higher poverty levels. NCLB is the primary reference point in most policy debates about how best to improve schools and close achievement gaps between poor and minority students and their peers. NCLB is now widely understood as being about "accountability for results"—more specifically about using state achievement tests to determine whether students are proficient in the math and reading skills that the state has determined all students should master, and then, if not enough students in the school are proficient to meet the targets for annual yearly progress, subjecting the school to increasing levels of interventions to improve performance. The identification of a school as in need of improvement in these terms is generally viewed as stigmatizing, and the interventions are generally viewed as punitive. Indeed, it is typically believed that the law is premised on using teachers' and administrators' desires to avoid this stigmatization and intervention as the main driving force for improvement.

Understood this way, it is not surprising that NCLB has produced highly polarized reactions, including widespread vocal opposition. Reactions include a concern that, in their efforts to meet the targets and avoid identification, many schools may be engaging in practices that are not consistent with real achievement or in the best educational interests of the children the law was intended to serve. Such practices include focusing too much on a single test; narrowing the curriculum, both by teaching to the test and by cutting back on subjects not part of this accountability; pushing low-achieving students out of school so that they will not be included in proficiency rates; and using statistical loopholes allowed by federal regulations in order not to count certain groups. At the same time, supporters can point to evidence that the law is generating higher expectations for and more attention to groups of students previously written off and consigned to low tracks. Achieving high proficiency rates does not necessarily depend upon hunkering down and teaching to the test. For example, the first school in Maryland to reach 100 percent proficiency in both reading and math cites getting students to talk constantly, among themselves as well as with the teacher, as central it its success. This is consistent with a body of research showing that dramatic achievement gains result from engaging students in disciplined inquiry to create new knowledge about real world matters. In the aggregate, however, trends in overall achievement have been mixed since NCLB went into effect, and in any case causality is hard to attribute.

Bringing a rights-based focus to current reforms is essential.

A Rights-based Approach to Education

While embodying in its title the same spirit underlying a universal right—that no child should be left behind—the NCLB, at least as understood above, is not amenable to a rights-based interpretation because it contains no clear notion of what the school is obligated to provide or what the individual student and family can count on in the way of quality education.

Bringing a rights-based focus to current reforms is essential. To turn the unexceptionable belief in every child's right to a quality education into a living reality, all students, families, and educators must know and be able to count on what they can expect the system of public education to provide for every child—and to make sure that no child *is* left behind. In other words, the abstract right must be understood as giving to every student in any public elementary or secondary school a right to the *elements* of a quality education needed to enable him or her to achieve.

A rights-based approach focusing on every student's right to a high-quality education is a critical lens for making school reform work. Otherwise, strategies for school reform fail to be rigorous in answering, with sufficient immediacy and reality, the question that is most important: how will the reforms actually result in providing the children now in school with a high-quality education? Since it is ultimately children, not schools, who achieve, and at the individual level no child is "entitled" to a certain level of achievement, this right must therefore be understood in terms of the elements of a high-quality education to which the child is entitled in order to enable that child to achieve.

This approach is also central to resolving the NCLB controversies in ways that will benefit children and help fulfill their right to quality education.

First and foremost, articulating a clear set of expectations for the elements of quality education that every child must receive, and then focusing on whether those elements are fully present and remedying any gaps, is precisely the piece widely experienced as missing in many schools today. The required reporting of student outcomes that now occurs is not accompanied by equivalent data about what actually goes on in the schools that may affect those outcomes. Understanding student achievement levels is an important part of improving those levels, but much more is required for genuine progress than relying on a supposed fear of stigma or sanctions.

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What schools typically lack is any real understanding of the improvements needed to the core academic program to raise achievement levels; efforts at improvement also lack adequate attention and support from school districts and state governments. It is critical that schools put tests and student assessment in their rightful place—as important checks on the system, not as a substitute for the system.

Second, a focus on educational quality is important for making sense of the NCLB goal of every student becoming proficient in those subjects that the state mandates. States should be setting proficiency standards at levels that are high enough to be challenging. Whenever any children are not on a path sufficient to master what the state has said they all should learn, the occasion should trigger not punishment but increased attention on what actions and changes are needed to actually improve the educational quality of their program; this is both realistic and simple justice.

Third, a rights-based focus is important for resolving the concerns about the adequate funding of Title I. Title I is not a separate "program" that can or should be run entirely with federal funds. Rather, it is a framework for providing federal assistance to improve the core academic program of schools, with certain requirements for what that core program needs to contain and do as a condition of receiving the funds. While Title I should be funded at a higher level, no level of federal funding short of the complete federalization of American public education could be adequate to run this "program" on federal funds alone. At the same time, those federally imposed requirements are consistent with the obligations on states, under their own constitutions, to create and adequately fund a thorough and efficient system of public education capable of teaching what the state has said all students should learn. Clearly articulating, as a basic right, the elements of a quality education that each child must receive is an essential foundation for assuring that funding decisions are pushed past limiting notions of what is politically expedient to guarantee adequate funding to put those elements in place.

Key Components to a Quality Education

Contrary to the general perception of NCLB, the law is not simply a system for measuring whether students have made adequate progress toward proficiency and imposing consequences on schools where they do not. Rather, the law has a set of core program requirements, largely retained from the version of Title I prior to NCLB, but as widely ignored now as they were then. These requirements do in fact articulate many of the key components of a quality education that should be provided to all students. These include the obligation to provide students with: (1) an accelerated and enriched (rather than slowed down and stripped down) curriculum aligned with challenging state standards for what all students should learn; (2) effective instructional methods, used by qualified teachers who in turn receive ongoing, effectively designed professional development to better enable them to do so; and (3) effective and timely individual attention whenever a child experiences difficulty in mastering any of the skills or knowledge articulated in the standards.

Title I schools are required to assess how well they are providing each of these elements (not merely how well students are doing), and based on that assessment, to develop a plan spelling out how they will provide each required element. That plan must be jointly developed with the parents of students in the school, consistent with a parent involvement policy that is jointly developed and approved by the parents and that also ensures the information, training, and assistance needed for parent involvement. (Secondary school students must also be involved, though the law does not contain the same level of detail as to how.) State and local agencies are required to both ensure that schools comply with these obligations and have the capacity to do so.

In considering the core elements of a high-quality education, the requirements above focus on three especially critical broad areas—curriculum, instruction, and individual attention—that are at the crux of what students actually get in school. If we expect all students to learn certain knowledge and skills, as every state now does in establishing learning standards, then those things must be taught, they must be taught well, and they must be taught with attention to the individual needs of students in learning them.

These critical requirements to which a rights-oriented focus should draw us—along with similarly unadvertised provisions that, rather than mandating reliance on a single test actually prohibit it by requiring that student be assessed using multiple measures, and that also require attention to other subjects not the current focus of NCLB activity—are largely unknown. Similarly ignored are civil rights mandates for closely examining educational practices that have a disproportionate impact by race or disability, and either rigorously justifying their necessity or eliminating them. Serious advocacy to ensure that these requirements are understood by schools and those they serve, and implemented by educational agencies, would go a long way to make the right to quality education on an equal basis a reality.

Paul Weckstein has been a lawyer at the Center for Law & Education for thirty years and its codirector since 1990. He has been deeply involved in education reform efforts at the federal and state levels and has been instrumental in shaping reform of Title I and other major federal education legislation. He is a member of the ABA's Commission on Youth at Risk. Stephen J. Wermiel co-chair of the Human Rights *editorial board. Portions of this article are adapted from a lengthier piece by Paul Weckstein, "Closing the Circle on the Right to Quality Education" (forthcoming).*

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Student Journalism

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should extend to off-campus speech about the school that could reasonably be anticipated to have a disruptive impact if viewed or discussed in school.

In the most worrisome of these cases, *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), the Second Circuit ruled in May 2008 that a Connecticut high school could lawfully discipline a student for using a personal online journal to urge the public to contact school administrators—whom she called by an insulting vulgarity—to urge administrators to reverse a decision that threatened a student-organized concert.

The court emphasized that, in its view, Doninger's characterization of the administrators' decisions was misleading and her use of a vulgarity threatened to escalate the dispute, although it is black-letter law that speech does not lose its First Amendment protection either because it is false (unless defamatory, which Doninger's was not) or because it is offensive (a point the Supreme Court reaffirmed in last year's *Morse v. Frederick* ruling, 127 S. Ct. 2618 (2007)).

While Doninger was not engaged in traditional journalism, the court's ruling is in no way limited to personal blogs. Rather, decisions like *Doninger* portend dangerous times for underground newspapers and other off-campus publications that traditionally have been safe harbors for expression.

Thirty-four years ago, author Jack Nelson wrote in *Captive Voices*, his seminal study of scholastic journalism, that "[c]ensorship is the fundamental cause of the triviality, innocuousness and uniformity that characterize the high school press." Nelson's study fueled the proliferation of independent student periodicals that presaged this generation's online publishing explosion. Advocates for student journalism must be vigilant that the creep of school authority into students' personal writings does not herald a new era of triviality.

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Student Privacy

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model adds to the uncertainty that characterizes the legal relationship between students and their schools.

The shootings at Virginia Tech provide another forum to debate the merits of the potentially competing approaches to higher education law because each approach offers a distinct analytical framework through which one can evaluate the shootings. Furthermore, until educational policy makers reach a consensus on the legal relationship between students and their schools, it is difficult to take measures that might prevent further incidents like the tragedy at Virginia Tech.

Daniel Silverman is a third year law student at Boston College in Newton, Massachusetts. He wrote this article during a summer internship at the American Council on Education.

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Abstinence-only

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pregnancy prevention, and adolescent sexual health. She is currently director of Planning and Special Projects and assistant professor of Clinical Population and Family Health for the Heilbrunn Department of Population and Family Health in the Mailman School of Public Health at Columbia University in New York.

Women and Girls

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Women's Rights Project of the ACLU, where she works on behalf of women and girls in the criminal and juvenile justice systems. Lenora M. Lapidus is the director of the Women's Rights Project of the ACLU, where she focuses on economic justice for low-income women of color, equal educational opportunities, violence against women, and women and girls in the criminal and juvenile justice systems. The authors gratefully acknowledge the assistance of Joshua David Riegel, the paralegal for the Women's Rights Project of the ACLU.

The Speech Divide

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speech for elementary and secondary students, including the recent Supreme Court decision in *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (more famously known as *Bong Hits 4 Jesus*), in which the school was found not to have violated Frederick's free speech rights when he was expelled for displaying a banner at an off-campus event that was not sponsored by the school.

A large number of cases revolve around the right to wear T-shirts with political statements on them that may be viewed as intolerant, but the circuit courts have reached different conclusions based on similar facts. The Ninth Circuit, for instance, upheld a restriction on a shirt bearing the slogan "Homosexuality Is Shameful," *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), while the Seventh Circuit defended the right to wear a shirt that said "Be Happy, Not Gay." *Nuxoll v. Indian Prairie School District No. 204,* 523 F.3d 688 (7th Cir. 2008).

Conclusion

Changing interpretations of GLBT status within Fourteenth Amendment law offer hope for improved student experiences. But GLBT students are entitled to the same protections students receive under Title IX on the basis of sex. Congress must revise Title IX to incorporate sexual orientation or create a new statute mirroring its protections in order to provide an equitable educational experience for all students,

Sarah Warbelow, a civil rights attorney, is the Justice for All Fellow at the Human Rights Campaign and an affiliated professor at the Georgetown Public Policy Institute and George Washington University.

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Mary Beth Tinker

By Stephen J. Wermiel

In the play *Inherit the Wind*, defense lawyer Henry Drummond observes, "It's the loneliest feeling in the world—to find yourself standing up when everybody else is sitting down."

Don't make that argument to Mary Beth Tinker. She has been standing up for the rights of students for more than forty years, and one of the things that keeps her going is the young people she meets who are also willing to fight for what they believe.

Tinker was a thirteen-year-old junior high student in Des Moines, Iowa, in 1965, when she, her older brother, and a friend decided to wear black armbands to school to protest the Vietnam War and support a Christmas truce. They were suspended from school and challenged the school's actions all the way to the landmark U.S. Supreme Court ruling, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The decision, which marks its fortieth anniversary in February 2009, declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506.

Tinker has never stopped speaking out. She became a pediatric nurse and spoke up for better health care. She became a union organizer and spoke up for the rights of workers. She calls for peace, equality for all, education that is more than standardized testing, and an end to poverty as she speaks all over the United States. When she pulls out a black armband and recalls her protest, her passion and experience light up classrooms of young people. At those times, she may be the only person in the room who is standing up, but there is nothing lonely about her experience.

Stephen J. Wermiel is the associate director of the Marshall-Brennan Constitutional Literacy Project, a program of law students teaching in Washington-area public schools through American University's Washington College of Law. He was the Wall Street Journal*'s Supreme Court correspondent from 1979 to 1991.*

Find out how this Human Rights Hero is marking the fortieth anniversary of *Tinker* in a separate interview with her on page 6 this issue.

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